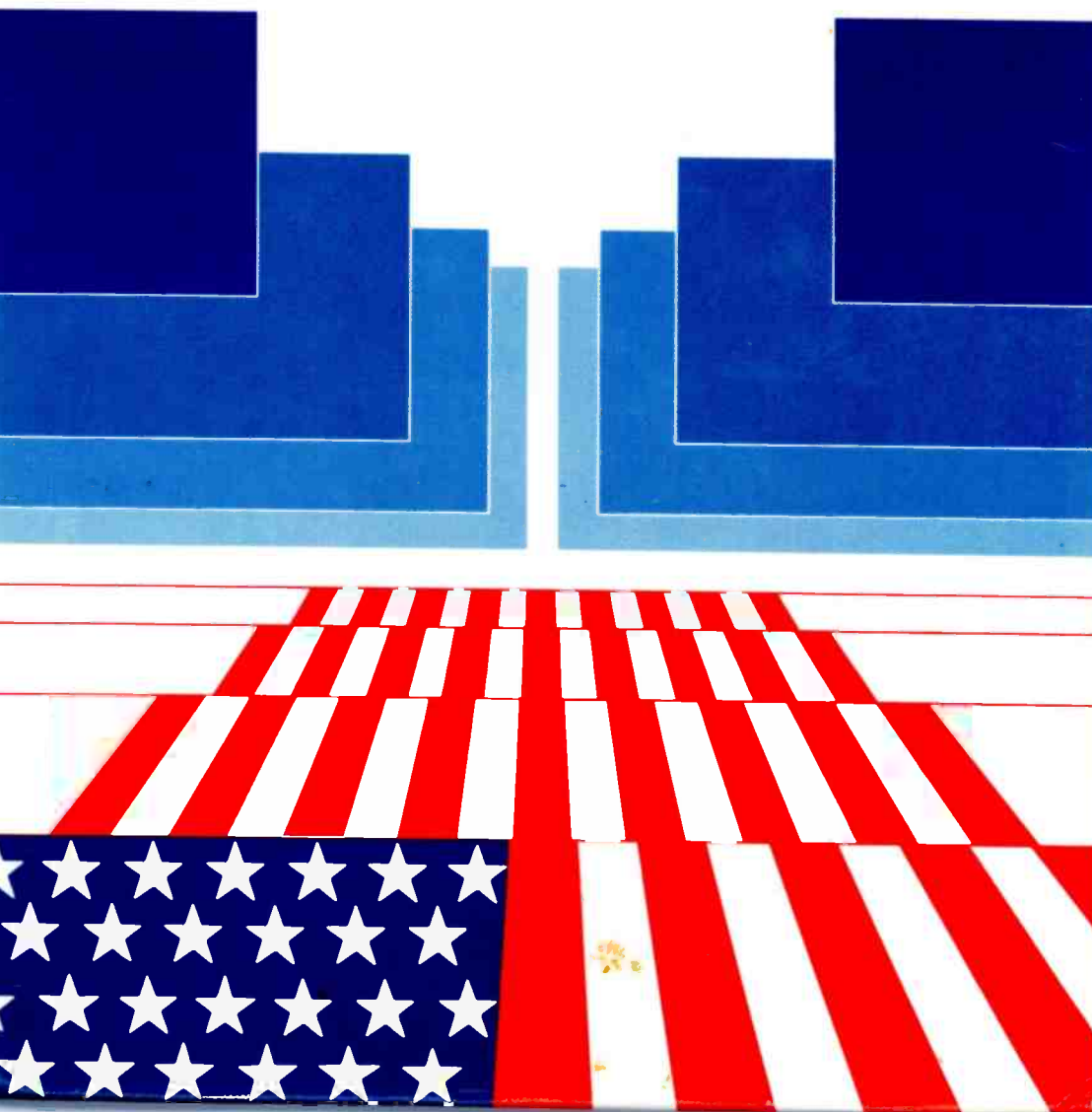


FRANK J. KAHN, EDITOR

# Documents of American Broadcasting

FOURTH EDITION



*Fourth Edition*

# DOCUMENTS OF AMERICAN BROADCASTING

**Frank J. Kahn**, Editor

Herbert H. Lehman College  
City University of New York

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*For Abby, Julie, and Leora*

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# Preface

Broadcasting in America is a major force. There are twice as many radio receivers as people in the nation. Only two percent of all households lack a television set. We receive most of our entertainment and news from a TV screen that is turned on almost seven hours a day in the typical home. Cable television reaches over a third of the public. Before the next edition of this book appears, direct broadcast satellites will be operational in this country.

Businesses spend more than \$15 billion a year for broadcast advertising. Increasing numbers of people display a willingness to pay program sources and distributors directly for attractive material without advertising subsidy. Many freely confess they wouldn't know what to do with themselves if their TV and radio sets suddenly disappeared. We are very dependent on the electronic mass media—perhaps *too* dependent. Nevertheless, whether radio and television are stimulants or soporifics, beneficial or harmful, servants or masters, they are undeniably popular entertainment sources and powerful social, educational, economic, cultural, journalistic, and political instruments in the United States.

The basic system of American broadcasting is an amalgam of commercial free enterprise and limited government regulation. This structure is augmented by a similarly regulated system called "public broadcasting" that, thus far, is prohibited from engaging in direct advertising on a regular basis while it receives some of its financial support from the federal government. The licenses required to operate broadcast stations are granted to serve the "public interest, convenience, and necessity." Yet most of the programming attended by most of the public most of the time is frivolous, passive entertainment that provides diversion, relaxation, and a type of companionship. Whether this is consistent with the "public interest" de-

pends on the meaning given to that elusive phrase by the body established to implement it—the Federal Communications Commission.

The present organization and accepted institutional status of broadcasting in the United States did not simply “happen.” Rather, radio, TV, and cable evolved as products of particular needs and values. The documents in this volume cast light on shifting needs and values and on democratic methods of applying values to serve needs. They are fundamental to an understanding of how we got where we are. Readers will be well prepared to greet future developments in the electronic media with realistic expectations and insight, for “just as the twig is bent the tree’s inclined.”

*Documents of American Broadcasting* remains a collection of primary source materials in the field of public policy formulation in broadcasting and related media. The laws, commission materials, court decisions, and other documents span electronic media development from their prehistory to the 1980’s in chronological fashion. Presently governing statutes are exceptions to the prevailing pattern of organization; these are the last documents in this collection. As before, I have attempted to strike a reasonable balance between timeliness and timelessness in selecting contents.

The primary utility of this source book is in the college classroom where it can serve as the core text or supplement in numerous courses in the media curriculum. *Documents* will also be helpful to broadcasting and cable professionals and to lawyers and general readers who want to know more about this fascinating field.

Every document is placed in perspective by an introductory headnote. The documents themselves have been minimally edited for the most part. Most entries conclude with one or more questions (“Mind Probes”) that may be silently pondered or discussed aloud and a “Related Reading” section that suggests sources for fuller consideration of the document. A glossary of legal terms is included in a new section, “Understanding Law,” that follows this preface. Other features include dual tables of contents—one arranged in unbroken page order and another based on thematic patterns—and two indices—one a guide to cited cases and the other a general index.

Doubtless, had this work been edited by someone else its contents would be somewhat different. The selections are functions of my particular orientation to education in the electronic media and the era during which the choices were made. No work can include everything, and this one is no exception. Given the practical limitations of size and cost, I have chosen those materials I deem most important for most readers. Importance, like beauty, is in the eye of the beholder, and I regret excluding many valuable documents from this collection. Cutting back on the completeness of included materials would have provided space for excerpts from additional candidates for inclusion. However, this would have vitiated the underlying concept of *Documents of American Broadcasting*, namely, to make accessible essential source materials in their entirety whenever useful and possible.

I remain indebted to many people, including the scores who commented on the concept, contents, and organization of this book during its genesis and meta-



morphoses. I especially acknowledge the contribution of my two most influential broadcasting teachers, Bob Crawford and Charles Siepmann, who instructed me better than they ever knew. Martin Stanford, my original editor at Appleton-Century-Crofts in the 1960's, has my gratitude for seeing merit in this book in the first place and for giving me seasoned guidance that has left its mark on all subsequent editions. My dear wife, Abby, who read proof with me on the first edition of *Documents*, has played an indispensable role ever since. I hope she is pleased to have her husband back in circulation. Our children, Julie and Leora, will be happy to learn that the typewriter is again available for their occasional use.

Since the third edition of *Documents* appeared in 1978 I have completed a degree in law. I also spent two rewarding summers working in the legal department of the National Association of Broadcasters at the invitation of their general counsel, Erwin Krasnow. These recent experiences confirm my commitment to the notion that those who hope to be or are associated with the media should be broadly prepared both in and out of the classroom. True, we live in an age of specialization. But history and law are far too important to be left solely to the historians and lawyers. This volume will make a specialist of no one. But if it enlarges the horizons of its readers, it will have fulfilled its objective and the hope of its editor.

*Dobbs Ferry, New York*  
*July, 1983*

*F.J.K.*



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# Understanding Law

## THE WORLD AND WORDS OF LAW

The system of law affects the ordinary citizen in many ways. Because of the law, if you drive, your car must be registered with a governmental entity and you must hold a currently valid license to operate your vehicle. Tax is legally withheld from your earnings. You are or will be a party to numerous legally enforceable contracts—to purchase or sell, to work or employ, to marry or separate, to be insured, to pay back borrowed money, and so on. If you are unfortunate enough to be injured on someone else's premises you may well bring a lawsuit to recover the damages you suffer. By the time you became a viable fetus you acquired legal status. When you die, the law will oversee the disposition of your property whether or not you leave a will.

Law is an omnipresent aspect of our lives. It helps make possible your ability to receive broadcast signals without interference. Sometimes we even try to shape the law, as when we petition for equal rights, or urge an increase or decrease of the legal drinking age, or attempt to convince a legislator to vote more funds for higher education. But despite our involvement with law, most of us are legalphobes. We have rarely, if ever, had to read a statute or a court decision applying the law to a particular controversy. Conventional wisdom tells us such activities are reserved for lawyers. We are brought up to think that the law is forbidden fruit for the lay person or that it is something to be adhered to or broken, but not to be examined, understood, or thought about very much. Nothing could be further from the truth.

In other life activities we are not so content to leave matters to specially trained experts. We read Shakespeare by ourselves, experiencing shocked delight when we learn what the bard meant when he used the word "nunnery." We take from literature what it says as it is colored by our mental filters and sensitivities, rather than being content to cling to the appreciations and deprecations of our English teacher-scholars. We need not rely on religious leaders to tell us what the Bible means to us, for we freely dip into its wisdom whenever we want, with or without benefit of clergy.

So it should be with law. It is available to all who desire to explore it. No special license or dispensation is required to crack open a law book and read it. True, you will be confused at first, but this is a condition attending many new experiences. You may be perplexed as you gain familiarity with the subject. This will not

be your fault. Law, like literature, religion, and other worthwhile fields, is a perplexing area of inquiry with its own tools, techniques, and terminology. So await the coming of law's perplexity, for its arrival signals the beginning of understanding.

The law is a system of establishing societal standards and resolving disputes without recourse to physical force. It can be divided and categorized many ways: common law–statutory law, criminal law–civil law, local–state–federal–international law, procedural law–substantive law, tort law–contract law, etc. Communication law is largely a blend of federal administrative and constitutional law with inputs often provided by contract, entertainment, copyright, patent, antitrust, property, criminal, merger–acquisition, corporation, tax, and other branches of law.

## THE AMERICAN LEGAL SYSTEM

The federal Constitution sets basic standards of democratic governance in the United States. It allocates enumerated powers among the three branches of national government and reserves other powers and rights to the states and individuals. Congress, the federal legislative branch, enacts statutes (“laws”) concerning matters within its authority. The President, who is the chief executive, provides national leadership by commanding the armed forces, conducting the nation’s foreign policy, proposing legislative measures to Congress, and appointing public officials. The federal judicial branch consists of many district courts distributed throughout the country, twelve circuit courts of appeal, and one Supreme Court of the United States.

The district courts are trial-level courts empowered to hear and decide cases involving federal law. These courts also have jurisdiction over so-called “diversity” cases, that is, controversies arising under state law involving parties from two or more states. A jury (or the judge if jury trial is waived) decides contested questions of fact while the judge has the exclusive power to resolve questions of law.

Appeals from district court decisions may be taken to the court of appeals serving the trial court’s region. Further appeal may then proceed up the judicial ladder to the Supreme Court. This highest of all courts has the discretion to limit its caseload. It typically hears fewer than five percent of the thousands of cases submitted to it on petitions for *certiorari* during any given year. Appeals at both levels, the courts of appeal and the Supreme Court, are decided without juries and witnesses’ testimony, since the evidentiary facts are no longer disputed; contested factual issues have already been decided at the trial-court level. Appeals are considered by three-judge panels in the courts of appeal with the exception of cases a court decides to hear *en banc* with all judges assigned to the court participating. All nine justices serving on the Supreme Court usually participate in disposing of appeals to that tribunal. The adversarial inputs for appellate court rulings are lawyers’ briefs (*i.e.*, legal arguments in writing advocating affirmance or reversal of the decision below) and oral argument heard by the judges.

## ADMINISTRATIVE LAW

Administrative agencies are created by constitutionally identified branches of government. They perform functions that the identified branches cannot perform because of a lack of time, expertise, or both. One such agency that was created by Congress to carry out its responsibilities over foreign and interstate communication is the Federal Communications Commission.

The trial level of the federal judiciary has its administrative counterpart at the FCC in the hearing process. The Commission acts like a court of law when deciding whether to grant or revoke a contested license to operate a broadcast station. The term "quasi-judicial" is often used to describe the process. The administrative equivalent of a fact-finding trial is a hearing conducted before an administrative law judge (ALJ) who decides the ultimate factual issue of whether a grant would serve the public interest after hearing testimony from the parties involved, receiving other forms of evidence, and listening to cross-examination of witnesses. There is no jury involved, however. Appeals from FCC final licensing decisions (following the ALJ's initial decision and the appellant's exhaustion of intra-agency appeal procedures) are taken to the Court of Appeals for the District of Columbia Circuit, as provided in § 402(b) of the Communications Act.

The FCC also possesses quasi-legislative authority under the rulemaking power Congress has delegated to it. Commission rules have the same force of law as statutes enacted by the federal legislature. Rules are adopted, deleted, or modified by the FCC only after it complies with the constitutionally derived due process requirements of providing notice of a proposed rule change to interested parties and opportunity for them to comment. Changes in Commission rules may be appealed to any of the twelve federal circuit courts of appeal. As with quasi-judicial decisions, the Supreme Court is the court of last resort for appeals stemming from rulemaking actions.

## STATE LAW

In addition to the federal system, which is preemptive in broadcast law, there are fifty states, each having its own constitution, legislature, executive, judiciary, and associated administrative agencies. (Recall that the federal judiciary applies state law in diversity cases.) Appeals from the highest state court level that involve federal constitutional questions may be decided by the U.S. Supreme Court. Many such appeals, however, fail to be decided by the High Court for lack of substantiality and end up being summarily dismissed without oral argument or opinion.

Among the blessings of federalism is that when the national government cannot or will not establish public policy in one of the areas over which it has jurisdiction, the states will fill the gap. Thus, state statutes and case law can be looked to for evolving the law(s) of cable TV in the absence of a federal preemptive statute.

## LEGAL CITATION

Because legal citations are incomprehensible to the uninitiated, this explanation is intended for readers who wish to explore sources cited throughout the text. A legal citation is a kind of shorthand, like map coordinates or the symbols used in a chemical formula, enabling one to find the material to which reference is made. Once you know the system, using citations becomes easy.

A complete citation begins with the name of the case, usually in italics. For example, the name of the case in Document 35 is *Columbia Broadcasting System, Inc. v. Democratic National Committee*. (The "v." between the two parties in a case is unitalicized and is a standard legal abbreviation for "versus.") The case name is followed by a comma, after which appears a series of numbers and letters constituting a citation to a published source of the decision called a "reporter." The citation for the above case is 412 U.S. 94 (1973). "U.S." means the reporter cited is *United States Reports*, the official government version of United States Supreme Court decisions published by the Government Printing Office. The number immediately preceding the letters, "412," stands for the volume in which the decision is found. The number directly after the letters indicates the first page of the decision. And the number in parentheses following the page denotes the year in which the case was decided. The complete citation for this case is: *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). You could examine the full text of this case, which was decided in 1973, by asking your library for volume 412 of *United States Reports* and turning to page 94. (If you read through all of the concurring and dissenting opinions, you would find yourself at page 204. Some decisions are even longer, but most are considerably shorter than this example.)

The following reporters and their abbreviations are the most frequently encountered in broadcast law citations:

ABBREVIATION	NAME OF REPORTER
FCC (or F.C.C.)	* <i>Federal Communications Commission Reports</i>
F. (or Fed.)	<i>Federal Reporter</i>
F.Supp.	<i>Federal Supplement</i>
Med.L.Rptr.	<i>Media Law Reporter</i> (Bureau of National Affairs)
Op. Att'y Gen. (or Op.)	* <i>Opinions of the Attorney General</i>
R.R. (or Radio Reg.)	<i>Radio Regulation</i> (Pike and Fischer)
S.Ct. (or Sup. Ct.)	<i>Supreme Court Reporter</i>
U.S. App. D.C.	* <i>U.S. Court of Appeals, District of Columbia</i>

\*Indicates the official government reporter published by the Government Printing Office. Privately published reporters are used more widely than the "official" reporter in some instances, and they are frequently cited as alternates to the official reporter.

ABBREVIATION	NAME OF REPORTER
U.S.	* <i>United States Reports</i>
L.Ed.	<i>U.S. Supreme Court Reports, Lawyer's Edition</i>

A citation followed by the notation "2d" means the decision is found in the second series of the indicated reporter. For example, 359 F.2d 994 (Document 30) refers to a decision that begins on page 994 of volume 359 of *Federal Reporter*, second series. F., FCC, L.Ed., and R.R. are presently in their second series. An entry such as 41 FCC 148, 158 (Document 24B) indicates a specific page (158 in this example) of a document that starts on an earlier page (namely, page 148 of volume 41 of *Federal Communications Commission Reports*).

Citations are also made to sources of legal documents other than decisions, such as laws, regulations, etc. C.F.R. indicates the *Code of Federal Regulations*, Title 47 of which embodies the rules and regulations of the Federal Communications Commission. Proposed and enacted FCC rules appear in the daily *Federal Register*, abbreviated Fed. Reg. or FR. Acts of Congress are found in *Statutes at Large* (Stat.), the *United States Code* (U.S.C.), the *United States Code Annotated* (U.S.C.A.), and the *United States Code Service, Lawyers Edition* (U.S.C.S.). The Communications Act of 1934, as amended, is located in Title 47 of the last three publications.

FCC Ann. Rep. refers to the *Annual Reports* of the Federal Communications Commission. The *Congressional Record* (Cong. Rec.) contains transcripts of debates on the floor of the Senate and House of Representatives. Records of hearings before congressional committees are separately published by the Government Printing Office. Miscellaneous reports of congressional committees and other legislative documents, including presidential messages to Congress, are compiled in serial sets for each house of Congress.

For further guidance concerning legal notation consult the latest edition of *A Uniform System of Citation* published by the Harvard Law Review Association, Cambridge, Massachusetts 02138. Another useful supplementary source is Joseph M. Foley's article, "Broadcast Regulation Research: A Primer for Non-Lawyers," in the *Journal of Broadcasting*, 17, No. 2 (Spring 1973), pp. 147-157.

## LEGALESE

Legal terminology, too, poses obstacles for people who want to understand the language of broadcast regulation. The FCC, courts, and Congress are, for the most part, bodies of lawyers dealing with other lawyers. They frequently use "legalese," a paralogue fully comprehensible only to Latin scholars, bureaucrats, and law school graduates. While the use of specialized jargon is not intended to impede the transfer of meaning to lay persons, unfortunately this is often its effect.

Because law should be understandable to nonlawyers, the user of this book must make a special effort to understand legalese. Any standard law dictionary

(*Black's*, for example) will serve to define legal terms, as will Daniel Oran's highly portable and recommended *Law Dictionary for Non-Lawyers* (St. Paul, Minn.: West Publishing Company, 1975). Below is a glossary of many of the specialized legal terms appearing in this volume.

## GLOSSARY

- a fortiori* with greater reason.
- ad hoc* temporary, for a specific circumstance; case-by-case.
- administrative law judge** presiding officer at FCC hearings who takes and weighs evidence and issues a preliminary decision subject to modification by an internal review board or the Commission itself; formerly called "hearing examiner" or simply "examiner." Abbreviated "ALJ."
- ante* See *supra*.
- arguendo* for argument's sake.
- bona fide(s)* in good faith; genuine; free of intent to deceive or of knowledge of fraud.
- certiorari* (abbreviated *cert.*) an appeal, typically to the U.S. Supreme Court; if the Court grants a petition for writ of *certiorari*, case records are transmitted by the lower court (such as the Court of Appeals) to the High Court for "certification," meaning review.
- de minimus* insignificant; small; trifling.
- de novo* completely new from the beginning.
- dicta* (plural of *dictum*) See *obiter dicta*.
- en banc* (or *in banc*) a session in which the entire membership of a court or the FCC meets together.
- et seq.* abbreviation for *et sequens*; and (the) following.
- examiner** See **administrative law judge**.
- ex parte* one-sided; contact with a decision-making authority by one party to a proceeding without the other parties present.
- ex rel.* in relation to; on behalf of.
- id., Id.* same as *ibid.* or *ibidem*; something already cited or referred to.
- infra* below; following; opposite of *supra*.
- in haec verba* in these words.
- in re* in the matter of; used frequently in administrative case titles or whenever "versus" would be inappropriate.
- inter alia* in addition to other things.
- obiter dicta* the portions of a decision that are tangential (or even irrelevant) to the legal determination; not legally binding; opposite of *ratio decidendi*.
- per se* by or in itself; inherently; considered alone.
- prima facie* at first glance; sufficient to satisfy the initial burden of proof and, if uncontradicted, to determine the outcome of a proceeding.
- pro forma* according to form; a formality.
- pro tanto* for so much; to such (an) extent.
- quid pro quo* something for something; the exchange of one valuable thing for another between parties.
- ratio decidendi* the portions of a decision that are central to the resolution of a case; having the weight of precedent; opposite of *obiter dicta*.
- remand** to send back to a lower body; an appellate court often returns a reversed case to the body that issued the improper decision with instructions to rectify the errors causing reversal.



*seriatim* one at a time; in order; each in turn.

*sine qua non* the essence; an indispensable part.

*standing* the right to participate in a legal proceeding, typically restricted to those having a substantial stake in the outcome.

*stare decisis* the judicial doctrine that legal precedent will be adhered to in subsequent cases raising similar issues unless there are powerful reasons not to do so.

*statute* an enacted bill; a law passed by the legislature.

*stay order* an enforceable command issued by a court to prevent something from taking place, either temporarily or permanently.

*sua sponte* spontaneously, as when the FCC or a court acts on its own initiative instead of in response to a petition or motion of a party to a proceeding.

*subpoena* (also *subpena*) an order issued by a tribunal requiring a person to appear and testify or produce documents.

*supra* above; preceding; opposite of *infra*.

*ultra vires* beyond the scope; exceeding permissible authority.

*vel non* or not.

*voir dire* a court's initial examination of the competence of a prospective juror or witness.



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# The U.S. Constitution

1787-1868

The Constitution is the wellspring of all federal law, and broadcasting is no exception. The "commerce clause" of Article I, Section 8, assigns to Congress the responsibility for regulating interstate and foreign commerce. But what is "commerce"? The Supreme Court of the United States has determined that "commerce" includes communication. Because radio waves are physically incapable of staying within the political boundaries of states and nations, broadcasting is inherently a form of interstate and foreign "commerce" over which Congress has jurisdiction. Note the Constitution gives Congress authority over the mails. Another portion of Section 8 lays down the constitutional basis for copyright and patent law.

The First Amendment to the Constitution is echoed by Section 29 of the Radio Act of 1927 and Section 326 of the Communications Act of 1934. But free expression is not an absolute right. Many of the court cases that follow establish rationales that limit freedom of speech in the broadcast media. The Constitution embodies a variety of powers and rights. The judiciary is often called upon to balance conflicting provisions of this flexible document.

*Article I, Section 8.* The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . To establish Post Offices and post Roads; To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

*Article II, Section 1.* The executive Power shall be vested in a President of the United States of America. . . .

*Section 2.* . . . he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .

*Article III, Section 1.* The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

*Section 2.* The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .—to Controversies to which the United States shall be a Party; . . .

*First Amendment.* Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Fifth Amendment.* No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Sixth Amendment.* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Fourteenth Amendment. Sec. 1.* . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

### *MIND PROBES*

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1. Why does the Constitution reserve the responsibility for regulating interstate commerce to the Congress instead of the states themselves?

2. The First Amendment's protection of speech and press was enacted before the spread of literacy, mass communication, and electronic technology. Considering the power of mass media to influence public opinion, to help or hinder seekers and holders of public office, and generally to enlighten or mislead, should the Amendment be repealed? Why?

*RELATED READING*

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GUNTHER, GERALD, *Cases and Materials on Constitutional Law*, 10th edition. Mineola, N.Y.: Foundation Press, 1980.

MIDDLETON, KENT, and ROY M. MERSKY, comps., *Freedom of Expression: A Collection of Best Writings*. Buffalo, N.Y.: William S. Hein & Co., 1981.

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# The Wireless Ship Act of 1910

Public Law 262, 61st Congress

June 24, 1910

During the first decade of this century wireless telegraphy and telephony emerged as a technical marvel that fascinated hobbyists and was without equal as a lifesaving device at sea. This first American radio law, enacted 10 years before the advent of broadcasting, was limited to the uses of radio for point-to-point maritime communication.

Following the *Titanic* disaster of April, 1912, the 62d Congress passed Public Law 238 (approved July 23, 1912, a month before the Radio Act of 1912), which strengthened the provisions of the Wireless Ship Act by requiring vessels to have auxiliary power supplies for their transmitters and to have at least two skilled radio operators, one of whom would have to be on duty at all times the ship was moving.

*Be it enacted by the State and House of Representatives of the United States of America in Congress assembled,* That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any ocean-going steamer of the United States, or of any foreign country, carrying passengers and carrying fifty or more persons, including passengers and crew, to leave or attempt to leave any port of the United States unless such steamer shall be equipped with an efficient apparatus for radio-communication, in good working order, in charge of a person skilled in the use of such apparatus, which apparatus shall be capable of transmitting and receiving messages over a distance of at least one hundred miles, night or day: *Provided,* That the provisions of this act shall not apply to steamers plying only between ports less than two hundred miles apart.

**Sec. 2.** That for the purpose of this act apparatus for radio-communication shall not be deemed to be efficient unless the company installing it shall contract in writing to exchange, and shall, in fact, exchange, as far as may be physically practicable, to be determined by the master of the vessel, messages with shore or ship stations using other systems of radio-communication.

**Sec. 3.** That the master or other person being in charge of any such vessel which leaves or attempts to leave any port of the United States in violation of any of the provisions of this act shall, upon conviction, be fined in a sum not more than five thousand dollars, and any such fine shall be a lien upon such vessel, and such vessel may be libeled therefor in any district court of the United States within the jurisdiction of which such vessel shall arrive or depart, and the leaving or attempting to leave each and every port of the United States shall constitute a separate offense.

**Sec. 4.** That the Secretary of Commerce and Labor shall make such regulations as may be necessary to secure the proper execution of this act by collectors of customs and other officers of the Government.

### *MIND PROBES*

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1. How did large ships communicate with each other and land masses prior to the advent of wireless communication?
2. The *Titanic* was equipped with efficient radio apparatus and skilled operators. What were the circumstances that resulted in the loss of two-thirds of the more than 2,000 people aboard when the ship struck an iceberg and sank?

### *RELATED READING*

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LORD, WALTER, *A Night to Remember*. New York: Henry Holt & Company, 1955.  
MARCUS, GEOFFREY, *The Maiden Voyage*. New York: Viking, 1969.

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# The Radio Act of 1912

Public Law 264, 62d Congress

August 13, 1912

International wireless conferences were held in Berlin in 1903 and 1906 and in London in 1912 in order to establish a degree of uniformity in the use of radio. The Radio Act of 1912 was enacted to honor America's treaty obligations with respect to these international radio agreements.

This first comprehensive piece of radio legislation made it illegal to operate a radio station without a license from the Secretary of Commerce, but it failed to provide sufficient discretionary standards for the effective regulation of broadcasting, which was still not envisioned at this early stage of radio's development.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication as a means of commercial intercourse among the several States, or with foreign nations, or upon any vessel of the United States engaged in interstate or foreign commerce, or for the transmission of radiograms or signals the effect of which extends beyond the jurisdiction of the State or Territory in which the same are made, or where interference would be caused thereby with the receipt of messages or signals from beyond the jurisdiction of the said State or Territory, except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce and Labor upon application therefor; but nothing in this Act shall be construed to apply to the transmission and exchange of radiograms or signals between points situated in the same State: *Provided,* That the effect thereof shall not extend beyond the jurisdiction of the said State or interfere with the reception of radiograms or signals from beyond said jurisdiction; and a license shall not be required for the transmission or exchange of radiograms or signals by or on behalf of the Government of the United States, but every Government station on land or sea shall have special call letters designated and published in the list of



radio stations of the United States by the Department of Commerce and Labor. Any person, company, or corporation that shall use or operate any apparatus for radio communication in violation of this section, or knowingly aid or abet another person, company, or corporation in so doing, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five hundred dollars, and the apparatus or device so unlawfully used and operated may be adjudged forfeited to the United States.

*Sec. 2.* That every such license shall be in such form as the Secretary of Commerce and Labor shall determine and shall contain the restrictions, pursuant to this Act, on and subject to which the license is granted; that every such license shall be issued only to citizens of the United States or Porto Rico or to a company incorporated under the laws of some State or Territory or of the United States or Porto Rico, and shall specify the ownership and location of the station in which said apparatus shall be used and other particulars for its identification and to enable its range to be estimated; shall state the purpose of the station, and, in case of a station in actual operation at the date of passage of this Act, shall contain the statement that satisfactory proof has been furnished that it was actually operating on the above-mentioned date; shall state the wave length or the wave lengths authorized for use by the station for the prevention of interference and the hours for which the station is licensed for work; and shall not be construed to authorize the use of any apparatus for radio communication in any other station than that specified. Every such license shall be subject to the regulations contained herein, and such regulations as may be established from time to time by authority of this act or subsequent acts and treaties of the United States. Every such license shall provide that the President of the United States in time of war or public peril or disaster may cause the closing of any station for radio communication and the removal therefrom of all radio apparatus, or may authorize the use or control of any such station or apparatus by any department of the Government, upon just compensation to the owners.

*Sec. 3.* That every such apparatus shall at all times while in use and operation as aforesaid be in charge or under the supervision of a person or persons licensed for that purpose by the Secretary of Commerce and Labor. Every person so licensed who in the operation of any radio apparatus shall fail to observe and obey regulations contained in or made pursuant to this act or subsequent acts or treaties of the United States, or any one of them, or who shall fail to enforce obedience thereto by an unlicensed person while serving under his supervision, in addition to the punishments and penalties herein prescribed, may suffer the suspension of the said license for a period to be fixed by the Secretary of Commerce and Labor not exceeding one year. It shall be unlawful to employ any unlicensed person or for any unlicensed person to serve in charge or in supervision of the use and operation of such apparatus, and any person violating this provision shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than one hundred dollars or imprisonment for not more than two months; or both, in the

discretion of the court, for each and every such offense: *Provided*, That in case of emergency the Secretary of Commerce and Labor may authorize a collector of customs to issue a temporary permit, in lieu of a license, to the operator on a vessel subject to the radio ship act of June twenty-fourth, nineteen hundred and ten.

**Sec. 4.** That for the purpose of preventing or minimizing interference with communication between stations in which such apparatus is operated, to facilitate radio communication, and to further the prompt receipt of distress signals, said private and commercial stations shall be subject to the regulations of this section. These regulations shall be enforced by the Secretary of Commerce and Labor through the collectors of customs and other officers of the Government as other regulations herein provided for.

The Secretary of Commerce and Labor may, in his discretion, waive the provisions of any or all of these regulations when no interference of the character above mentioned can ensue.

The Secretary of Commerce and Labor may grant special temporary licenses to stations actually engaged in conducting experiments for the development of the science of radio communication, or the apparatus pertaining thereto, to carry on special tests, using any amount of power or any wave lengths, at such hours and under such conditions as will insure the least interference with the sending or receipt of commercial or Government radiograms, of distress signals and radiograms, or with the work of other stations.

In these regulations the naval and military stations shall be understood to be stations on land.

## REGULATIONS

### Normal Wave Length

*First.* Every station shall be required to designate a certain definite wave length as the normal sending and receiving wave length of the station. This wave length shall not exceed six hundred meters or it shall exceed one thousand six hundred meters. Every coastal station open to general public service shall at all times be ready to receive messages of such wave lengths as are required by the Berlin convention. Every ship station, except as hereinafter provided, and every coast station open to general public service shall be prepared to use two sending wave lengths, one of three hundred meters and one of six hundred meters, as required by the international convention in force: *Provided*, That the Secretary of Commerce and Labor may, in his discretion, change the limit of wave length reservation made by regulations first and second to accord with any international agreement to which the United States is a party.

### Other Wave Lengths

*Second.* In addition to the normal sending wave length all stations, except as provided hereinafter in these regulations, may use other sending wave lengths: *Provided*, That they do not exceed six hundred meters or that they do exceed one thousand six hundred meters: *Provided further*, That the character of the waves emitted conforms to the requirements of regulations third and fourth following.

#### Use of a "Pure Wave"

*Third.* At all stations if the sending apparatus, to be referred to hereinafter as the "transmitter," is of such a character that the energy is radiated in two or more wave lengths, more or less sharply defined, as indicated by a sensitive wave meter, the energy in no one of the lesser waves shall exceed ten per centum of that in the greatest.

#### Use of a "Sharp Wave"

*Fourth.* At all stations the logarithmic decreement per complete oscillation in the wave trains emitted by the transmitter shall not exceed two-tenths, except when sending distress signals or signals and messages relating thereto.

#### Use of "Standard Distress Wave"

*Fifth.* Every station on shipboard shall be prepared to send distress calls on the normal wave length designated by the international convention in force, except on vessels of small tonnage unable to have plants insuring that wave length.

#### Signal of Distress

*Sixth.* The distress call used shall be the international signal of distress  
... - - - - .

#### Use of "Broad Interfering Wave" for Distress Signals

*Seventh.* When sending distress signals, the transmitter of a station on shipboard may be tuned in such a manner as to create a maximum of interference with a maximum of radiation.

#### Distance Requirements for Distress Signals

*Eighth.* Every station on shipboard, wherever practicable, shall be prepared to send distress signals of the character specified in regulations fifth and sixth with sufficient power to enable them to be received by day over sea a distance of one

hundred nautical miles by a shipboard station equipped with apparatus for both sending and receiving equal in all essential particulars to that of the station first mentioned.

#### **"Right of Way" for Distress Signals**

*Ninth.* All stations are required to give absolute priority to signals and radiograms relating to ships in distress; to cease all sending on hearing a distress signal; and, except when engaged in answering or aiding the ship in distress, to refrain from sending until all signals and radiograms relating thereto are completed.

#### **Reduced Power for Ships Near a Government Station**

*Tenth.* No station on shipboard, when within fifteen nautical miles of a naval or military station, shall use a transformer input exceeding one kilowatt, nor, when within five nautical miles of such a station, a transformer input exceeding one-half kilowatt, except for sending signals of distress, or signals or radiograms relating thereto.

#### **Intercommunication**

*Eleventh.* Each shore station open to general public service between the coast and vessels at sea shall be bound to exchange radiograms with any similar shore station and with any ship station without distinction of the radio system adopted by such stations, respectively, and each station on shipboard shall be bound to exchange radiograms with any other station on shipboard without distinction of the radio systems adopted by each station, respectively.

It shall be the duty of each such shore station, during the hours it is in operation, to listen in at intervals of not less than fifteen minutes and for a period not less than two minutes, with the receiver tuned to receive messages of three hundred-meter wave lengths.

#### **Division of Time**

*Twelfth.* At important seaports and at all other places where naval or military and private commercial shore stations operate in such close proximity that interference with the work of naval and military stations can not be avoided by the enforcement of the regulations contained in the foregoing regulations concerning wave lengths and character of signals emitted, such private or commercial shore stations as do interfere with the reception of signals by the naval and military stations concerned shall not use their transmitters during the first fifteen minutes of each hour, local standard time. The Secretary of Commerce and Labor may, on the recommendation of the department concerned, designate the station or stations which may be required to observe this division of time.

### **Government Stations to Observe Division of Time**

*Thirteenth.* The naval or military stations for which the above-mentioned division of time may be established shall transmit signals or radiograms only during the first fifteen minutes of each hour, local standard time, except in case of signals or radiograms relating to vessels in distress, as hereinbefore provided.

### **Use of Unnecessary Power**

*Fourteenth.* In all circumstances, except in case of signals or radiograms relating to vessels in distress, all stations shall use the minimum amount of energy necessary to carry out any communication desired.

### **General Restrictions on Private Stations**

*Fifteenth.* No private or commercial station not engaged in the transaction of bona fide commercial business by radio communication or in experimentation in connection with the development and manufacture of radio apparatus for commercial purposes shall use a transmitting wave length exceeding two hundred meters, or a transformer input exceeding one kilowatt, except by special authority of the Secretary of Commerce and Labor contained in the license of the station: *Provided,* That the owner or operator of a station of the character mentioned in this regulation shall not be liable for a violation of the requirements of the third or fourth regulations to the penalties of one hundred dollars or twenty-five dollars, respectively, provided in this section unless the person maintaining or operating such station shall have been notified in writing that the said transmitter has been found, upon tests conducted by the Government, to be so adjusted as to violate the third and fourth regulations, and opportunity has been given to said owner or operator to adjust said transmitter in conformity with said regulations.

### **Special Restrictions in the Vicinities of Government Stations**

*Sixteenth.* No station of the character mentioned in regulation fifteenth situated within five nautical miles of a naval or military station shall use a transmitting wave length exceeding two hundred meters or a transformer input exceeding one-half kilowatt.

### **Ship Stations to Communicate with Nearest Shore Stations**

*Seventeenth.* In general, the shipboard stations shall transmit their radiograms to the nearest shore station. A sender on board a vessel shall, however, have the right to designate the shore station through which he desires to have his radiograms transmitted. If this can not be done, the wishes of the sender are to be complied with only if the transmission can be effected without interfering with the service of other stations.

### Limitations for Future Installations in Vicinities of Government Stations

*Eighteenth.* No station on shore not in actual operation at the date of the passage of this act shall be licensed for the transaction of commercial business by radio communication within fifteen nautical miles of the following naval or military stations, to wit: Arlington, Virginia; Key West, Florida; San Juan, Porto Rico; North Head and Tatoosh Island, Washington; San Diego, California; and those established or which may be established in Alaska and in the Canal Zone; and the head of the department having control of such Government stations shall, so far as is consistent with the transaction of governmental business, arrange for the transmission and receipt of commercial radiograms under the provisions of the Berlin convention of nineteen hundred and six and future international conventions or treaties to which the United States may be a party, at each of the stations above referred to, and shall fix the rates therefor, subject to control of such rates by Congress. At such stations and wherever and whenever shore stations open for general public business between the coast and vessels at sea under the provisions of the Berlin convention of nineteen hundred and six and future international conventions and treaties to which the United States may be a party shall not be so established as to insure a constant service day and night without interruption, and in all localities wherever or whenever such service shall not be maintained by a commercial shore station within one hundred nautical miles of a naval radio station, the Secretary of the Navy shall, so far as is consistent with the transaction of Government business, open naval radio stations to the general public business described above, and shall fix rates for such service, subject to control of such rates by Congress. The receipts from such radiograms shall be covered into the Treasury as miscellaneous receipts.

### Secrecy of Messages

*Nineteenth.* No person or persons engaged in or having knowledge of the operation of any station or stations shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court.

### Penalties

For violation of any of these regulations, subject to which a license under sections one and two of this act may be issued, the owner of the apparatus shall be liable to a penalty of one hundred dollars, which may be reduced or remitted by the

Secretary of Commerce and Labor, and for repeated violations of any of such regulations the license may be revoked.

For violation of any of these regulations, except as provided in regulation nineteenth, subject to which a license under section three of this act may be issued, the operator shall be subject to a penalty of twenty-five dollars, which may be reduced or remitted by the Secretary of Commerce and Labor, and for repeated violations of any such regulations, the license shall be suspended or revoked.

**Sec. 5.** That every license granted under the provisions of this act for the operation or use of apparatus for radio communication shall prescribe that the operator thereof shall not willfully or maliciously interfere with any other radio communication. Such interference shall be deemed a misdemeanor, and upon conviction thereof the owner or operator, or both, shall be punishable by a fine of not to exceed five hundred dollars or imprisonment for not to exceed one year, or both.

**Sec. 6.** That the expression "radio communication" as used in this act means any system of electrical communication by telegraphy or telephony without the aid of any wire connecting the points from and at which the radiograms, signals, or other communications are sent or received.

**Sec. 7.** That a person, company, or corporation within the jurisdiction of the United States shall not knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent distress signal or call or false or fraudulent signal, call, or other radiogram of any kind. The penalty for so uttering or transmitting a false or fraudulent distress signal or call shall be a fine of not more than two thousand five hundred dollars or imprisonment for not more than five years, or both, in the discretion of the court, for each and every such offense, and the penalty for so uttering or transmitting, or causing to be uttered or transmitted, any other false or fraudulent signal, call, or other radiogram shall be a fine of not more than one thousand dollars or imprisonment for not more than two years, or both, in the discretion of the court, for each and every such offense.

**Sec. 8.** That a person, company, or corporation shall not use or operate any apparatus for radio communication on a foreign ship in territorial waters of the United States otherwise than in accordance with the provisions of sections four and seven of this act and so much of section five as imposes a penalty for interference. Save as aforesaid, nothing in this act shall apply to apparatus for radio communication on any foreign ship.

**Sec. 9.** That the trial of any offense under this act shall be in the district in which it is committed, or if the offense is committed upon the high seas or out of the jurisdiction of any particular State or district the trial shall be in the district where the offender may be found or into which he shall be first brought.

**Sec. 10.** That this act shall not apply to the Philippine Islands.

*Sec. 11.* That this act shall take effect and be in force on and after four months from its passage.

### *MIND PROBES*

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1. To appreciate more fully the priorities of the Act, rank the offenses specifically mentioned according to the severity of the penalty.
2. What does this Act tell about the state of radio's development in 1912?

### *RELATED READING*

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- KITTROSS, JOHN M., ed., *Documents in American Telecommunications Policy*, Vol. 1. New York: Arno Press, 1977.
- TOMLINSON, JOHN D., *The International Control of Radiocommunications*. Geneva, Switzerland: University of Geneva, 1938. (Reprinted New York: Kraus Reprint Co., 1972.)



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# The Vision of David Sarnoff

Memorandum to E. J. Nally\*

1915-1916

The British controlled Marconi Wireless Telegraph Company of America was formed in 1899 to develop the commercial potential of the radio patents of Italian inventor Guglielmo Marconi. Transatlantic radio signals (Morse code dots and dashes) were first transmitted in 1901, and wireless telephony (voices and music) was achieved in 1906, the same year David Sarnoff (1891-1971) joined American Marconi as an office boy.

An expert telegrapher with an agile mind and great ambition, Sarnoff quickly rose through the organization's ranks. It was Sarnoff, assigned to a Marconi station in New York City in 1912, who spent three solid days relaying wireless messages to the press telling of the survivors of the tragic *Titanic* disaster. A year later he was promoted to the position of Assistant Traffic Manager of the growing company. In 1915 or 1916, sensing a way to exploit an attribute of radiotelephony that many considered to be a liability—its lack of privacy—Sarnoff accurately prophesied the coming of broadcasting in the following memorandum to Edward J. Nally, Vice-President and General Manager of American Marconi.

World War I brought a temporary lull to the commercial (but not technical) development of radio, and Sarnoff's idea was put aside. When the assets of American Marconi were acquired by the newly formed Radio Corporation of America in 1919, Sarnoff stayed with the nascent organization as Commercial Manager. He was instrumental in forming the National Broadcasting Company, an RCA subsidiary, in 1926. Sar-

\*Reprinted with permission from "Radio and David Sarnoff," unpublished manuscript by Elmer E. Bucher deposited in the David Sarnoff Research Center Library, Princeton, New Jersey.

noff fostered the emergence of monochrome and color television from laboratory to marketplace. He headed RCA from 1930 until his retirement in 1969. More than any other person, David Sarnoff influenced the pattern of growth of broadcasting in America.

I have in mind a plan of development which would make radio a "household utility" in the same sense as the piano or phonograph. The idea is to bring music into the home by wireless.

While this has been tried in the past by wires, it has been a failure because wires do not lend themselves to this scheme. With radio, however, it would be entirely feasible. For example, a radio telephone transmitter having a range of say twenty-five to fifty miles can be installed at a fixed point where instrumental or vocal music or both are produced. The problem of transmitting music has already been solved in principle and therefore all the receivers attuned to the transmitting wave length should be capable of receiving such music. The receiver can be designed in the form of a simple "Radio Music Box" and arranged for several different wave lengths, which should be changeable with throwing of a single switch or pressing of a single button.

The "Radio Music Box" can be supplied with amplifying tubes and a loud-speaking telephone, all of which can be neatly mounted in one box. The box can be placed on a table in the parlor or living room, the switch set accordingly and the transmitted music received. There should be no difficulty in receiving music perfectly when transmitted within a radius of twenty-five to fifty miles. Within such a radius there reside hundreds of thousands of families; and as all can simultaneously receive from a single transmitter, there would be no question of obtaining sufficiently loud signals to make the performance enjoyable. The power of the transmitter can be made five K. W., if necessary, to cover even a short radius of twenty-five to fifty miles; thereby giving extra loud signals in the home if desired. The use of head telephones would be obviated by this method. The development of a small loop antenna to go with each "Radio Music Box" would likewise solve the antennae problem.

The same principle can be extended to numerous other fields as, for example, receiving lectures at home which can be made perfectly audible; also events of national importance can be simultaneously announced and received. Baseball scores can be transmitted in the air by the use of one set installed at the Polo Grounds. The same would be true of other cities. This proposition would be especially interesting to farmers and others living in outlying districts removed from cities. By the purchase of a "Radio Music Box" they could enjoy concerts, lectures, music, recitals, etc., which may be going on in the nearest city within their radius. While I have indicated a few of the most probable fields of usefulness for such a device, yet there are numerous other fields to which the principle can be extended. . . .

The manufacture of the "Radio Music Box" including antenna, in large quantities, would make possible their sale at a moderate figure of perhaps \$75.00 per

outfit. The main revenue to be derived will be from the sale of "Radio Music Boxes" which if manufactured in quantities of one hundred thousand or so could yield a handsome profit when sold at the price mentioned above. Secondary sources of revenue would be from the sale of transmitters and from increased advertising and circulation of the "Wireless Age." The Company would have to undertake the arrangements, I am sure, for music recitals, lectures, etc., which arrangements can be satisfactorily worked out. It is not possible to estimate the total amount of business obtainable with this plan until it has been developed and actually tried out but there are about 15,000,000 families in the United States alone, and if only one million or seven percent of the total families thought well of the idea it would, at the figure mentioned, mean a gross business of about \$75,000,000 which should yield considerable revenue.

Aside from the profit to be derived from this proposition the possibilities for advertising for the Company are tremendous; for its name would ultimately be brought into the household and wireless would receive national and universal attention.

### *MIND PROBES*

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1. If you were Sarnoff's boss in 1915-16 and you received this memo, what action would you take? Explain your reason(s).
2. Why and how was RCA formed in 1919?

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- DREHER, CARL, *Sarnoff: An American Success*. New York: Quadrangle, 1977.
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# Emergence of Broadcast Advertising

Sales Talk Transmitted by Radio Station WEAF,  
New York City\*  
August 28, 1922, 5:15-5:30 p.m.

It can be said that broadcasting in the United States began on November 2, 1920, when the Westinghouse Electric and Manufacturing Corporation inaugurated station KDKA in Pittsburgh, Pennsylvania, with reports of the Harding-Cox presidential election returns. Fewer than 50 pioneering radio stations had joined KDKA by the end of 1921, but the number swelled to more than 500 a year later. Some of the early radio stations were built and operated by equipment manufacturers like Westinghouse that were interested in increasing the market for radio receivers and parts. Department stores, educational institutions, and newspapers became prevalent among station licensees during these formative years as the public's investment in receiving apparatus increased by leaps and bounds.

But was there a more permanent way to finance station operation than through sales of equipment to audience members? The American Telephone and Telegraph Company (AT&T) built station WEAF in New York City in the summer of 1922 for the express purpose of experimenting with what they called "toll broadcasting"—making radio facilities available to anybody who wanted to transmit something to the general public provided one could pay the price. The following radio talk was the first paid program aired on WEAF. It cost the sponsor \$50.00.

The Queensboro Corporation had begun building a residential neighborhood on suburban farmland in the county of Queens, New York, in 1909. Manhattan, some seven miles distant, became increasing-

\*Reprinted from Gleason L. Archer, *History of Radio to 1926* (New York: American Historical Society, Inc., 1938), pp. 397-399.

ly accessible to Jackson Heights when a municipal elevated subway line started serving its southern perimeter in 1917. Undeterred by the rising din of airplanes from LaGuardia Airport on its northern boundary, the community's population had swelled to 80,000 by the early 1980's.

AT&T attempted to prevent other broadcasters from accepting commercially sponsored matter, but by the mid-1920's more and more stations carried advertising. By 1930 commercial advertising had become institutionalized as the way to support America's broadcast system.

The telephone company also established the first of the broadcasting networks by interconnecting stations with the telephone lines it controlled. AT&T declined to permit other broadcast organizations to make use of its national wire web until 1926, when it gave up station and network operation under threat of government antitrust action and sold WEAJ to RCA for a million dollars. The phone company, however, reserved the right to provide interconnection facilities for radio networks.

## **BROADCASTING PROGRAM HAWTHORNE COURT INTRODUCTION**

This afternoon the radio audience is to be addressed by Mr. Blackwell of the Queensboro Corporation, who through arrangements made by the Griffin Radio Service, Inc., will say a few words concerning Nathaniel Hawthorne and the desirability of fostering the helpful community spirit and the healthful, unconfined home life that were Hawthorne ideals. Ladies and Gentlemen: Mr. Blackwell.

## **BROADCASTING PROGRAM HAWTHORNE COURT**

It is fifty-eight years since Nathaniel Hawthorne, the greatest of American fictionists, passed away. To honor his memory the Queensboro Corporation, creator and operator of the tenant-owned system of apartment homes at Jackson Heights, New York City, has named its latest group of high-grade dwellings "Hawthorne Court."

I wish to thank those within sound of my voice for the broadcasting opportunity afforded me to urge this vast radio audience to seek the recreation and the daily comfort of the home removed from the congested part of the city, right at the boundaries of God's great outdoors, and within a few minutes by subway from the business section of Manhattan. This sort of residential environment strongly influenced Hawthorne, America's greatest writer of fiction. He analyzed with charming keenness the social spirit of those who had thus happily selected their homes, and he painted the people inhabiting those homes with good-natured relish.

There should be more Hawthorne sermons preached about the utter inadequacy and the general hopelessness of the congested city home. The cry of the heart

is for more living room, more chance to unfold, more opportunity to get near to Mother Earth, to play, to romp, to plant and to dig.

Let me enjoy upon you as you value your health and your hopes and your home happiness, get away from the solid masses of brick, where the meagre opening admitting a slant of sunlight is mockingly called a light shaft, and where children grow up starved for a run over a patch of grass and the sight of a tree.

Apartments in congested parts of the city have proven failures. The word neighbor is an expression of peculiar irony—a daily joke.

Thousands of dwellers in the congested district apartments want to remove to healthier and happier sections but they don't know and they can't seem to get into the belief that their living situation and home environment can be improved. Many of them balk at buying a home in the country or the suburbs and becoming a commuter. They have visions of toiling down in a cellar with a sullen furnace, or shoveling snow, or of blistering palms pushing a clanking lawn mower. They can't seem to overcome the pessimistic inertia that keeps pounding into their brains that their crowded, unhealthy, unhappy living conditions cannot be improved.

The fact is, however, that apartment homes on the tenant-ownership plan can be secured by these city martyrs merely for the deciding to pick them—merely for the devoting of an hour or so to preliminary verification of the living advantages that are within their grasp. And this too within twenty minutes of New York's business center by subway transit.

Those who balk at building a house or buying one already built need not remain deprived of the blessings of the home within the ideal residential environment, or the home surrounded by social advantages and the community benefits where neighbor means more than a word of eight letters.

In these better days of more opportunities, it is possible under the tenant-ownership plan to possess an apartment-home that is equal in every way to the house-home and superior to it in numberless respects.

In these same better days, the purchaser of an apartment-home can enjoy all the latest conveniences and contrivances demanded by the housewife and yet have all of the outdoor life that the city dweller yearns for but has deludedly supposed could only be obtained through purchase of a house in the country.

Imagine a congested city apartment lifted bodily to the middle of a large garden within twenty minutes travel of the city's business center. Imagine the interior of a group of such apartments traversed by a garden court stretching a block, with beautiful flower beds and rich sward, so that the present jaded congested section dweller on looking out of his windows is not chilled with the brick and mortar vista, but gladdened and enthused by colors and scents that make life worth living once more. Imagine an apartment to live in at a place where you and your neighbor join the same community clubs, organizations and activities, where you golf with your neighbor, tennis with your neighbor, bowl with your neighbor and join him in a long list of outdoor and indoor pleasure-giving health-giving activities.

And finally imagine such a tenant-owned apartment, where you own a floor in a house the same as you can own an entire house with a proportionate ownership

of the ground the same as the ground attached to an entire house but where you have great spaces for planting and growing the flowers you love, and raising the vegetables of which you are fond.

Right at your door is such an opportunity. It only requires the will to take advantage of it all. You owe it to yourself and you owe it to your family to leave the hemmed-in, sombre-hued, artificial apartment life of the congested city section and enjoy what nature intended you should enjoy.

Dr. Royal S. Copeland, Health Commissioner of New York, recently declared that any person who preached leaving the crowded city for the open country was a public-spirited citizen and a benefactor to the race. Shall we not follow this advice and become the benefactors he praises? Let us resolve to do so. Let me close by urging that you hurry to the apartment home near the green fields and the neighborly atmosphere right on the subway without the expense and the trouble of a commuter, where health and community happiness beckon—the community life and friendly environment that Hawthorne advocated.

### *MIND PROBES*

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1. What might broadcasting in America be like today if AT&T had continued to build its radio empire after 1926?
2. Compare and contrast the persuasive techniques utilized in contemporary commercials with those employed by Mr. Blackwell.

### *RELATED READING*

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- HEIGHTON, ELIZABETH J., and DON R. CUNNINGHAM, *Advertising in the Broadcast Media*. Belmont, Calif.: Wadsworth, 1976.
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# Breakdown of the Act of 1912

35 Op. Att'y Gen. 126

July 8, 1926

From its beginning broadcasting was a medium characterized by a scarcity of frequencies. All broadcast stations operated on no more than two or three wave lengths during broadcasting's first two years, necessitating shared-time arrangements among the early stations.

Herbert Hoover became Secretary of Commerce in 1921. He convened the first of four annual National Radio Conferences in Washington in 1922. All those attending agreed that the Radio Act of 1912 was inadequate to regulate recent radio developments, including broadcasting; new legislation was introduced that year by Congressman Wallace White, Jr., but Congress was slow to act.

In 1923 a federal appeals court held that the Secretary of Commerce had no discretionary power to refuse a radio license to anyone who was qualified under the 1912 Act [*Hoover v. Intercity Radio Co., Inc.*, 286 F. 1003 (D.C. Cir. 1923)]. The same decision opined that the Secretary did possess authority to select the frequency "which, in his judgment, will result in the least possible interference." Hoover thereupon opened up many more frequencies to broadcasting, and the crowding was temporarily relieved as the broadcasting industry cooperated with government attempts to minimize interference. This worked reasonably well, and Congress paid little heed to repeated requests for a new law.

But by 1925, as new stations came on the air and broadcasting schedules expanded, the congestion became intolerable, and Hoover decided in November to refuse to grant any new authorizations to operate on the 89 frequencies then available for broadcasting. The penultimate crack in the regulatory structure appeared on April 16, 1926, when a federal district court ruled that Hoover was powerless to require a licensee to broadcast only at specified times and only on designated chan-



nels, for the Radio Act of 1912 gave the Secretary of Commerce no authority to issue regulations [*United States v. Zenith Radio Corporation et al.*, 12 F.2d 614 (N.D. Ill. 1926)].

Hoover's request for clarification of his lawful authority was answered in the Attorney General's opinion, below, which pointed out the crying need for more effective broadcast legislation.

Department of Justice

July 8, 1926.

*Sir:* Receipt is acknowledged of your letter of June 4, 1926, in which you ask for a definition of your powers and duties with respect to the regulation of radio broadcasting under the Act of August 13, 1912, c. 287 (37 Stat. 302). Specifically, you request my opinion upon the following five questions:

1. Does the 1912 Act require broadcasting stations to obtain licenses, and is the operation of such a station without a license an offense under that Act?
2. Has the Secretary of Commerce authority under the 1912 Act to assign wave lengths and times of operation and limit the power of stations?
3. Has a station, whose license stipulates a wave length for its use, the right to use any other wave length, and if it does operate on a different wave length, is it in violation of the law and does it become subject to the penalties of the Act?
4. If a station, whose license stipulates a period during which only the station may operate and limits its power, transmits at different times, or with excessive power, is it in violation of the Act and does it become subject to the penalties of the Act?
5. Has the Secretary of Commerce power to fix the duration of the licenses which he issues or should they be indeterminate, continuing in effect until revoked or until Congress otherwise provides?

With respect to the first question, my answer to both its parts is in the affirmative. Section 1 of the Act of 1912 provides—

That a person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication as a means of commercial intercourse among the several States, or with foreign nations, or upon any vessel of the United States engaged in interstate or foreign commerce, or for the transmission of radiograms or signals the effect of which extends beyond the jurisdiction of the State or Territory in which the same are made, or where interference would be caused thereby with the receipt of messages or signals from beyond the jurisdiction of the said State or Territory, except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce (and Labor) upon application therefor; but nothing in this Act shall be construed to apply to the

transmission and exchange of radiograms or signals between points situated in the same State: *Provided*, That the effect thereof shall not extend beyond the jurisdiction of the said State or interfere with the reception of radiograms or signals from beyond said jurisdiction. . . .

Violation of this section is declared to be a misdemeanor.

There is no doubt whatever that radio communication is a proper subject for Federal regulation under the commerce clause of the Constitution. *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U.S. 1, 9, 24 Op. 100. And it may be noticed in passing that even purely intrastate transmission of radio waves may fall within the scope of Federal power when it disturbs the air in such a manner as to interfere with interstate communication, a situation recognized and provided for in the Act. *Cf. Minnesota Rate Cases*, 230 U.S. 352.

While the Act of 1912 was originally drafted to apply primarily to wireless telegraphy, its language is broad enough to cover wireless telephony as well; and this was clearly the intention of its framers (62nd Cong., 2nd Sess., S. Rept. 698). Whether the transmission is for profit is immaterial so far as the commerce clause is concerned. *American Express Company v. United States*, 212 U.S. 522; *Caminetti v. United States*, 242 U.S. 470.

For these reasons I am of the opinion that broadcasting is within the terms of the 1912 Act; that a license must be obtained before a broadcasting station may be lawfully operated; and that the penalties of section 1 of the Act may be imposed upon any person or corporation who operates such a station without a license.

Your second question involves three separate problems:

- (a) The assignment of wave lengths.
- (b) The assignment of hours of operation.
- (c) The limitation of power.

(a) As to the assignment of wave lengths, section 2 of the Act provides—

That every such license shall be in such form as the Secretary of Commerce (and Labor) shall determine and shall contain the restrictions, pursuant to this Act, on and subject to which the license is granted; . . . shall state the wave length or the wave lengths authorized for use by the station for the prevention of interference and the hours for which the station is licensed for work. . . . Every such license shall be subject to the regulations contained herein and such regulations as may be established from time to time by authority of this Act or subsequent Acts and treaties of the United States.

The power to make general regulations is nowhere granted by specific language to the Secretary. On the contrary, it seems clear from section 4 of the Act that Congress intended to cover the entire field itself, and that, with minor exceptions, Congress left very little to the discretion of any administrative officer. This fact is made additionally plain by the reports which accompanied the Act in both Houses. 62d Cong. 2d Sess., S. Rept. 698; *ibid.*, H.R. Rept. 582. *Cf.* 29 Op. 579.

The first regulation in section 4 provides that the station shall be required to designate a definite wave length, outside of the band between 600 and 1,600 meters (reserved for Government stations), and that ship stations shall be prepared to use 300 and 600 meters.

The second regulation provides that in addition to the normal sending wave length, all stations, except as otherwise provided in the regulations, may use "other sending wave lengths," again excluding the band from 600 to 1,600 meters.

These two regulations constitute a direct legislative regulation of the use of wave lengths. They preclude the possibility of administrative discretion in the same field. In *Hoover v. Intercity Radio Company*, 286 Fed. 1003, it was held that it was mandatory upon the Secretary under the Act to grant licenses to all applicants complying with its provisions. The court added in that case these remarks:

In the present case the duty of naming a wave length is mandatory upon the Secretary. The only discretionary act is in selecting a wave length, within the limitations prescribed in the statute, which, in his judgment, will result in the least possible interference. The issuing of a license is not dependent upon the fixing of a wave length. It is a restriction entering into the license. The wave length named by the Secretary merely measures the extent of the privilege granted to the licensee.

You have advised me that following this decision you have assumed that you had discretionary authority in assigning wave lengths for the use of particular stations, and have made such assignments to the individual broadcasting stations.

However, in my opinion, these remarks of the Court of Appeals are to be construed as applying only to the *normal* sending and receiving wave length which every station is required to designate under the first regulation. But under the second regulation, any station is at liberty to use "other wave lengths" at will, provided only that they do not trespass upon the band from 600 to 1,600 meters. This conclusion appears to be in accord with the opinion of the District Court for the Northern District of Illinois in the case . . . of *United States v. Zenith Radio Corporation*.

But it is suggested that under the fifteenth regulation broadcasting stations may not, without special authority from the Secretary, use wave lengths over 200 meters or power exceeding one kilowatt. This regulation is applicable only to "private and commercial stations not engaged in the transaction of bona fide commercial business by radio communication." I am of opinion that broadcasting is "the transaction of bona fide commercial business" (*Witmark v. Bamberger*, 291 Fed. 776; *Remick v. American Automobile Accessories Co.*, 298 Fed. 628), and that it is conducted "by radio communication." Broadcasting stations, therefore, do not fall within the scope of the fifteenth regulation; and the Secretary is without power to impose on them the restrictions provided therein.

From the foregoing consideration I am forced to conclude that you have no general authority under the Act to assign wave lengths to broadcasting stations, except for the purpose of designating normal wave lengths under regulation 1.

(b) As to the assignment of hours of operation:

The second section of the Act, already quoted, provides that the license shall state "the hours for which the station is licensed for work." By the twelfth and thirteenth regulations the Secretary, on the recommendation of the Department concerned, may designate stations which must refrain from operating during the first 15 minutes of each hour—a period to be reserved in designated localities for Government stations. These two regulations are the only ones in which a division of time is mentioned; and it is to them that the second section of the Act refers. I therefore conclude that you have no general authority to fix the times at which broadcasting stations may operate, apart from the limitations of regulations 12 and 13.

(c) As to the limitation of power:

The only provisions concerning this are to be found in regulation 14, which requires all stations to use "the minimum amount of energy necessary to carry out any communication desired." It does not appear that the Secretary is given power to determine in advance what this minimum amount shall be for every case; and I therefore conclude that you have no authority to insert such a determination as a part of any license.

What I have said above with respect to your second question necessarily serves also as an answer to your third. While a station may not lawfully operate without a license, yet under the decision in the *Intercity Co.* case and under 29 Op. 579 you are required to issue such a license on request. And while a normal wave length must be designated under regulation 1, any station is free to operate on other wave lengths under regulation 2.

The same considerations cover your fourth question. Since the Act confers upon you no general authority to fix hours of operation or to limit power, any station may with impunity operate at hours and with powers other than those fixed in its license, subject only to regulations 12 and 13 and to the penalties against malicious interference contained in section 5.

With respect to your fifth question, I can find no authority in the Act for the issuance of licenses of limited duration.

It is apparent from the answers contained in this opinion that the present legislation is inadequate to cover the art of broadcasting, which has been almost entirely developed since the passage of the 1912 Act. If the present situation requires control, I can only suggest that it be sought in new legislation, carefully adapted to meet the needs of both the present and the future.

Respectfully,

William J. Donovan,  
*Acting Attorney General.*

To the Secretary of Commerce.

*MIND PROBES*

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1. Many radio stations in 1926 accepted no advertising and were not operated as commercial enterprises. Did the Radio Act of 1912 apply to such stations? Your answer may gain support through a reading of the judicial precedents cited in Mr. Donovan's opinion.

2. Using the 1912 Act as your statutory basis, redraft this opinion so that the answer to Secretary Hoover's second question is "yes" instead of "no." Assume the precedents established by *Hoover v. Intercity* and *U.S. v. Zenith* do not exist.

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# President Coolidge's Message to Congress

H.R. Doc. 483, 69th Congress, 2d Session

December 7, 1926

Following the Attorney General's Opinion of July 8, 1926, Secretary Hoover abandoned his valiant efforts to maintain a semblance of order on the airwaves and urged the radio industry to regulate itself. Chaos ensued as stations switched frequencies and locations and increased their power at will. In short order some 200 new stations crowded on the air. Broadcast reception became jumbled and sporadic.

The general public and the radio industry both clamored for effective regulation. When Congress reconvened they found that even President Calvin Coolidge had joined the chorus, as illustrated in the following excerpt from his Congressional message recommending the enactment of new radio legislation.

## RADIO LEGISLATION

The Department of Commerce has for some years urgently presented the necessity for further legislation in order to protect radio listeners from interference between broadcasting stations and to carry out other regulatory functions. Both branches of Congress at the last session passed enactments intended to effect such regulation, but the two bills yet remain to be brought into agreement and final passage.

Due to decisions of the courts, the authority of the department under the law of 1912 has broken down; many more stations have been operating that can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocation set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to de-

stroy its great value. I most urgently recommend that this legislation should be speedily enacted.

I do not believe it is desirable to set up further independent agencies in the Government. Rather I believe it advisable to entrust the important functions of deciding who shall exercise the privilege of radio transmission and under what conditions, the assigning of wave lengths and determination of power, to a board to be assembled whenever action on such questions becomes necessary. There should be right of appeal to the courts from the decisions of such board. The administration of the decisions of the board and the other features of regulation and promotion of radio in the public interest, together with scientific research, should remain in the Department of Commerce. Such an arrangement makes for more expert, more efficient, and more economical administration than an independent agency or board, whose duties, after initial stages, require but little attention, in which administrative functions are confused with semijudicial functions and from which of necessity there must be greatly increased personnel and expenditure.

#### *MIND PROBE*

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After more than a half-century of experience with the FRC and FCC, do any of President Coolidge's objections to the establishment of a permanent, independent agency to regulate radio appear justified?

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# Senate Joint Resolution 125

Public Resolution 47, 69th Congress

December 8, 1926

On March 15, 1926, the House of Representatives passed a radio bill introduced by Congressman Wallace White, Jr., and based on recommendations of the Fourth National Radio Conference. On July 2, 1926, the Senate passed a similar bill introduced by Senator Clarence Dill. Senate-House conferees reported one day later that they could not reconcile the differences in the two versions prior to the session's end. They suggested passage of a Senate Joint Resolution that would preserve the status quo of all radio by limiting licensing periods and by requiring licensees to sign a waiver of claim to ownership of frequencies. This Resolution, although swiftly passed by the Senate and House, was delayed by the impending close of the session and was thus not signed by the President until December 8, 1926.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That until otherwise provided by law, no original license for the operation of any radio broadcasting station and no renewal of a license of an existing broadcasting station, shall be granted for longer periods than ninety days and no original license for the operation of any other class of radio station and no renewal of the license for an existing station of any other class than a broadcasting station, shall be granted for longer periods than two years; and that no original radio license or the renewal of an existing license shall be granted after the date of the passage of this resolution unless the applicant therefor shall execute in writing a waiver of any right or of any claim to any right, as against the United States, to any wave length or to the use of the ether in radio transmission because of previous license to use the same or because of the use thereof.*



*MIND PROBE*

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Is the requirement that an applicant relinquish the “right . . . to any wave length or to the use of the ether” prior to the grant of a license consistent with the provisions of the Fifth Amendment to the Constitution on p. 10?

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# The Radio Act of 1927

Public Law 632, 69th Congress

February 23, 1927

The Senate–House conferees presented their compromise bill on January 27, 1927. It was passed by the House on January 29; the Senate approved it on February 18. Five days later President Coolidge signed the Dill–White Radio Act of 1927 into law.

The five-member Federal Radio Commission, created as a temporary body by the Act, remained in power from year to year and “until otherwise provided” through various acts of Congress until the 1927 law was supplanted by the Communications Act of 1934 that gave rise to a permanent body, the seven-member Federal Communications Commission. In 1983 the FCC’s membership was reduced to five.

Communications law, while generally paralleling technological development, has never been able to keep pace with entrepreneurial innovation in the broadcast field. This was certainly true of the Radio Act of 1927, which owed much to the original White bill of 1922. But between then and 1927 broadcasting first assumed its now familiar form as a network distributed and advertiser supported mass medium under the inadequate provisions of the 1912 Radio Act. The 1927 Act remedied the deficiencies of the earlier law by establishing a discretionary licensing standard (“public interest, convenience, or necessity”) and by granting broad rule-making powers to the licensing authority. As a statement of public policy, however, the new Radio Act was curiously vague about radio networks and advertising, the two dominant elements of the unfolding broadcasting industry. These examples of regulatory lag” were to manifest themselves again when the major features of the Radio Act of 1927 were re-enacted as Title III of the Dill–Rayburn Communications Act of 1934.

In addition to creating the public interest standard, the 1927 statute made it clear in §§ 13 and 15 that monopoly in the radio field would not be condoned. While § 29 seemed to apply the First Amendment’s free speech guarantee to broadcasting, § 18 required stations to

treat political candidates without favoritism. These provisions and most others found their way into the Communications Act of 1934. Thus, the Radio Act of 1927 is the basis of current broadcast regulation.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; 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 individuals, firms, or corporations, 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. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (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) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, 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; or (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

**Sec. 2.** For the purposes of this Act, the United States is divided into five zones, as follows: The first zone shall embrace the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Delaware, Maryland, the District of Columbia, Porto Rico, and the Virgin Islands; the second zone shall embrace the States of Pennsylvania, Virginia, West Virginia, Ohio, Michigan, and Kentucky; the third zone shall embrace the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, Mississippi, Arkansas, Louisiana, Texas, and Oklahoma; the fourth zone shall embrace the States of Indiana, Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Kansas, and Missouri; and the fifth zone shall embrace the States of Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, California, the Territory of Hawaii, and Alaska.

**Sec. 3.** That a commission is hereby created and established to be known as the Federal Radio Commission, hereinafter referred to as the commission, which shall be composed of five commissioners appointed by the President, by and with the advice and consent of the Senate, and one of whom the President shall designate as chairman: *Provided*, That chairmen thereafter elected shall be chosen by the commission itself.

Each member of the commission shall be a citizen of the United States and an actual resident citizen of a State within the zone from which appointed at the time of said appointment. Not more than one commissioner shall be appointed from any zone. No member of the commission shall be financially interested in the manufacture or sale of radio apparatus or in the transmission or operation of radiotelegraphy, radiotelephony, or radio broadcasting. Not more than three commissioners shall be members of the same political party.

The first commissioners shall be appointed for the terms of two, three, four, five, and six years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed.

The first meeting of the commission shall be held in the city of Washington at such time and place as the chairman of the commission may fix. The commission shall convene thereafter at such times and places as a majority of the commission may determine, or upon call of the chairman thereof.

The commission may appoint a secretary, and such clerks, special counsel, experts, examiners, and other employees as it may from time to time find necessary for the proper performance of its duties and as from time to time may be appropriated for by Congress.

The commission shall have an official seal and shall annually make a full report of its operations to the Congress.

The members of the commission shall receive a compensation of \$10,000 for the first year of their service, said year to date from the first meeting of said commission, and thereafter a compensation of \$30 per day for each day's attendance upon sessions of the commission or while engaged upon work of the commission and while traveling to and from such sessions, and also their necessary traveling expenses.

**Sec. 4.** 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 or wave lengths to the various classes of stations, and assign frequencies or wave lengths 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 wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, 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) Have authority to establish areas or zones to be served by any station;

(h) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(i) 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;

(j) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(k) Have authority to hold hearings, summon witnesses, administer oaths, compel the production of books, documents, and papers and to make such investigations as may be necessary in the performance of its duties. The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the commission and, as from time to time may be appropriated for by Congress. All expenditures of the commission shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman.

**Sec. 5.** From and after one year after the first meeting of the commission created by this Act, all the powers and authority vested in the commission under the terms of this Act, except as to the revocation of licenses, shall be vested in and exercised by the Secretary of Commerce; except that thereafter the commission shall have power and jurisdiction to act upon and determine any and all matters brought before it under the terms of this section.

It shall also be the duty of the Secretary of Commerce—

(A) For and during a period of one year from the first meeting of the commission created by this Act, to immediately refer to the commission all applications for station licenses or for the renewal or modification of existing station licenses.

(B) From and after one year from the first meeting of the commission created by this Act, to refer to the commission for its action any application for a station license or for the renewal or modification of any existing station license as to the granting of which dispute, controversy, or conflict arises or against the granting of which protest is filed within ten days after the date of filing said application by any

party in interest and any application as to which such reference is requested by the applicant at the time of filing said application.

(C) To prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such persons as he finds qualified.

(D) To suspend the license of any operator for a period not exceeding two years upon proof sufficient to satisfy him that the licensee (a) has violated any provision of any Act or treaty binding on the United States which the Secretary of Commerce or the commission is authorized by this Act to administer or by any regulation made by the commission or the Secretary of Commerce under any such Act or treaty; or (b) has failed to carry out the lawful orders of the master of the vessel on which he is employed; or (c) has willfully damaged or permitted radio apparatus to be damaged; or (d) has transmitted superfluous radio communications or signals or radio communications containing profane or obscene words or language; or (e) has willfully or maliciously interfered with any other radio communications or signals.

(E) To inspect all transmitting apparatus to ascertain whether in construction and operation it conforms to the requirements of this Act, the rules and regulations of the licensing authority, and the license under which it is constructed or operated.

(F) To report to the commission from time to time any violations of this Act, the rules, regulations, or orders of the commission, or of the terms or conditions of any license.

(G) To designate call letters of all stations.

(H) To cause to be published such call letters and such other announcements and data as in his judgment may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act.

The Secretary may refer to the commission at any time any matter the determination of which is vested in him by the terms of this Act.

Any person, firm, company, or corporation, any State or political division thereof aggrieved or whose interests are adversely affected by any decision, determination, or regulation of the Secretary of Commerce may appeal therefrom to the commission by filing with the Secretary of Commerce notice of such appeal within thirty days after such decision or determination or promulgation of such regulation. All papers, documents, and other records pertaining to such application on file with the Secretary shall thereupon be transferred by him to the commission. The commission shall hear such appeal de novo under such rules and regulations as it may determine.

Decisions by the commission as to matters so appealed and as to all other matters over which it has jurisdiction shall be final, subject to the right of appeal herein given.

No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length 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.

**Sec. 6.** Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 1, 4, and 5 of this Act. All such Government stations shall use such frequencies or wave lengths as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the licensing authority may prescribe. Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the licensing authority, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners. Radio stations on board vessels of the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation or the Inland and Coastwise Waterways Service shall be subject to the provisions of this Act.

**Sec. 7.** The President shall ascertain the just compensation for such use or control and certify the amount ascertained to Congress for appropriation and payment to the person entitled thereto. If the amount so certified is unsatisfactory to the person entitled thereto, such person shall be paid only 75 per centum of the amount and shall be entitled to sue the United States to recover such further sum as added to such payment of 75 per centum which will make such amount as will be just compensation for the use and control. Such suit shall be brought in the manner provided by paragraph 20 of section 24, or by section 145 of the Judicial Code, as amended.

**Sec. 8.** All stations owned and operated by the United States, except mobile stations of the Army of the United States, and all other stations on land and sea, shall have special call letters designated by the Secretary of Commerce.

Section 1 of this Act shall not apply to any person, firm, company, or corporation sending radio communications or signals on a foreign ship while the same is within the jurisdiction of the United States, but such communications or signals shall be transmitted only in accordance with such regulations designed to prevent interference as may be promulgated under the authority of this Act.

*Sec. 9.* The licensing authority, 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.

In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same.

No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five 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 and not to exceed five years in the case of other licenses.

No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

*Sec. 10.* The licensing authority may grant station licenses only upon written application therefor addressed to it. All applications shall be filed with the Secretary of Commerce. All such applications shall set forth such facts as the licensing authority 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 and of the stations, if any, with which it is proposed to communicate; the frequencies or wave lengths 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. The licensing authority at any time after the filing of such original application and during the term of any such license may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

The licensing authority in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States," approved May 24, 1921.

*Sec. 11.* If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting



thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Such station licenses as the licensing authority 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:

(A) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

(B) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(C) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 6 hereof.

In cases of emergency arising during the period of one year from and after the first meeting of the commission created hereby, or on applications filed during said time for temporary changes in terms of licenses when the commission is not in session and prompt action is deemed necessary, the Secretary of Commerce shall have authority to exercise the powers and duties of the commission, except as to revocation of licenses, but all such exercise of powers shall be promptly reported to the members of the commission, and any action by the Secretary authorized under this paragraph shall continue in force and have effect only until such time as the commission shall act thereon.

**Sec. 12.** The station license required hereby shall not be granted to, or after the granting thereof such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or the representative of any alien; (b) to any foreign government, or the representative thereof; (c) to any company, corporation, or association organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more than one-fifth of the capital stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country.

The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority.

**Sec. 13.** The licensing authority is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any per-

son, firm, company, or corporation, or any subsidiary thereof, which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, after this Act takes effect, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person, firm, company, or corporation for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such firm, company, or corporation.

**Sec. 14.** Any station license shall be revocable by the commission for false statements either in the application or in the statement of fact which may be required by section 10 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the licensing authority in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, for violation of or failure to observe any of the restrictions and conditions of this Act, or of any regulation of the licensing authority authorized by this Act or by a treaty ratified by the United States, or whenever the Interstate Commerce Commission, or any other Federal body in the exercise of authority conferred upon it by law, shall find and shall certify to the commission that any licensee bound so to do, has failed to provide reasonable facilities for the transmission of radio communications, or that any licensee has made any unjust and unreasonable charge, or has been guilty of any discrimination, either as to charge or as to service or has made or prescribed any unjust and unreasonable classification, regulation, or practice with respect to the transmission of radio communications or service: *Provided*, That no such order of revocation shall take effect until thirty days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the parties known by the commission to be interested in such license. Any person in interest aggrieved by said order may make written application to the commission at any time within said thirty days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing herein directed. Notice in writing of said hearing shall be given by the commission to all the parties known to it to be interested in such license twenty days prior to the time of said hearing. Said hearing shall be conducted under such rules and in such manner as the commission may prescribe. Upon the conclusion hereof the commission may affirm, modify, or revoke said orders of revocation.

**Sec. 15.** 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 com-

merce 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 proceeding 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: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

*Sec. 16.* Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor.

The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon such terms and conditions as it may deem proper.

At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal.

*Sec. 17.* After the passage of this Act no person, firm, company, or corporation now or hereafter directly or indirectly through any subsidiary, associated, or affiliated person, firm, company, corporation, or agent, or otherwise, in the business

of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share of any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States or in the District of Columbia and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person, firm, company, or corporation now or hereafter engaged directly or indirectly through any subsidiary, associated, or affiliated person, company, corporation, or agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

*Sec. 18.* 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, and the licensing authority shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

*Sec. 19.* 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, firm, compa-

ny, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.

**Sec. 20.** The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder. No person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Secretary of Commerce.

**Sec. 21.** No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the licensing authority upon written application therefor. The licensing authority may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the licensing authority 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 and of the station or stations with which it is proposed to communicate, the frequencies and wave length or wave lengths 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 licensing authority may require. Such application shall be signed by the applicant under oath or affirmation.

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and 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 licensing authority may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person, firm, company, or corporation without the approval of the licensing authority. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction for which a permit has been granted, and upon it being made to appear to the licensing authority 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 licensing authority since the granting of the permit would in the judgment of the licensing authority, make the operation of such station against the public interest, the licensing authority 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.

**Sec. 22.** The licensing authority is authorized to designate from time to time radio stations the communications or signals of which, in its opinion, are liable to interfere with the transmission or with respect thereto which the Commission may by order require, to keep a licensed radio operator listening in on the wave lengths designated for signals of distress and radio communications relating thereto during the entire period the transmitter of such station is in operation.

**Sec. 23.** Every radio station on shipboard shall be equipped to transmit radio communications or signals of distress on the frequency or wave length specified by the licensing authority, with apparatus capable of transmitting and receiving messages over a distance of at least one hundred miles by day or night. When sending radio communications or signals of distress and radio communications relating thereto the transmitting set may be adjusted in such a manner as to produce a maximum of radiation irrespective of the amount of interference which may thus be caused.

All radio stations, including Government stations and stations on board foreign vessels when within the territorial waters of the United States, shall give absolute priority to radio communications or signals relating to ships in distress; shall cease all sending on frequencies or wave lengths which will interfere with hearing a radio communication or signal of distress, and, except when engaged in answering or aiding the ship in distress, shall refrain from sending any radio communications or signals until there is assurance that no interference will be caused with the radio communications or signals relating thereto, and shall assist the vessel in distress, so far as possible, by complying with its instructions.

**Sec. 24.** Every shore station open to general public service between the coast and vessels at sea shall be bound to exchange radio communications or signals with any ship station without distinction as to radio systems or instruments adopted by such stations, respectively, and each station on shipboard shall be bound to exchange radio communications or signals with any other station on shipboard without distinction as to radio systems or instruments adopted by each station.

**Sec. 25.** At all places where Government and private or commercial radio stations on land operate in such close proximity that interference with the work of Government stations can not be avoided when they are operating simultaneously such private or commercial stations as do interfere with the transmission or reception of radio communications or signals by the Government stations concerned shall not use their transmitters during the first fifteen minutes of each hour, local standard time.

The Government stations for which the above-mentioned division of time is established shall transmit radio communications or signals only during the first fifteen minutes of each hour, local standard time, except in case of signals or radio communications relating to vessels in distress and vessel requests for information as to course, location, or compass direction.

**Sec. 26.** In all circumstances, except in case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired.

**Sec. 27.** No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable, or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress.

**Sec. 28.** No person, firm, company, or corporation within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

**Sec. 29.** Nothing in this Act shall be understood or construed to give the licensing authority 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 licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

**Sec. 30.** The Secretary of the Navy is hereby authorized unless restrained by international agreement, under the terms and conditions and at rates prescribed by him, which rates shall be just and reasonable, and which, upon complaint, shall be subject to review and revision by the Interstate Commerce Commission, to use all radio stations and apparatus, wherever located, owned by the United States and under the control of the Navy Department (a) for the reception and transmission of press messages offered by any newspaper published in the United States, its Territories or possessions, or published by citizens of the United States in foreign countries, or by any press association of the United States, and (b) for the reception and transmission of private commercial messages between ships, between ship and shore, between localities in Alaska and between Alaska and the continental United States: *Provided*, That the rates fixed for the reception and transmission of all such messages, other than press messages between the Pacific coast of the United States, Hawaii, Alaska, the Philippine Islands, and the Orient, and between the United States and the Virgin Islands, shall not be less than the rates charged by privately owned and operated stations for like messages and service: *Provided further*, That the right to use such stations for any of the purposes named in this section shall terminate and cease as between any countries or localities or between any locality and privately operated ships whenever privately owned and operated stations are capable of meeting the normal communication requirements between such countries or localities or between any locality and privately operated ships, and the licensing authority shall have notified the Secretary of the Navy thereof.

**Sec. 31.** The expression "radio communication" or "radio communications" wherever used in this Act means any intelligence, message, signal, power, pictures, or communication of any nature transferred by electrical energy from one point to another without the aid of any wire connecting the points from and at which the electrical energy is sent or received and any system by means of which such transfer of energy is effected.

**Sec. 32.** Any person, firm, company, or corporation failing or refusing to observe or violating any rule, regulation, restriction, or condition made or imposed by the licensing authority under the authority of this Act or of any international radio convention or treaty ratified or adhered to by the United States, in addition to any other penalties provided by law, upon conviction thereof by a court of competent jurisdiction, shall be punished by a fine of not more than \$500 for each and every offense.

**Sec. 33.** Any person, firm, company, or corporation who shall violate any provision of this Act, or shall knowingly make any false oath or affirmation in any affidavit required or authorized by this Act, or shall knowingly swear falsely to a material matter in any hearing authorized by this Act, upon conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than \$5,000 or by imprisonment for a term of not more than five years or both for each and every such offense.



**Sec. 34.** The trial of any offense under this Act shall be in the district in which it is committed; or if the offense is committed upon the high seas, or out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender may be found or into which he shall be first brought.

**Sec. 35.** This Act shall not apply to the Philippine Islands or to the Canal Zone. In international radio matters the Philippine Islands and the Canal Zone shall be represented by the Secretary of State.

**Sec. 36.** The licensing authority is authorized to designate any officer or employee of any other department of the Government on duty in any Territory or possession of the United States other than the Philippine Islands and the Canal Zone, to render therein such services in connection with the administration of the radio laws of the United States as such authority may prescribe: *Provided*, That such designation shall be approved by the head of the department in which such person is employed.

**Sec. 37.** The unexpended balance of the moneys appropriated in the item for "wireless communication laws," under the caption "Bureau of Navigation" in Title III of the Act entitled "An Act making appropriations for the Departments of State and Justice and for the judiciary, and for the Departments of Commerce and Labor, for the fiscal year ending June 30, 1927, and for other purposes," approved April 29, 1926, and the appropriation for the same purposes for the fiscal year ending June 30, 1928, shall be available both for expenditures incurred in the administration of this Act and for expenditures for the purposes specified in such items. There is hereby authorized to be appropriated for each fiscal year such sums as may be necessary for the administration of this Act and for the purposes specified in such item.

**Sec. 38.** If any provision of this Act or the application thereof to any person, firm, company, or corporation, or to any circumstances, is held invalid, the remainder of the Act and the application of such provision to other persons, firms, companies, or corporations, or to other circumstances, shall not be affected thereby.

**Sec. 39.** The Act entitled "An Act to regulate radio communication," approved August 13, 1912, the joint resolution to authorize the operation of Government-owned radio stations for the general public, and for other purposes, approved June 5, 1920, as amended, and the joint resolution entitled "Joint resolution limiting the time for which licenses for radio transmission may be granted, and for other purposes," approved December 8, 1926, are hereby repealed.

Such repeal, however, shall not affect any act done or any right accrued or any suit or proceeding had or commenced in any civil cause prior to said repeal, but all liabilities under said laws shall continue and may be enforced in the same manner as if committed; and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by

this Act, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

Nothing in this section shall be construed as authorizing any person now using or operating any apparatus for the transmission of radio energy or radio communications or signals to continue such use except under and in accordance with this Act and with a license granted in accordance with the authority hereinbefore conferred.

**Sec. 40.** This Act shall take effect and be in force upon its passage and approval, except that for and during a period of sixty days after such approval no holder of a license or an extension thereof issued by the Secretary of Commerce under said Act of August 13, 1912, shall be subject to the penalties provided herein for operating a station without the license herein required.

**Sec. 41.** This Act may be referred to and cited as the Radio Act of 1927.

### **MIND PROBES**

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1. In what way, if any, does this Act distinguish between the criteria to be employed by the licensing authority in acting on applications for construction permits, initial licenses, and renewals?
2. Can you reconcile § 4(b) with the prohibitions of § 29?
3. Was Congress influenced by a conflict of interest in enacting § 18? If so, what was the nature of the conflict? Did its resolution as found in § 18's provisions favor the interests of Congress, the public, or broadcasters?

### **RELATED READING**

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# FRC Interpretation of the Public Interest

Statement Made by the Commission on  
August 23, 1928, Relative to Public Interest,  
Convenience, or Necessity  
2 FRC Ann. Rep. 166 (1928)

Delayed confirmations and appropriations complicated by death and resignation caused the membership of the Federal Radio Commission to remain incomplete until a year after passage of the Act of 1927. At about the same time, on March 28, 1928, the "Davis Amendment" (Public Law 195, 70th Congress) was signed into law. This amendment directed the FRC to provide "equality of radio broadcasting service, both of transmission and of reception" to each of the five zones established by Section 2 of the Radio Act. The amendment was an administrative nightmare for a new commission plagued with the problems of an overcrowded broadcast spectrum. See Document 15.

Before establishing the quotas required by the Davis Amendment, the Commission acted on its own General Order No. 32, holding expedited hearings during two weeks in July, 1928, in which 164 broadcast licensees were given the opportunity to justify their continued status as station operators under the Radio Act's public interest standard. When the dust had settled there were 62 fewer broadcasters; several others had to settle for power reductions, consolidations, or probationary renewals. Fewer than half of the 164 stations emerged unscathed.

The following statement constitutes the FRC's first comprehensive attempt to put the flesh of administrative interpretation on the bare-boned "public interest" standard with which Congress had endowed it. Although many of the specific 1928 guidelines have been modified with the passing years, the broader principles of regulatory philosophy continue to guide contemporary federal supervision of broadcasting.

Federal Radio Commission, *Washington, D.C.*

The Federal Radio Commission announced on August 23, 1928, the basic principles and its interpretation of the public interest, convenience, or necessity clause of the radio act, which were invoked in reaching decisions in cases recently heard of radio broadcasting stations whose public service was challenged. The commission's statement follows:

**Public Interest, Convenience, or Necessity**

The only standard (other than the Davis amendment) which Congress furnished to the commission for its guidance in the determination of the complicated questions which arise in connection with the granting of licenses and the renewal or modification of existing licenses is the rather broad one of "public interest, convenience, or necessity." . . .

. . . No attempt is made anywhere in the act to define the term "public interest, convenience, or necessity," nor is any illustration given of its proper application.

The commission is of the opinion that Congress, in enacting the Davis amendment, did not intend to repeal or do away with this standard. While the primary purpose of the Davis amendment is to bring about equality as between the zones, it does not require the commission to grant any application which does not serve public interest, convenience, or necessity simply because the application happens to proceed from a zone or State that is under its quota. The equality is not to be brought about by sacrificing the standard. On the other hand, where a particular zone or State is over its quota, it is true that the commission may on occasions be forced to deny an application the granting of which might, in its opinion, serve public interest, convenience, or necessity. The Davis amendment may, therefore, be viewed as a partial limitation upon the power of the commission in applying the standard.

The cases which the commission has considered as a result of General Order No. 32 are all cases in which it has had before it applications for renewals of station licenses. Under section 2 of the act the commission is given full power and authority to follow the procedure adhered to in these cases, when it has been unable to reach a decision that granting a particular application would serve public interest, convenience, or necessity. In fact, the entire radio act of 1927 makes it clear that no renewal of a license is to be granted, unless the commission shall find that public interest, convenience, or necessity will be served. The fact that all of these stations have been licensed by the commission from time to time in the past, and the further fact that most of them were licensed prior to the enactment of the radio act of 1927 by the Secretary of Commerce, do not, in the opinion of the commission, demonstrate that the continued existence of such stations will serve public interest, convenience, or necessity. The issuance of a previous license by the commission is not in any event to be regarded as a finding further than for the duration of the limited period covered by the license (usually 90 days). There have been a variety of considerations to which the commission was entitled to give weight. For example, when the commission first entered upon its duties it found in existence a large num-

ber of stations, much larger than could satisfactorily operate simultaneously and permit good radio reception. Nevertheless, in order to avoid injustice and in order to give the commission an opportunity to determine which stations were best serving the public, it was perfectly consistent for the commission to relicense all of these stations for limited periods. It was in the public interest that a fair test should be conducted to determine which stations were rendering the best service. Furthermore, even if the relicensing of a station in the past would be some indication that it met the test, there is no reason why the United States Government, the commission, or the radio-listening public should be bound by a mistake which has been made in the past. There were no hearings preliminary to granting these licenses in the past, and it can hardly be said that the issue has been adjudicated in any of the cases.

The commission has been urged to give a precise definition of the phrase "public interest, convenience, or necessity," and in the course of the hearings has been frequently criticized for not having done so. It has also been urged that the statute itself is unconstitutional because of the alleged uncertainty and indefiniteness of the phrase. So far as the generality of the phrase is concerned, it is no less certain or definite than other phrases which have found their way into Federal statutes and which have been upheld by the Supreme Court of the United States. An example is "unfair methods of competition." To be able to arrive at a precise definition of such a phrase which will foresee all eventualities is manifestly impossible. The phrase will have to be defined by the United States Supreme Court, and this will probably be done by a gradual process of decisions on particular combinations of fact.

It must be remembered that the standard provided by the act applies not only to broadcasting stations but to each type of radio station which must be licensed, including point-to-point communication, experimental, amateur, ship, airplane, and other kinds of stations. Any definition must be broad enough to include all of these and yet must be elastic enough to permit of definite application to each.

It is, however, possible to state a few general principles which have demonstrated themselves in the course of the experience of the commission and which are applicable to the broadcasting band.

In the first place, the commission has no hesitation in stating that it is in the public interest, convenience, and necessity that a substantial band of frequencies be set aside for the exclusive use of broadcasting stations and the radio listening public, and under the present circumstances believes that the band of 550 to 1,500 kilocycles meets that test.

In the second place, the commission is convinced that public interest, convenience, or necessity will be served by such action on the part of the commission as will bring about the best possible broadcasting reception conditions throughout the United States. By good conditions the commission means freedom from interference of various types as well as good quality in the operation of the broadcasting station. So far as possible, the various types of interference, such as heterodyning, cross talk, and blanketing must be avoided. The commission is convinced that the interest

of the broadcast listener is of superior importance to that of the broadcaster and that it is better that there should be a few less broadcasters than that the listening public should suffer from undue interference. It is unfortunate that in the past the most vociferous public expression has been made by broadcasters or by persons speaking in their behalf and the real voice of the listening public has not sufficiently been heard.

The commission is furthermore convinced that within the band of frequencies devoted to broadcasting, public interest, convenience, or necessity will be best served by a fair distribution of different types of service. Without attempting to determine how many channels should be devoted to the various types of service, the commission feels that a certain number should be devoted to stations so equipped and financed as to permit the giving of a high order of service over as large a territory as possible. This is the only manner in which the distant listener in the rural and sparsely settled portions of the country will be reached. A certain number of other channels should be given over to stations which desire to reach a more limited region and as to which there will be large intermediate areas in which there will be objectionable interference. Finally, there should be a provision for stations which are distinctly local in character and which aim to serve only the smaller towns in the United States without any attempt to reach listeners beyond the immediate vicinity of such towns.

The commission also believes that public interest, convenience, or necessity will be best served by avoiding too much duplication of programs and types of programs. Where one community is undeserved and another community is receiving duplication of the same order of programs, the second community should be restricted in order to benefit the first. Where one type of service is being rendered by several stations in the same region, consideration should be given to a station which renders a type of service which is not such a duplication.

In view of the paucity of channels, the commission is of the opinion that the limited facilities for broadcasting should not be shared with stations which give the sort of service which is readily available to the public in another form. For example, the public in large cities can easily purchase and use phonograph records of the ordinary commercial type. A station which devotes the main portion of its hours of operation to broadcasting such phonograph records is not giving the public anything which it can not readily have without such a station. If, in addition to this, the station is located in a city where there are large resources in program material, the continued operation of the station means that some other station is being kept out of existence which might put to use such original program material. The commission realizes that the situation is not the same in some of the smaller towns and farming communities, where such program resources are not available. Without placing the stamp of approval on the use of phonograph records under such circumstances, the commission will not go so far at present as to state that the practice is at all times and under all conditions a violation of the test provided by the statute. It may be also that the development of special phonograph records will take such a form that the result can be made available by broadcasting only and not available to the public

commercially, and if such proves to be the case the commission will take the fact into consideration. The commission can not close its eyes to the fact that the real purpose of the use of phonograph records in most communities is to provide a cheaper method of advertising for advertisers who are thereby saved the expense of providing an original program.

While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public.

The same question arises in another connection. Where the station is used for the broadcasting of a considerable amount of what is called "direct advertising," including the quoting of merchandise prices, the advertising is usually offensive to the listening public. Advertising should be only incidental to some real service rendered to the public, and not the main object of a program. The commission realizes that in some communities, particularly in the State of Iowa, there seems to exist a strong sentiment in favor of such advertising on the part of the listening public. At least the broadcasters in that community have succeeded in making an impressive demonstration before the commission on each occasion when the matter has come up for discussion. The commission is not fully convinced that it has heard both sides of the matter, but is willing to concede that in some localities the quoting of direct merchandise prices may serve as a sort of local market, and in that community a service may thus be rendered. That such is not the case generally, however, the commission knows from thousands and thousands of letters which it has had from all over the country complaining of such practices. . . .

The commission is furthermore convinced that in applying the test of public interest, convenience, or necessity, it may consider the character of the licensee or applicant, his financial responsibility, and his past record, in order to determine whether he is more or less likely to fulfill the trust imposed by the license than others who are seeking the same privilege from the same community, State, or zone.

A word of warning must be given to those broadcasting (of which there have been all too many) who consume much of the valuable time allotted to them under their licenses in matters of a distinctly private nature, which are not only uninteresting but also distasteful to the listening public. Such is the case where two rival broadcasters in the same community spend their time in abusing each other over the air.

A station which does not operate on a regular schedule made known to the public through announcements in the press or otherwise is not rendering a service which meets the test of the law. If the radio listener does not know whether or not a particular station is broadcasting, or what its program will be, but must rely on the whim of the broadcaster and on chance in tuning his dial at the proper time, the service is not such as to justify the commission in licensing such a broadcaster as against one who will give a regular service of which the public is properly advised. *A fortiori*, where a licensee does not use his transmitter at all and broadcasts his pro-

grams, if at all, over some other transmitter separately licensed, he is not rendering any service. It is also improper that the zone and State in which his station is located should be charged with a license under such conditions in connection with the quota of that zone and that State under the Davis amendment.

A broadcaster who is not sufficiently concerned with the public's interest in good radio reception to provide his transmitter with an adequate control or check on its frequency is not entitled to a license. The commission in allowing a latitude of 500 cycles has been very lenient and will necessarily have to reduce this margin in the future. Instability in frequency means that the radio-listening public is subjected to increased interference by heterodyne (and, in some cases, cross-talk) on adjacent channels as well as on the assigned channels.

In conclusion, the commission desires to point out that the test—"public interest, convenience, or necessity"—becomes a matter of a comparative and not an absolute standard when applied to broadcasting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser.

### *MIND PROBES*

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1. In light of what is said about using records as a major source of programming, explain how your favorite music radio station is in the public interest.
2. How has the Supreme Court responded to the challenge to define "public interest, convenience, or necessity"?



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# The Great Lakes Statement

In the Matter of the Application of Great  
Lakes Broadcasting Co.  
FRC Docket No. 4900  
3 FRC Ann. Rep. 32 (1929)

The FRC reconstructed its interpretation of the public interest in this early comparative hearing proceeding. The reformulation was unaffected by a court remand [*Great Lakes Broadcasting Company et al. v. Federal Radio Commission*, 37 F.2d 993 (D.C. Cir. 1930); *cert. dismissed* 281 U.S. 706].

The 1927 Radio Act's "public interest, convenience, or necessity" phrase was derived from public utility law. The *Great Lakes* statement gives detailed treatment to the contention that although broadcasting was a type of utility, radio stations were not to be thought of as common carriers. This principle was given legislative affirmation in 1934 when Section 3(h) was included in the Communications Act.

The statement is noteworthy for its emphasis on the requirement that radio stations carry diverse and balanced programming to serve the "tastes, needs, and desires" of the general public. This has been an underlying premise of subsequent FCC programming pronouncements, including the 1960 statement (see Document 25). Although the force of this principle has been moderated with respect to the vastly expanded AM and FM radio services, its vigor remains unabated for television broadcasting.

The *Great Lakes* statement also contains the germ of what was promulgated as the "Fairness Doctrine" 20 years later (see Document 23). It is clear that by 1929 the FRC had come to view advertising as the economic backbone of broadcasting and was prepared to accept it as an inevitability, within bounds. The last sentence of the statement

alludes to listeners' councils, which were the forerunners of the citizens groups of today.

. . . Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this. The only exception that can be made to this rule has to do with advertising; the exception, however, is only apparent because advertising furnishes the economic support for the service and thus makes it possible. As will be pointed out below, the amount and character of advertising must be rigidly confined within the limits consistent with the public service expected of the station.

The service to be rendered by a station may be viewed from two angles, (1) as an instrument for the communication of intelligence of various kinds to the general public by persons wishing to transmit such intelligence, or (2) as an instrument for the purveying of intangible commodities consisting of entertainment, instruction, education, and information to a listening public. As an instrument for the communication of intelligence, a broadcasting station has frequently been compared to other forms of communication, such as wire telegraphy or telephony, or point-to-point wireless telephony or telegraphy, with the obvious distinction that the messages from a broadcasting station are addressed to and received by the general public, whereas toll messages in point-to-point service are addressed to single persons and attended by safeguards to preserve their confidential nature. If the analogy were pursued with the usual legal incidents, a broadcasting station would have to accept and transmit for all persons on an equal basis without discrimination in charge, and according to rates fixed by a governmental body; this obligation would extend to anything and everything any member of the public might desire to communicate to the listening public, whether it consist of music, propaganda, reading, advertising, or what-not. The public would be deprived of the advantage of the self-imposed censorship exercised by the program directors of broadcasting stations who, for the sake of the popularity and standing of their stations, will select entertainment and educational features according to the needs and desires of their invisible audiences. In the present state of the art there is no way of increasing the number of stations without great injury to the listening public, and yet thousands of stations might be necessary to accommodate all the individuals who insist on airing their views through the microphone. If there are many such persons, as there undoubtedly are, the results would be, first, to crowd most or all of the better programs off the air, and second, to create an almost insoluble problem, *i.e.*, how to choose from among an excess of applicants who shall be given time to address the public and who shall exercise the power to make such a choice.

To pursue the analogy of telephone and telegraph public utilities is, therefore, to emphasize the right of the sender of messages to the detriment of the listening public. The commission believes that such an analogy is a mistaken one when ap-

plied to broadcasting stations; the emphasis should be on the receiving of service and the standard of public interest, convenience or necessity should be construed accordingly. This point of view does not take broadcasting stations out of the category of public utilities or relieve them of corresponding obligations; it simply assimilates them to a different group of public utilities, *i.e.*, those engaged in purveying commodities to the general public, such, for example, as heat, water, light, and power companies, whose duties are to consumers, just as the duties of broadcasting stations are to listeners. The commodity may be intangible but so is electric light; the broadcast program has become a vital part of daily life. Just as heat, water, light, and power companies use franchises obtained from city or State to bring their commodities through pipes, conduits, or wires over public highways to the home, so a broadcasting station uses a franchise from the Federal Government to bring its commodity over a channel through the ether to the home. The Government does not try to tell a public utility such as an electric-light company that it must obtain its materials such as coal or wire, from all comers on equal terms; it is not interested so long as the service rendered in the form of light is good. Similarly, the commission believes that the Government is interested mainly in seeing to it that the program service of broadcasting stations is good, *i.e.*, in accordance with the standard of public interest, convenience, or necessity.

It may be said that the law has already written an exception into the foregoing viewpoint in that, by section 18 of the radio act of 1927, a broadcasting station is required to afford equal opportunities for use of the station to all candidates for a public office if it permits any of the candidates to use the station. It will be noticed, however, that in the same section it is provided that "no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." This is not only not inconsistent with, but on the contrary it supports, the commission's viewpoint. Again the emphasis is on the listening public, not on the sender of the message. It would not be fair, indeed it would not be good service to the public to allow a one-sided presentation of the political issues of a campaign. In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies not only to addresses by political candidates but to all discussions of issues of importance to the public. The great majority of broadcasting stations are, the commission is glad to say, already tacitly recognizing a broader duty than the law imposes upon them. . . .

An indispensable condition to good service by any station is, of course, modern efficient apparatus, equipped with all devices necessary to insure fidelity in the transmission of voice and music and to avoid frequency instability or other causes of interference. . . .

There are a few negative guides to the evaluation of broadcasting stations. First of these in importance are the injunctions of the statute itself, such, for example, as the requirement for nondiscrimination between political candidates and the prohibition against the utterance of "any obscene, indecent, or profane language" (sec. 29). In the same connection may be mentioned rules and regulations of

the commission, including the requirements as to the announcing of call letters and as to the accurate description of mechanical reproductions (such as phonograph records) in announcements. . . .

For more positive guides the commission again finds itself persuaded of the applicability of doctrines analogous to those governing the group of public utilities to which reference has already been made. If the viewpoint is found that the service to the listening public is what must be kept in contemplation in construing the legal standard with reference to broadcasting stations, the service must first of all be continuous during hours when the public usually listens, and must be on a schedule upon which the public may rely. . . .

Furthermore, the service rendered by broadcasting stations must be without discrimination as between its listeners. Obviously, in a strictly physical sense, a station can not discriminate so as to furnish its programs to one listener and not to another; in this respect it is a public utility by virtue of the laws of nature. Even were it technically possible, as it may easily be as the art progresses, so to design both transmitters and receiving sets that the signals emitted by a particular transmitter can be received only by a particular kind of receiving set not available to the general public, the commission would not allow channels in the broadcast band to be used in such fashion. By the same token, it is proceeding very cautiously in permitting television in the broadcast band because, during the hours of such transmission, the great majority of the public audience in the service area of the station, not being equipped to receive television signals, are deprived of the use of the channel.

There is, however, a deeper significance to the principle of nondiscrimination which the commission believes may well furnish the basic formula for the evaluation of broadcasting stations. 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. If, therefore, all the programs transmitted are intended for, and interesting or valuable to, only a small portion of that public, the rest of the listeners are being discriminated against. This does not mean that every individual is entitled to his exact preference in program items. It does mean, in the opinion of the commission, that the tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place. With so few channels in the spectrum and so few hours in the day, there are obvious limitations on the emphasis which can appropriately be placed on any portion of the program. There are parts of the day and of the evening when one type of service is more appropriate than another. There are differences between communities as to the need for one type as against another. The commission does not propose to erect a rigid schedule specifying the hours or minutes that may be devoted to one kind of program or another. What it wishes to emphasize is the general character which it believes must be conformed to by a station in order to best serve the public. . . .

In such a scheme there is no room for the operation of broadcasting stations exclusively by or in the private interests of individuals or groups so far as the nature of the programs is concerned. There is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether. If franchises are extended to some it gives them an unfair advantage over others, and results in a corresponding cutting down of general public-service stations. It favors the interests and desires of a portion of the listening public at the expense of the rest. Propaganda stations (a term which is here used for the sake of convenience and not in a derogatory sense) are not consistent with the most beneficial sort of discussion of public questions. As a general rule, postulated on the laws of nature as well as on the standard of public interest, convenience, or necessity, particular doctrines, creeds, and beliefs must find their way into the market of ideas by the existing public-service stations, and if they are of sufficient importance to the listening public the microphone will undoubtedly be available. If it is not, a well-founded complaint will receive the careful consideration of the commission in its future action with reference to the station complained of.

The contention may be made that propaganda stations are as well able as other stations to accompany their messages with entertainment and other program features of interest to the public. Even if this were true, the fact remains that the station is used for what is essentially a private purpose for a substantial portion of the time and in addition, is constantly subject to the very human temptation not to be fair to opposing schools of thought and their representatives. By and large, furthermore, propaganda stations do not have the financial resources nor do they have the standing and popularity with the public necessary to obtain the best results in programs of general interest. The contention may also be made that to follow out the commission's viewpoint is to make unjustifiable concessions to what is popular at the expense of what is important and serious. This bears on a consideration which the commission realizes must always be kept carefully in mind and in so far as it has power under the law it will do so in its reviews of the records of particular stations. A defect, if there is any, however, would not be remedied by a one-sided presentation of a controversial subject, no matter how serious. The commission has great confidence in the sound judgment of the listening public, however, as to what types of programs are in its own best interest.

If the question were now raised for the first time, after the commission has given careful study to it, the commission would not license any propaganda station, at least, to an exclusive position on a cleared channel. Unfortunately, under the law in force prior to the radio act of 1927 (see particularly *Hoover v. Intercity Radio Co.*, 286 Fed. 1003), the Secretary of Commerce had no power to distinguish between kinds of applicants and it was not possible to foresee the present situation and its problems. Consequently there are and have been for a long time in existence a number of stations operated by religious or similar organizations. Certain enterprising organizations, quick to see the possibilities of radio and anxious to present their creeds to the public, availed themselves of license privileges from the earlier days of broadcasting, and now have good records and a certain degree of popularity

among listeners. The commission feels that the situation must be dealt with on a common-sense basis. It does not seem just to deprive such stations of all right to operation and the question must be solved on a comparative basis. While the commission is of the opinion that a broadcasting station engaged in general public service has, ordinarily, a claim to preference over a propaganda station, it will apply this principle as to existing stations by giving preferential facilities to the former and assigning less desirable positions to the latter to the extent that engineering principles permit. In rare cases it is possible to combine a general public-service station and a high-class religious station in a division of time which will approximate a well-rounded program. In other cases religious stations must accept part time on inferior channels or on daylight assignments where they are still able to transmit during the hours when religious services are usually expected by the listening public.

It may be urged that the same reasoning applies to advertising. In a sense this is true. The commission must, however, recognize that, without advertising, broadcasting would not exist, and must confine itself to limiting this advertising in amount and in character so as to preserve the largest possible amount of service for the public. The advertising must, of course, be presented as such and not under the guise of other forms on the same principle that the newspaper must not present advertising as news. It will be recognized and accepted for what it is on such a basis, whereas propaganda is difficult to recognize. If a rule against advertising were enforced, the public would be deprived of millions of dollars worth of programs which are being given out entirely by concerns simply for the resultant good will which is believed to accrue to the broadcaster or the advertiser by the announcement of his name and business in connection with programs. Advertising must be accepted for the present as the sole means of support for broadcasting, and regulation must be relied upon to prevent the abuse and overuse of the privilege.

It may be urged that if what has heretofore been said is law, the listening public is left at the mercy of the broadcaster. Even if this were so, the commission doubts that any improvement would be effected by placing the public at the mercy of each individual in turn who desired to communicate his hobby, his theory, or his grievance over the microphone, or at the mercy of every advertiser without regard to the standing either of himself or his product. That it is not so, however, is demonstrable from two considerations. In the first place, the listener has a complete power of censorship by turning his dial away from a program which he does not like; this results in a keen appreciation by the broadcaster of the necessity of pleasing a large portion of his listeners if he is to hold his audience, and of not displeasing, annoying, or offending the sensibilities of any substantial portion of the public. His failure or success is immediately reflected on the telephone and in the mail, and he knows that the same reaction to his programs will reach the licensing authority. In the second place, the licensing authority will have occasion, both in connection with renewals of his license and in connection with applications of others for his privileges, to review his past performances and to determine whether he has met with the standard. A safeguard which some of the leading stations employ, and which appeals to the commission as a wise precaution, is the association with the

station of an advisory board made up of men and women whose character, standing, and occupations will insure a well-rounded program best calculated to serve the greatest portion of the population in the region to be served.

### *MIND PROBES*

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1. Heat, water, light, and power companies are paid directly by the consumers they serve, but nonsubscription broadcast stations are not. How does this affect the FRC's utility analogy?

2. The First Amendment is even clearer about governmental noninterference with religion than it is about free speech and press. Yet, the FRC indicates that religious stations will be assigned "less desirable positions" than "general public service" stations. Is the Commission's position constitutionally tenable?

3. Familiarize yourself with the Fairness Doctrine (Document 23). Then identify the portions of the *Great Lakes* statement that lay the foundations of the Fairness Doctrine. Can you find a statutory basis for the FRC's extension of § 18 to "all discussions of issues of importance to the public" in the Radio Act of 1927?

### *RELATED READING*

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KAHN, FRANK J., "The Quasi-Utility Basis for Broadcast Regulation," *Journal of Broadcasting*, 18:3 (Summer 1974), 259-76.

LOEVINGER, LEE, "Religious Liberty and Broadcasting," *George Washington Law Review*, 33:3 (March 1965), 631-59.

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# Self-Regulation

## NAB Code of Ethics and Standards of Commercial Practice\*

March 25, 1929

The National Association of Broadcasters (NAB) was organized in 1923 to combat the demands of the American Society of Composers, Authors, and Publishers that radio station operators pay royalties to copyright holders for the use of music on the air. The NAB evolved into a comprehensive trade association. Today it provides a wide range of services to its membership. With headquarters in Washington, D.C., the NAB acts as an effective lobbyist before various agencies of government including the FCC and Congress.

Two years after passage of the Radio Act of 1927 the NAB issued its "Code of Ethics" and "Standards of Commercial Practice," the first industry-wide instruments of self-regulation in broadcasting. It should be noted that section I(B) of the "Standards of Commercial Practice" was not intended to prohibit *institutional* advertising during prime-time, though the provision reflects the cautious approach to broadcast commercialism widely shared at the time. Three or four years passed before the national networks, NBC and CBS, permitted advertisers to mention actual prices over the air.

The NAB reformulated and expanded the Radio Code many times since 1929. In 1951 it issued the first Television Code, which attracted widespread industry support of its general programming guidelines and detailed advertising provisions. Broadcasters defeated an FCC attempt in 1963-1964 to adopt both Codes' commercial time limitations as government regulations, though these standards later appeared as "processing guidelines" governing delegation of license renewal authority to the Commission's staff.

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Eager to prevent governmental intervention in such areas as cigarette advertising (see Document 32) and children's TV commercial standards, broadcasters enacted code provisions in the late 1960's and early 1970's that met with official approval. In 1975 this characteristic industry response to federal jawboning became regulatory incest when the NAB adopted "family viewing time" (FVT) at the urging of Commission Chairman Richard Wiley who, in turn, was being pressured to "do something" about what some influential legislators perceived as an excess of sex and violence on TV. The TV Code was amended to discourage "entertainment programming inappropriate for viewing by a general family audience" between the hours of 7:00 and 9:00 p.m., eastern time. When a federal district court ruled that FVT violated the First Amendment because the industry adopted it under threat of government action [*Writers Guild of America v. FCC*, 432 F.Supp. 1064 (C.D.Cal. 1976), *vacated on jurisdictional grounds sub nom. Writers Guild of America v. American Broadcasting Co.*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980)], the NAB suspended enforcement of the TV Code's program standards.

The advertising time standards of the TV Code became the subject of an antitrust suit brought by the government in 1979. In 1982 summary judgment was granted to prevent the NAB from enforcing the TV Code's multiple product standard, a provision that prohibited advertising two unrelated commodities in commercials running less than one minute. The standard was found to be a *per se* violation of § 1 of the Sherman Antitrust Act [*U.S. v. NAB*, 536 F.Supp. 149 (D.D.C. 1982)]. This court decision prompted the NAB to stop enforcing all advertising provisions in both codes, dismantle its code staff, and reach a settlement in the form of a consent decree that was accepted by the Department of Justice and the presiding judge.

At this writing the NAB was attempting to decide what kind of self-regulatory mechanism to adopt. As federal deregulation of radio and television evolves, there will be declining pressure on the NAB to develop any form of institutionalized, collective self-regulation as a defense against government intrusion. Individual stations and networks remain free to adjust their own self-policing mechanisms to the needs of the competitive marketplace.

## NAB CODE OF ETHICS

*First.* Recognizing that the Radio audience includes persons of all ages and all types of political, social, and religious belief, every broadcaster will endeavor to prevent the broadcasting of any matter which would commonly be regarded as offensive.

*Second.* When the facilities of a broadcaster are used by others than the owner, the broadcaster shall ascertain the financial responsibility and character of such client, that no dishonest, fraudulent or dangerous person, firm or organization may gain access to the Radio audience.

*Third.* Matter which is barred from the mails as fraudulent, deceptive or obscene shall not be broadcast.

*Fourth.* Every broadcaster shall exercise great caution in accepting any advertising matter regarding products or services which may be injurious to health.

*Fifth.* No broadcaster shall permit the broadcasting of advertising statements or claims which he knows or believes to be false, deceptive or grossly exaggerated.

*Sixth.* Every broadcaster shall strictly follow the provisions of the Radio Act of 1927 regarding the clear identification of sponsored or paid-for material.

*Seventh.* Care shall be taken to prevent the broadcasting of statements derogatory to other stations, to individuals, or to competing products or services, except where the law specifically provides that the station has no right of censorship.

*Eighth.* Where charges of violation of any article of the Code of Ethics of The National Association of Broadcasters are filed in writing with the Managing Director, the Board of Directors shall investigate such charges and notify the station of its findings.

## NAB STANDARDS OF COMMERCIAL PRACTICE

### I. *Program Content and Presentation*

- (A) There is a decided difference between what may be broadcast before and after 6:00 p.m. Time before 6:00 p.m. is included in the business day and, therefore, may be devoted in part, at least, to broadcasting programs of a business nature; while time after 6:00 p.m. is for recreation and relaxation, and commercial programs should be of the good-will type.
- (B) Commercial announcements, as the term is generally understood, should not be broadcast between 7:00 and 11:00 p.m.
- (C) A client's business and his product should be mentioned sufficiently to insure him an adequate return on his investment—but never to the extent that it loses listeners to the station.
- (D) The use of records should be governed by the following:
  - 1. The order of the Commission with reference to identifying "Phonograph Records" and other means of mechanical reproduction should be completely carried out.

2. Phonograph records (those for sale to the public) should not be broadcast between 6:00 and 11:00 p.m. except in the case of pre-release records used in programs sponsored either by the manufacturer or the local distributor.
3. When mechanical reproductions prepared for radio use only are not for public sale, and are of such quality to recommend their being broadcast, no limitation should be placed on their use, except as individual station policy may determine.

## II. *Salesmen and Representatives*

- (A) Salesmen on commission or salary should have:
  1. Definite responsibility to the station for which they solicit;
  2. Some means of identification.Furthermore, contracts should state specifically that they will not be considered as acceptable until signed by an officer of the station; that no agreements, verbal or understood, can be considered as part of the contract. The salesman's conference with the client should always be confirmed by an officer of the station.
- (B) The standard commission allowed by all advertising media to recognized agencies should be allowed by broadcasting stations. If selling representatives are maintained by stations in cities where they otherwise have no representation, the station itself should make its own arrangements as to payment for such representation.
- (C) Blanket time should not be sold to clients to be resold by them as they see fit.

## III. *Agencies*

- (A) Agencies have three functions in broadcasting:
  1. Credit responsibility.
  2. Account service and contact.
  3. Program supervision in the interest of the client.
- (B) Commission should be allowed only to agencies of recognized standing.

## IV. *Sales Data.* — The best sales data is result data.

## V. *Rate Cards*

- (A) There should be no deviation whatsoever from rates quoted on a rate card or cards.
- (B) Wherever practicable, the standard rate card form recommended by this Association should be used.

## VI. *Clients*

- (A) Client standards of credit should be maintained similar to those established in other fields of advertising.
- (B) In deciding what accounts or classes of business are acceptable for broadcast advertising, member stations should be governed by the Code of Ethics adopted by this Association.

*MIND PROBES*

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1. In addition to telling subscribing broadcasters to obey the law, what else do these documents prescribe or proscribe?
2. What are the advantages and disadvantages of self-regulation compared to government regulation to the public, broadcasters, and the government?
3. Some people look upon the federal government as a monolithic repository of power. Yet the FCC regarded the NAB Codes positively while the Justice Department by 1979 viewed key provisions negatively. How do you reconcile such apparent governmental discord?

*RELATED READING*

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- AUGUST, ELLEN, "Writers Guild v. FCC: Duty of the Networks to Resist Governmental Regulation," *Syracuse Law Review*, 28:2 (Spring 1977), 583-607.
- COWAN, GEOFFREY, *See No Evil: The Backstage Battle Over Sex and Violence on Television*. New York: Simon & Schuster, 1979.
- HELFFRICH, STOCKTON, "The Radio and Television Codes and the Public Interest," *Journal of Broadcasting*, 14:3 (Summer 1970), 267-74.
- MACKEY, DAVID R., "The Development of the National Association of Broadcasters," *Journal of Broadcasting*, 1:4 (Fall 1957), 305-25.
- WHITE, LLEWELLYN, *The American Radio*. Chicago: University of Chicago Press, 1947. (Reprinted New York: Arno Press, 1971.)

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# The Brinkley Case

KFKB Broadcasting Association, Inc., v. Federal

Radio Commission\*

47 F.2d 670 (D.C. Cir.)

February 2, 1931

Government censorship of broadcast programming was expressly prohibited by § 29 of the Radio Act and its re-enactment as § 326 of the Communications Act. These provisions establish radio as a medium in which free speech enjoys the protection of the First Amendment to the Constitution. Yet the FRC and FCC were charged with the task of regulating broadcasting in the "public interest, convenience, or necessity." Since providing a program service to the general public is at the heart of any reasonable interpretation of the "public interest" in broadcasting, both commissions have found themselves poised on the horns of a dilemma: to impose prior restraints on programming is contrary to the legal and philosophical underpinnings of freedom of speech, but to exercise absolutely no influence over what is broadcast seems inimical to the concept of the public interest.

Dr. John R. Brinkley was hardly the only malpractitioner, medical or other, who gained access to the airwaves during radio's formative era, but he was certainly the most celebrated! His station, KFKB, was among the most popular in the nation for many years, and Brinkley himself twice came close to being elected governor of Kansas as a political independent. Brinkley had purchased his medical degrees from diploma mills but was nevertheless reputed to be a skilled surgeon. His medical specialty was a costly "goat gland" operation, the implantation of animal gonads in the scrota of men seeking sexual rejuvenation and salvation from enlarged prostates. Brinkley's questionable surgical practice and sales of his equally dubious prescription remedies earned him millions of dollars over the years—and the wrath of the American Medical Associ-

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ation. In 1930 a three-to-two majority of the Federal Radio Commission voted not to renew KFKB's license.

This Court of Appeals decision stands as the first judicial affirmation of the FRC's right to consider a station's past programming when deciding whether or not license renewal will serve the public interest. After the decision Brinkley continued to broadcast to his American audience from radio stations in Mexico for another decade, though his Kansas medical license was revoked in 1935. [See *Brinkley v. Hassig*, 83 F.2d 351 (10th Cir. 1936).]

*Robb, Associate Justice.*

Appeal from a decision of the Federal Radio Commission denying appellant's application for the renewal of its station license.

The station is located at Milford, Kan., is operating on a frequency of 1,050 kilocycles with 5,000 watts power and is known by the call letters KFKB. The station was first licensed by the Secretary of Commerce on September 20, 1923, in the name of the Brinkley-Jones Hospital Association, and intermittently operated until June 3, 1925. On October 23, 1926, it was relicensed to Dr. J. R. Brinkley with the same call letters and continued to be so licensed until November 26, 1929, when an assignment was made to appellant corporation.

On March 20, 1930, appellant filed its application for renewal of license (Radio Act of 1927, c. 169, 44 Stat. 1162, U.S.C. Supp. 3, tit. 47, § 81, et seq. [47 USCA § 81 et seq.]). The commission, failing to find that public interest, convenience, or necessity would be served thereby, accorded appellant opportunity to be heard. Hearings were had on May 21, 22, and 23, 1930, at which appellant appeared by counsel and introduced evidence on the question whether the granting of the application would be in the public interest, convenience, or necessity. Evidence also was introduced in behalf of the commission. Upon consideration of the evidence and arguments, the commission found that public interest, convenience, or necessity would not be served by granting the application and, therefore, ordered that it be denied, effective June 13, 1930. A stay order was allowed by this court, and appellant has since been operating thereunder.

The evidence tends to show that Dr. J. R. Brinkley established Station KFKB, the Brinkley Hospital, and the Brinkley Pharmaceutical Association, and that these institutions are operated in a common interest. While the record shows that only 3 of the 1,000 shares of the capital stock of appellant are in Dr. Brinkley's name and that his wife owns 381 shares, it is quite apparent that the doctor actually dictates and controls the policy of the station. The Brinkley Hospital, located at Milford, is advertised over Station KFKB. For this advertising the hospital pays the station from \$5,000 to \$7,000 per month.

The Brinkley Pharmaceutical Association, formed by Dr. Brinkley, is com-

posed of druggists who dispense to the public medical preparations prepared according to formulas of Dr. Brinkley and known to the public only by numerical designations. Members of the association pay a fee upon each sale of certain of those preparations. The amounts thus received are paid the station, presumably for advertising the preparations. It appears that the income of the station for the period February, March, and April, 1930, was as follows:

Brinkley Pharmaceutical Association	\$27,856.40
Brinkley Hospital	6,500.00
All other sources	3,544.93
Total	<u>\$37,901.33</u>

Dr. Brinkley personally broadcasts during three one-half hour periods daily over the station, the broadcast being referred to as the "medical question box," and is devoted to diagnosing and prescribing treatment of cases from symptoms given in letters addressed either to Dr. Brinkley or to the station. Patients are not known to the doctor except by means of their letters, each letter containing a code signature, which is used in making answer through the broadcasting station. The doctor usually advises that the writer of the letter is suffering from a certain ailment, and recommends the procurement from one of the members of the Brinkley Pharmaceutical Association, of one or more of Dr. Brinkley's prescriptions, designated by numbers. In Dr. Brinkley's broadcast for April 1, 1930, presumably representative of all, he prescribed for forty-four different patients and in all, save ten, he advised the procurement of from one to four of his own prescriptions. We reproduce two as typical:

Here's one from Tillie. She says she had an operation, had some trouble 10 years ago. I think the operation was unnecessary, and it isn't very good sense to have an ovary removed with the expectation of motherhood resulting therefrom. My advice to you is to use Women's Tonic No. 50, 67, and 61. This combination will do for you what you desire if any combination will, after three months' persistent use.

Sunflower State, from Dresden Kans. Probably he has gall stones. No, I don't mean that, I mean kidney stones. My advice to you is to put him on Prescription No. 80 and 50 for men, also 64. I think that he will be a whole lot better. Also drink a lot of water.

In its "Facts and Grounds for Decision," the commission held "that the practice of a physician prescribing treatment for a patient whom he has never seen, and bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest"; that "the testimony in this case shows conclusively that the operation of Station KFKB is conducted only in the personal interest of Dr. John R. Brinkley. While it is to be expected that a licensee of a radio

broadcasting station will receive some remuneration for serving the public with radio programs, at the same time the interest of the listening public is paramount, and may not be subordinated to the interests of the station licensee.”

This being an application for the renewal of a license, the burden is upon the applicant to establish that such renewal would be in the public interest, convenience, or necessity (*Technical Radio Lab. v. Fed. Radio Comm.*, 59 App. D.C. 125, 36 F.(2d) 111, 114, 66 A.L.R. 1355; *Campbell v. Galeno Chem. Co.*, 281 U.S. 599, 609, 50 S.Ct. 412, 74 L. Ed. 1063), and the court will sustain the findings of fact of the commission unless “manifestly against the evidence.” *Ansley v. Fed. Radio Comm.*, 60 App. D.C. 19, 46 F.(2d) 600.

We have held that the business of broadcasting, being a species of interstate commerce, is subject to the reasonable regulation of Congress. *Technical Radio Lab. v. Fed. Radio Comm.*, 59 App. D.C. 125, 36 F.(2d) 111, 66 A.L.R. 1355; *City of New York v. Fed. Radio Comm.*, 59 App. D.C. 129, 36 F.(2d) 115; *Chicago Federation of Labor v. Fed. Radio Comm.*, 59 App. D.C. 333, 41 F.(2d) 422. It is apparent, we think, that the business is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the commission is necessarily called upon to consider the character and quality of the service to be rendered. In considering an application for a renewal of the license, an important consideration is the past conduct of the applicant, for “by their fruits ye shall know them.” *Matt. VII:20*. Especially is this true in a case like the present, where the evidence clearly justifies the conclusion that the future conduct of the station will not differ from the past.

In its Second Annual Report (1928), p. 169, the commission cautioned broadcasters “who consume much of the valuable time allotted to them under their licenses in matters of a distinctly private nature which are not only uninteresting, but also distasteful to the listening public.” When Congress provided that the question whether a license should be issued or renewed should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business but should be of a public character. Obviously, there is no room in the broadcast band for every business or school of thought.

In the present case, while the evidence shows that much of appellant’s programs is entertaining and unobjectionable in character, the finding of the commission that the station “is conducted only in the personal interest of Dr. John R. Brinkley” is not “manifestly against the evidence.” We are further of the view that there is substantial evidence in support of the finding of the Commission that the “medical question box” as conducted by Dr. Brinkley “is inimical to the public health and safety, and for that reason is not in the public interest.”

Appellant contends that the attitude of the commission amounts to a censorship of the station contrary to the provisions of section 29 of the Radio Act of 1927 (47 USCA § 109). This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant’s broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest,



convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship.

As already indicated, Congress has imposed upon the commission the administrative function of determining whether or not a station license should be renewed, and the commission in the present case has in the exercise of judgment and discretion ruled against the applicant. We are asked upon the record and evidence before the commission to substitute our judgment and discretion for that of the commission. While section 16 of the Radio Act of 1927 (44 Stat. 1162, 1169, U. S. C., Supp. 3, tit. 47, § 96) authorized an appeal to this court, we do not think it was the intent of Congress that we should disturb the action of the commission in a case like the present. Support is found for this view in the Act of July 1, 1930 (46 Stat. 844 [47 USCA § 96]), amending section 16 of the 1927 Act. The amendment specifically provides "that the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious." As to the interpretation that should be placed upon such provision, see *Ma-King v. Blair*, 271 U.S. 479, 483, 46 S. Ct. 544, 70 L.Ed. 1046.

We are therefore constrained, upon a careful review of the record, to affirm the decision.

Affirmed.

### *MIND PROBES*

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1. Was it reasonable for the FRC to conclude that KFKB's license renewal would not be in the public interest when the popularity of the station demonstrated beyond doubt that the public was very much interested in what Brinkley was broadcasting?

2. Although the court disposes of Brinkley's claim of FRC *censorship* by using the traditional view limiting censorship to "prior restraint," the court does not grapple with the language of § 29 that states "no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communication." Use the quoted passage of § 29 as the basis for a dissent from Judge Robb's opinion.

### *RELATED READING*

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SHELBY, MAURICE E., JR., "John R. Brinkley and the *Kansas City Star*," *Journal of Broadcasting*, 22:1 (Winter 1978), 33-45.

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# The Shuler Case

Trinity Methodist Church, South v. Federal Radio

Commission\*

62 F.2d 850 (D.C. Cir.)

November 28, 1932

Compared to "Doc" Brinkley whose rural charms held sway throughout much of the country, "battling Bob" Shuler was more a local phenomenon. Following the *Brinkley* case by almost two years, this appellate decision built on the court's earlier opinion in upholding the FRC's denial of license renewal to Shuler's radio station, KGEF, because of the minister's defamatory and otherwise objectionable utterances.

While the *Brinkley* decision is confined to statutory interpretation, the *Shuler* case grapples with constitutional issues arising from the appellant's reliance on First and Fifth Amendment claims. The Supreme Court declined to review the decision, 288 U.S. 599 (1933).

Despite these unequivocal judicial affirmations of the statutory and constitutional authority of the licensing agency to withhold franchises from broadcasters whose past programming served predominantly private interests rather than the public interest, the FCC has been timid in its exercise of programming powers through the licensing process. Instead, the Commission has relied on broad, marginally enforced policy statements (see Documents 22 and 25) and "regulation by raised eyebrow" through which a commissioner's speech (see Document 27) or a proposed (but not enacted) rule motivates program decisions in the broadcasting industry. These methods of encouraging programming in the public interest are subtler than license denial, but their effectiveness is difficult to measure.

In those rare instances in which the FCC declined to renew licenses on programming grounds, other issues have been involved, particularly licensee misrepresentation to the Commission. Judicial affirmations in these cases have tended to rely on the latter ground

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rather than program content. See *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir. 1964) affirming *Palmetto Broadcasting Company (WDKD)*, 33 FCC 250 (1962); *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972) affirming 24 FCC 2d 18 (1970). In the comparative renewal context, however, an incumbent licensee's past record of inadequate programming may result in a license being granted to a competitor promising superior service. See *Applications of Simon Geller and Grandbanke Corp.*, 90 FCC 2d 250 (1982) (appeal pending).

*Groner, Associate Justice.*

Appellant, Trinity Methodist Church, South, was the lessee and operator of a radio-broadcasting station at Los Angeles, Cal., known by the call letters KGEF. 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. The station was operated for a total of 23¼ hours each week.

In September, 1930, appellant filed an application for renewal of station license. Numerous citizens of Los Angeles protested, and the Commission, being unable to determine that public interest, convenience, and necessity would be served, set the application down for hearing before an examiner. In January, 1931, the matter was heard, and the testimony of ninety witnesses taken. The examiner recommended renewal of the license. Exceptions were filed by one of the objectors, and oral argument requested. This was had before the Commission, sitting in banc, and, upon consideration of the evidence, the examiner's report, the exceptions, etc., the 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.

This court denied a motion for a stay order, and this appeal was taken. 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 have been at great pains to examine carefully the record of a thousand pages, and have reached the conclusion that none of these assignments is well taken.

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 ex rel. Olson*, 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357. "Every free-man 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.

Section 1 of the Radio Act of 1927 (44 Stat. 1162, title 47, USCA, § 81) specifically declares the purpose of the act to be to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmissions; and to provide for the use of such channels for limited periods of time, under licenses granted by federal authority. The federal authority set up by the act to carry out its terms is the Federal Radio Commission, and the Commission is given power, and required, upon examination of an application for a station license, or for a renewal or modification, to determine whether "public interest, convenience, or necessity" will be served by the granting thereof, and any applicant for a renewal of license whose application is refused may of right appeal from such decision to this court.

We have already held that radio communication, in the sense contemplated by the act, constituted interstate commerce, *KFKB Broadcasting Ass'n v. Federal Radio Commission*, supra; *General Elec. Co. v. Federal Radio Commission*, 58 App. D.C. 386, 31 F.(2d) 630, and in this respect we are supported by many decisions of the Supreme Court, *Pensacola Telegraph Co. v. Western Union Tel. Co.*, 96 U.S. 1, 9, 24 L.Ed. 708; *International Text-Book Co. v. Pigg*, 217 U.S. 91, 106, 107, 30 S. Ct. 481, 54 L.Ed. 678, 27 L.R.A. (N.S.) 493, 18 Ann. Cas. 1103; *Western Union Teleg. Co. v. Pendelton*, 122 U.S. 347, 356, 7 S. Ct. 1126, 30 L.Ed. 1187. And we do not understand it is contended that where, as in the case before us, there is no

physical substance between the transmitting and the receiving apparatus, the broadcasting of programs across state lines is not interstate commerce, and, if this be true, it is equally true that the power of Congress to regulate interstate commerce, complete in itself, may be exercised to its utmost extent, and acknowledges no limitation, other than such as prescribed in the Constitution (*Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23), and these powers, as was said by the Supreme Court in *Pensacola Tel. Co. v. Western Union Tel. Co.*, *supra*, "keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances."

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, 37 A.L.R. 1407; 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, 43 L.R.A. (N.S.) 906, Ann. Cas. 1913E, 905; 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. See *In re Kemmler*, 136 U.S. 436, 448, 449, 10 S. Ct. 930, 34 L.Ed. 519; *Hamilton v. Kentucky, etc., Co.*, 251 U.S. 146, at page 156, 40 S. Ct. 106, 64 L.Ed. 194. 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, as in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321, and the denial of a permit to use the limited channels of the air. As was pointed out in *American Bond & Mtg. Co. v. United States (C.C.A.)* 52 F.(2d) 318, 320, the 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, 4 Ann. Cas. 1175: "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.

A case which illustrates this principle is *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 35 S. Ct. 551, 59 L.Ed. 939. In that case the state of Virginia had established lines of navigability in the harbor of Norfolk. The lumber company applied for and obtained permission from the state to build a wharf from its upland into the river to the line of navigability. Some twenty years later the government, in the exercise of its control of the navigable waters and in the interest of commerce and navigation, adopted the lines of navigability formerly established by the state of Virginia, but a few years prior to the commencement of the suit the Secretary of War, by authority conferred on him by the Congress, re-established the lines, as a result of which the riparian proprietor's wharf extended some two hundred feet within the new lines of navigability. The Secretary of War asserted the right to require the demolition of the wharf as an obstruction to navigation. The owner insisted that, having received a grant of privilege from the state of Virginia prior to the exercise by the government of its power over the river, and subsequently acquiesced in by its adoption of the state lines, the property right thus acquired became as stable as any other property, and the privilege so granted irrevocable, and that it could be taken for public use only upon the payment of just compensation. The contention was rejected on the principle that the control of Congress over the navigable streams of the country is conclusive, and its judgment and determination the exercise of a legislative power in respect of a subject wholly within its control. To the same effect is *Gibson v. United States*, 166 U.S. 269, 17 S. Ct. 578, 41 L.Ed. 996, in which a work of public improvement in the Ohio river diminished greatly the value of the riparian owner's property by destroying his access to navigable water; and *Union Bridge Co. v. United States*, 204 U.S. 364, 27 S. Ct. 367, 51 L.Ed. 523, where the owner of a bridge was required to remodel the same as an obstruction to navigation, though erected under authority of the state when it was not an obstruction to navigation; and *Louisville Bridge Co. v. United States*, 242 U.S. 409, 37 S. Ct. 158, 61 L.Ed. 395, in which the same rule was applied in the case of a bridge erected expressly pursuant to an act of Congress. So also in *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53; 33 S. Ct. 667, 57 L.Ed. 1063, the right of the government to destroy the water power of a riparian owner was upheld; and in *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 33 S. Ct. 679, 57 L.Ed. 1083, the right of compensation for the destruction of privately owned oyster beds was denied. All of these cases indubitably show adherence to



the principle that one who applies for and obtains a grant or permit from a state, or the United States, to make use of a medium of interstate commerce, under the control and subject to the dominant power of the government, takes such grant or right subject to the exercise of the power of government, in the public interest, to withdraw it without compensation.

Appellant was duly notified by the Commission of the hearing which it ordered to be held to determine if the public interest, convenience, or necessity would be served by granting a renewal of its license. Due notice of this hearing was given and opportunity extended to furnish proof to establish the right under the provisions of the act for a renewal of the grant. There was, therefore, no lack of due process, and, considered from every point of view, the action of the Commission in refusing to renew was in all respects right, and should be, and is, affirmed.

Affirmed.

Van Orsdel, Associate Justice, concurs in the result.

### *MIND PROBES*

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1. One proposition emerging from this case is that free speech protections must yield to congressional jurisdiction over broadcasting because of the shortage of frequencies. If the radio spectrum were plentiful rather than scarce, would this warrant striking the balance between the commerce clause and the First Amendment any differently?

2. The court has little difficulty finding no violation of the Fifth Amendment caused by a procedurally proper nonrenewal of license. Do §§ 6 and 7 of the 1927 Radio Act or § 606 of the Communications Act appear to pass the test of the Fifth Amendment?

### *RELATED READING*

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ORBISON, CHARLEY, "‘Fighting Bob’ Shuler: Early Radio Crusader," *Journal of Broadcasting*, 21:4 (Fall 1977), 459-72.

ROSENBLOOM, JOEL, "Authority of the Federal Communications Commission" in John E. Coons, ed., *Freedom and Responsibility in Broadcasting*. Evanston, Ill.: Northwestern University Press, 1961.

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# The Nelson Brothers Case

Federal Radio Commission v. Nelson Brothers Bond  
& Mortgage Company  
289 U.S. 266  
May 8, 1933

This earliest substantive Supreme Court decision concerned with broadcasting centers on two important amendments to the Radio Act of 1927. These were the rather infamous Davis amendment of 1928 (Public Law 195, 70th Congress) that altered § 9 of the Act and the overhaul of § 16 of 1930 (Public Law 494, 71st Congress) relieving the Court of Appeals of its role as a “super FRC” with power to upset properly made factual findings of the Commission.

The Davis amendment, reproduced in the Court’s first footnote, found its way into the Communications Act of 1934 as § 307(b). This subsection was amended to its present form in 1936 (Public Law 652, 74th Congress), thereby restoring to law the second paragraph of § 9 of the original 1927 Radio Act.

The amendment to § 16, laid out in the second footnote, was motivated by the Supreme Court’s refusal to render a decision on the merits in *FRC v. General Electric Co.*, 281 U.S. 464 (1930). In the *General Electric* case the Court of Appeals was characterized as “no more than . . . a superior and revising agency” (at 467) with respect to the FRC under the original § 16. Hence, proceedings emerging from the Court of Appeals were not cases or controversies, but only administrative actions not properly reviewable by the Supreme Court under Article III of the Constitution. In 1934 § 16(d) was re-enacted as § 402(e) of the Communications Act. Congress amended § 402 in 1952 (Public Law 554, 82d Congress), adopting in subsection (g) the Administrative Procedure Act’s standards for judicial review (5 U.S.C. § 706) quoted in footnote 21 of Document 36. Thus, the scope of review remains generally limited to questions of law.

In reversing the lower court and affirming the Commission, this decision voices two tenets of broadcast law. First, the public interest

standard is not an unconstitutionally vague delegation of legislative power. Second, the Commission has broad discretion in applying the statutory standard to particular situations. Both principles have weathered the ensuing half century in good shape.

*Mr. Chief Justice Hughes delivered the opinion of the Court.*

The Johnson-Kennedy Radio Corporation, owning Station WJKS at Gary, Indiana, applied to the Federal Radio Commission for modification of license so as to permit operation, with unlimited time, on the frequency of 560 kc. then assigned for the use of Station WIBO, owned by Nelson Brothers Bond & Mortgage Company, and Station WPCC, owned by the North Shore Church, both of Chicago, Illinois. These owners appeared before the chief examiner, who, after taking voluminous testimony, recommended that the application be denied. The applicant filed exceptions and, on consideration of the evidence, the Commission granted the application and directed a modified license to issue to the applicant authorizing the operation of Station WJKS on the frequency of 560 kc. and terminating the existing licenses theretofore issued for Stations WIBO and WPCC. On appeal, the Court of Appeals of the District of Columbia reversed the Commission's decision upon the ground that it was "in a legal sense arbitrary and capricious." 61 App.D.C. 315; 62 F.(2d) 854. This Court granted certiorari.

The action of the Commission was taken under § 9 of the Radio Act of 1927 (c. 169, 44 Stat. 1166), as amended by § 5 of the Act of March 28, 1928, c. 263, 45 Stat. 373; 47 U.S.C. 89.<sup>1</sup> The findings of fact upon which the Commission based its order included the following:

<sup>1</sup>Section 5 of the Act of March 28, 1928, 45 Stat. 373, is as follows:

"Sec. 5. The second paragraph of Section 9 of the Radio Act of 1927 is amended to read as follows:

"It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided*, That if and when there is a lack of applications from any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located."

Gary, Indiana, about 30 miles from Chicago, is the largest steel center in the world. It has a population of approximately 110,000 and is located in what is known as the Calumet region which has a population of about 800,000, sixty per cent of whom are foreign born and represent over fifty nationalities. Station WJKS is the only radio station in Gary and the programs it broadcasts are well designed to meet the needs of the foreign population. These programs include "broadcasts for Hungarian, Italian, Mexican, Spanish, German, Russian, Polish, Croatian, Lithuanian, Scotch and Irish people," and "are musical, educational and instructive in their nature and stress loyalty to the community and the Nation." Programs are arranged and supervised "to stimulate community and racial origin pride and rivalry and to instruct in citizenship and American ideals and responsibilities." "Special safety prevention talks" are given for workmen, explaining the application of new safeguards of various types of machinery used in the steel mills. The children's hour utilizes selections from various schools. There are "good citizenship talks" weekly by civic leaders. The facilities of the station are made available to the local police department and to all fraternal, charitable and religious organizations in the Calumet region, without charge. Sunday programs consist mainly "of church service broadcasts" including all churches and denominations desiring to participate. Although the Calumet area is served by a station at Fort Wayne and by several stations in Chicago, Station WJKS "is the only station which serves a substantial portion of the area with excellent or even good service." While Station WJKS "delivers a signal of sufficient strength to give good reception in its normal service area if not interfered with, heterodyne and cross-talk interference exist to within three miles of the transmitter and constant objection to interference is found in the good service area of the station, particularly to the south, southeast and east." This interference has increased during the past two years.

Station WIBO is operated by Nelson Brothers Bond & Mortgage Company separately from its mortgage and real estate business. It employs 55 persons and its total monthly expenses average \$17,000. In March, 1931, it earned a net profit of \$9,000. It represents a total cost of \$346,362.99 less a reserve for depreciation of \$54,627.36, and has been operated since April, 1925. Station WIBO was licensed to share time with Station WPCC, the latter being authorized to operate on Sundays during stated hours and by agreement has operated on certain week days in exchange for Sunday hours.

The licenses for Stations WIBO and WPCC, effective from September 1, 1931, to March 1, 1932, were issued upon the following condition: "This license is issued on a temporary basis and subject to such action as the Commission may take after hearing on the application filed by Station WJKS, Gary, Indiana, for the frequency 560 kc. No authority contained herein shall be construed as a finding by the Federal Radio Commission that the operation of this station is or will be in the public interest beyond the term hereof."

The programs broadcast by Station WIBO include a large number of chain programs originating in the National Broadcasting network and are almost entirely commercial in their nature. The same general type of programs broadcast by WIBO,

including National Broadcasting chain programs, are received in the service area of WIBO from many other stations located in the Chicago district.

Station WPCC, owned by the North Shore Church, has programs made up entirely of sermons, religious music and talks relating to the work and interests of the church. Contributions are solicited for the use of the church and to advance the matters in which it is interested; it is not used by other denominations or societies. "Other stations in Chicago, including WMBI, owned by the Moody Bible Institute, devoting more time to programs of a religious nature than WPCC, are received in the service area of that station."

"The State of Indiana is 2.08 units or 22 percent under-quota in station assignments and the State of Illinois is 12.49 units or 55 percent over-quota in such assignments. The Fourth Zone, in which both States are located, is 21.00 units or 26 percent over-quota in station assignments. The granting of this application and deletion of WIBO and WPCC would reduce the over-quota status of the State of Illinois and the Fourth Zone by .88 unit and .45 unit, respectively, and would increase the quota of Indiana by .43 unit."

Summarizing the grounds of its decision, the Commission found:

"1. The applicant station (WJKS) now renders an excellent public service in the Calumet region and the granting of this application would enable that station to further extend and enlarge upon that service.

"2. The deletion of Stations WIBO and WPCC would not deprive the persons within the service areas of those stations of any type of programs not now received from other stations.

"3. Objectionable interference is now experienced within the service area of WJKS through the operation of other stations on the same and adjacent frequencies.

"4. The granting of this application and deletion of Stations WIBO and WPCC would not increase interference within the good service areas of any other stations.

"5. The granting of this application and deletion of Stations WIBO and WPCC would work a more equitable distribution of broadcasting facilities within the Fourth Zone, in that there would be an increase in the radio broadcasting facilities of Indiana which is now assigned less than its share of such facilities and a decrease in the radio broadcasting facilities of Illinois which is now assigned more than its share of such facilities.

"6. Public interest, convenience and/or necessity would be served by the granting of this application."

The Court of Appeals was divided in opinion. The majority pointed out that the Court had repeatedly held that "it would not be consistent with the legislative policy to equalize the comparative broadcasting facilities of the various states or zones by unnecessarily injuring stations already established which are rendering valuable service to their natural service areas"; and they were of opinion that the evidence showed that Stations WIBO and WPCC had been "serving public interest,

convenience and necessity certainly to as great an extent as the applicant station” and that “the conclusively established and admitted facts” furnished no legal basis for the Commission’s decision. The minority of the Court took the view that the Court was substituting its own conclusions for those of the Commission; that the Commission had acted within its authority, and that its findings were sustained by the evidence.

*First.* Respondents challenge the jurisdiction of this Court. They insist that the decision of the Court of Appeals is not a ‘judicial judgment’; that, for the purpose of the appeal to it, the Court of Appeals is merely a part of the machinery of the Radio Commission and that the decision of the Court is an administrative decision. Respondents further insist that if this Court examines the record, its decision “would not be a judgment, or permit of a judgment to be made in any lower court, but would permit only consummation of the administrative function of issuing or withholding a permit to operate the station.”

Under § 16 of the Radio Act of 1927, the Court of Appeals, on appeal from decisions of the Radio Commission, was directed to “hear, review, and determine the appeal” upon the record made before the Commission, and upon such additional evidence as the Court might receive, and was empowered to “alter or revise the decision appealed from and enter such judgment as to it may seem just.” 44 Stat. 1169. This provision made the Court “a superior and revising agency” in the administrative field and consequently its decision was not a judicial judgment reviewable by this Court. *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 467. The province of the Court of Appeals was found to be substantially the same as that which it had, until recently, on appeals from administrative decisions of the Commissioner of Patents. While the Congress can confer upon the courts of the District of Columbia such administrative authority, this Court cannot be invested with jurisdiction of that character whether for the purpose of review or otherwise. It cannot give decisions which are merely advisory, nor can it exercise functions which are essentially legislative or administrative. *Id.*, pp. 468, 469. *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442-444; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 700.

In the light of the decision in the *General Electric* case, *supra*, the Congress, by the Act of July 1, 1930, c. 788, amended § 16 of the Radio Act of 1927 so as to limit the review by the Court of Appeals. 46 Stat. 844; 47 U.S.C. 96.<sup>2</sup> That re-

<sup>2</sup>By this amendment, § 16 (d) reads as follows:

“At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however*, That the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court’s judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal.” 46 Stat. 844; 47 U.S.C. 96.

view is now expressly limited to "questions of law" and it is provided "that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious." This limitation is in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review. Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U.S. 452, 470; *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541, 547, 548; *New England Divisions Case*, 261 U.S. 184, 203, 204; *Keller v. Potomac Electric Power Co.*, *supra*; *Chicago Junction Case*, 264 U.S. 258, 263, 265; *Silberschein v. United States*, 266 U.S. 221, 225; *Ma-King Products Co. v. Blair*, 271 U.S. 479, 483; *Federal Trade Commission v. Klesner*, 280 U.S. 19, 30; *Tagg Bros. v. United States*, 280 U.S. 420, 442; *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 654; *Crowell v. Benson*, 285 U.S. 22, 49, 50.

If the questions of law thus presented were brought before the Court by suit to restrain the enforcement of an invalid administrative order, there could be no

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In reporting this amendment, the Committee on the Merchant Marine and Fisheries of the House of Representatives stated: "The purpose of the amendment is to clarify the procedure on appeal to the court from decisions of the Federal Radio Commission, to more clearly define the scope of the subject matter of such appeals, and to insure a review of the decision of the Court of Appeals of the District of Columbia by the Supreme Court." H.R.Rep. No. 1665, 71st Cong., 2d Sess., p. 2.

question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body. We must not "be misled by a name, but look to the substance and intent of the proceeding." *United States v. Ritchie*, 17 How. 525, 534; *Stephens v. Cherokee Nation*, 174 U.S. 445, 479; *Federal Trade Commission v. Eastman Co.*, 274 U.S. 619, 623; *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 722-724. "It is not important," we said in *Old Colony Trust Co. v. Commissioner*, *supra*, "whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law." Nor is it necessary that the proceeding to be judicial should be one entirely *de novo*. When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power. The provision that, in case the Court reverses the decision of the Commission, "it shall remand the case to the Commission to carry out the judgment of the Court" means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of law. The procedure thus contemplates a judicial judgment by the Court of Appeals and this Court has jurisdiction, on certiorari, to review that judgment in order to determine whether or not it is erroneous. *Osborn v. United States Bank*, 9 Wheat. 738, 819; *In re Pacific Railway Commission*, 32 Fed. 241, 255; *Federal Trade Commission v. Klesner*, *supra*; *Federal Trade Commission v. Raladam Co.*, *supra*; *Old Colony Trust Co. v. Commissioner*, *supra*.

*Second.* In this aspect, the questions presented are (1) whether the Commission, in making allocations of frequencies or wave lengths to States within a zone, has power to license operation by a station in an 'under-quota' State on a frequency theretofore assigned to a station in an 'over-quota' State, and to terminate the license of the latter station; (2) whether, if the Commission has this power, its findings of fact sustain its order in the instant case, in the light of the statutory requirements for the exercise of the power, and, if so, whether these findings are supported by substantial evidence; and (3) whether, in its procedure, the Commission denied to the respondents any substantial right.

(1) No question is presented as to the power of the Congress, in its regulation of interstate commerce, to regulate radio communications. No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities. In view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses. The Commission has been set up as the licensing authority and invested with broad powers of distri-



bution in order to secure a reasonable equality of opportunity in radio transmission and reception.

The Radio Act divides the United States into five zones, and Illinois and Indiana are in the Fourth Zone. § 2; 47 U.S.C. 82. Except as otherwise provided in the Act, the Commission "from time to time, as public convenience, interest, or necessity requires," is directed to "assign bands of frequency or wave lengths to the various classes of stations and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate," and to "determine the location of classes of stations or individual stations." § 4 (c) (d); 47 U.S.C. 84. By § 9, as amended in 1928, the Congress declared that the people of all the zones "are entitled to equality of radio broadcasting service, both of transmission and of reception," and that "in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor"; and the Commission is further directed to "make a fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States, . . . within each zone, according to population"; and the Commission is to "carry into effect the equality of broadcasting service, . . . whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation and by increasing or decreasing station power when applications are made for licenses or renewals of licenses." § 9; 47 U.S.C. 89.<sup>3</sup>

By its General Order No. 40, of August 30, 1928,<sup>4</sup> the Commission established a basis for the equitable distribution of broadcasting facilities in accordance with the Act. That order, as amended, provided for the required apportionment by setting aside a certain number of frequencies for use by stations operating on clear channels for distant service, and other frequencies for simultaneous use by stations operating in different zones, each station serving a regional area, and still others for use by stations serving city or local areas. These three classes of stations have become known as "clear, regional, and local channel stations." A new allocation of frequencies, power and hours of operation, was made in November, 1928,<sup>5</sup> to conform to the prescribed classification. It was found to be impracticable to determine the total value of the three classes of assignments so that it could be ascertained whether a State was actually "under or over quota on total radio facilities," and the Commission developed a "unit system" in order "to evaluate stations, based on type of channel, power and hours of operation, and all other considerations required by law." In June 1930, the Commission issued its General Order No. 92<sup>6</sup> specifying the "unit value" of stations of various types, and in this way the Commission was

<sup>3</sup> See Note 1.

<sup>4</sup> Report, 1928, Federal Radio Commission, pp. 17, 48.

<sup>5</sup> *Id.*, pp. 18, 215-218.

<sup>6</sup> Report, 1930, Federal Radio Commission, pp. 4, 24.

able to make a tabulation by zones and States showing the "units due," based on estimated population, and the "units assigned." This action called for administrative judgment, and no ground is shown for assailing it. It appears that, with respect to total broadcasting facilities, Indiana is "under quota" and Illinois is "over quota" in station assignments.

Respondents contend that the Commission has departed from the principle set forth in its General Order No. 92, because it has ignored the fact that, both Indiana and Illinois being under quota in regional station assignments, Indiana has more of such assignments in proportion to its quota than has Illinois, and by ordering the deletion of regional stations in Illinois in favor of an Indiana station, the Commission has violated the command of Congress, by increasing the under quota condition of Illinois in favor of the already superior condition of Indiana with respect to stations of that type. We find in the Act no command with the import upon which respondents insist. The command is that there shall be a "fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States within each zone." It cannot be said that this demanded equality between States with respect to every type of station. Nor does it appear that the Commission ignored any of the facts shown by the evidence. The fact that there was a disparity in regional station assignments, and that Indiana had more of this type than Illinois, could not be regarded as controlling. In making its "fair and equitable allocations," the Commission was entitled and required to consider all the broadcasting facilities assigned to the respective States, and all the advantages thereby enjoyed, and to determine whether, in view of all the circumstances of distribution, a more equitable adjustment would be effected by the granting of the application of Station WJKS and the deletion of Stations WIBO and WPCC.

To accomplish its purpose, the statute authorized the Commission to effect the desired adjustment "by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power." This broad authority plainly extended to the deletion of existing stations if that course was found to be necessary to produce an equitable result. The context, as already observed, shows clearly that the Congress did not authorize the Commission to act arbitrarily or capriciously in making a redistribution, but only in a reasonable manner to attain a legitimate end. That the Congress had the power to give this authority to delete stations, in view of the limited radio facilities available and the confusion that would result from interferences, is not open to question. Those who operated broadcasting stations had no right superior to the exercise of this power of regulation. They necessarily made their investments and their contracts in the light of, and subject to, this paramount authority. This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises. *Union Bridge Co. v.*

*United States*, 204 U.S. 364, 400, 401; *Philadelphia Company v. Stimson*, 223 U.S. 605, 634, 638; *Philadelphia, Baltimore & Washington R. Co. v. Schubert*, 224 U.S. 603, 613, 614; *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 260; *Continental Insurance Co. v. United States*, 259 U.S. 156, 171; *Sproles v. Binford*, 286 U.S. 374, 390, 391; *Stephenson v. Binford*, 287 U.S. 251, 276; *City of New York v. Federal Radio Commission*, 36 F.(2d) 115; 281 U.S. 729; *American Bond & Mortgage Co. v. United States*, 52 F.(2d) 318; 285 U.S. 538; *Trinity Methodist Church, South v. Federal Radio Commission*, 61 App.D.C. 311, 62 F.(2d) 850; 288 U.S. 599.

Respondents urge that the Commission has misconstrued the Act of Congress by apparently treating allocation between States within a zone as subject to the mandatory direction of the Congress relating to the zones themselves. Respondents say that as to zones Congress requires an "equal" allocation, but as between States only "a fair and equitable" allocation, and that the provision "for granting or refusing licenses or renewals of licenses" relates to the former and not to the latter. It is urged that this construction is fortified by the proviso in § 9 as to temporary permits for zones.<sup>7</sup> We think that this attempted distinction is without basis. The Congress was not seeking in either case "an exact mathematical division."<sup>8</sup> It was recognized that this might be physically impossible. The equality sought was not a mere matter of geographical delimitation. The concern of the Congress was with the interests of the people,—that they might have a reasonable equality of opportunity in radio transmission and reception, and this involved an equitable distribution not only as between zones but as between States as well. And to construe the authority conferred, in relation to the deletion of stations, as being applicable only to an apportionment between zones and not between States, would defeat the manifest purpose of the Act.

We conclude that the Commission, in making allocations of frequencies to States within a zone, has the power to license operation by a station in an under-quota State on a frequency theretofore assigned to a station in an over-quota State, provided the Commission does not act arbitrarily or capriciously.

(2) Respondents contend that the deletion of their stations was arbitrary, in that they were giving good service, that they had not failed to comply with any of the regulations of the Commission, and that no proceeding had been instituted for the revocation of their licenses as provided in § 14 of the Act. 47 U.S.C., 94. That section permits revocation of particular licenses by reason of false statements or for failure to operate as the license required or to observe any of the restrictions and conditions imposed by law or by the Commission's regulations. There is, respondents say, no warrant in the Act for a "forfeiture" such as that here attempted. But the question here is not with respect to revocation under § 14, but as to the equitable adjustment of allocations demanded by § 9. The question is not simply as to

<sup>7</sup>See Note 1.

<sup>8</sup>Report of the Committee on the Merchant Marine and Fisheries, H.R.Rep. No. 800, 70th Cong. 1st sess., p. 3.

the service rendered by particular stations, independently considered, but as to relative facilities,—the apportionment as between States. At the time of the proceeding in question respondents were operating under licenses running from September 1, 1931, to March 1, 1932, and which provided in terms that they were issued “on a temporary basis and subject to such action as the Commission may take after hearing on the application filed by Station WJKS” for the frequency 560 kc. Charged with the duty of making an equitable distribution as between States, it was appropriate for the Commission to issue temporary licenses with such a reservation in order to preserve its freedom to act in the light of its decision on that application. And when decision was reached, there was nothing either in the provisions of § 14, or otherwise in the Act, which precluded the Commission from terminating the licenses in accordance with the reservation stipulated.

In granting licenses the Commission is required to act “as public convenience, interest or necessity requires.” This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *N.Y. Central Securities Co. v. United States*, 287 U.S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. In making such an adjustment the equities of existing stations undoubtedly demand consideration. They are not to be the victims of official favoritism. But the weight of the evidence as to these equities and all other pertinent facts is for the determination of the Commission in exercising its authority to make a “fair and equitable allocation.”

In the instant case the Commission was entitled to consider the advantages enjoyed by the people of Illinois under the assignments to that State, the services rendered by the respective stations, the reasonable demands of the people of Indiana, and the special requirements of radio service at Gary. The Commission’s findings show that all these matters were considered. Respondents say that there had been no material change in conditions since the general reallocation of 1928. But the Commission was not bound to maintain that allocation if it appeared that a fair and equitable distribution made a change necessary. Complaint is also made that the Commission did not adopt the recommendations of its examiner. But the Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence.

We are of the opinion that the Commission’s findings of fact, which we summarized at the outset, support its decision, and an examination of the record leaves no room for doubt that these findings rest upon substantial evidence.

(3) Respondents raise a further question with respect to the procedure adopted by the Commission. In January, 1931, the Commission issued its General Order No. 102<sup>9</sup> relating to applications from under quota States. This order provided, among other things, that “applications from under-quota States in zones which have already allocated to them their pro rata share of radio facilities should

<sup>9</sup> Report, 1931, Federal Radio Commission, p. 91.

be for a facility already in use in that zone by an over-quota State," and that, since the Commission had allocated frequencies for the different classes of stations, "applications should be for frequencies set aside by the Commission for the character of station applied for." Respondents insist that these requirements foreclosed the exercise of discretion by the Commission by permitting the applicant to select the station and the facilities which it desired; that this "naked action of the applicant" precluded the Commission from "giving general consideration to the field" and from making that fair and equitable allocation which is the primary command of the statute. We think that this argument misconstrues General Order No. 102. That order is merely a rule of procedural convenience, requiring the applicant to frame a precise proposal and thus to present a definite issue. The order in no way derogates from the authority of the Commission. While it required the applicant to state the facilities it desires, there was nothing to prevent respondents from contesting the applicant's demand upon the ground that other facilities were available and should be granted in place of those which the applicant designated. If such a contention had been made, there would have been no difficulty in bringing before the Commission other stations whose interests might be drawn in question. There is no showing that the respondents were prejudiced by the operation of the order in question.

Respondents complain that they were not heard in argument before the Commission. They were heard before the examiner and the evidence they offered was considered by the Commission. The exceptions filed by the applicant to the examiner's report were filed and served upon the respondents in August, 1931, and the decision of the Commission was made in the following October. While the request of the applicant for oral argument was denied, it does not appear that any such request was made by respondents or that they sought any other hearing than that which was accorded.

We find no ground for denying effect to the Commission's action. The judgment of the Court of Appeals is reversed and the cause is remanded with direction to affirm the decision of the Commission.

*Reversed.*

### MIND PROBES

1. For many years prior to a 1982 amendment to the Communications Act (see § 331), New Jersey complained that it was not assigned any commercial VHF television station. Several commercial UHF stations were licensed within the state, however. Was such an assignment complaint either with § 307(b) or the Davis amendment?
2. If you were a judge, how would you distinguish between questions of fact and questions of law?

*RELATED READING*

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# The Biltmore Agreement

December, 1933

News has been an ingredient of broadcasting from its beginning. Newspapers were willing to cooperate with radio stations by publishing program schedules (thereby increasing circulation) and sharing news with the young medium through the 1920's. But the Depression brought an end to this cozy relationship. As newspaper publishers watched their advertising revenues decline, radio stations and networks found commercial sponsors for news broadcasts. Although many stations were owned by newspaper interests, most members of the American Newspaper Publishers Association were unwilling to see radio prosper at their expense.

In 1933 the publishers used several tactics to bring the broadcasters to the bargaining table. They threatened to support anti-broadcasting legislation in Congress; they refused to print program schedules unless broadcasters paid for them; they convinced the three major press associations (Associated Press, United Press, and International News Service) to withhold news from the radio industry. The last tactic motivated CBS to establish its own news gathering organization, but newspapers retaliated by refusing to publish items about CBS, its programs, and its sponsors. Fearful of losing clients to the rival network, CBS joined NBC in seeking to negotiate a settlement with their print "enemies." The parties to the dispute met for 2 days in New York City's Hotel Biltmore, from which the document below derives its name. The agreement required CBS to abolish its news collecting agency and NBC vowed not to start one of its own. The NAB, representing independent station interests, did not adopt the agreement and named no member to the committee that established the Press-Radio Bureau, which commenced operations on March 1, 1934.

Although the networks were satisfied with this turn of events, many local radio stations that competed with local newspapers for ad-

\*This version is taken with permission from pp. 285-86 of *Bulletin No. 6266* of the American Newspaper Publishers Association dated May 3, 1934.

vertising revenues were not. This fostered the creation of several all-radio news services, the most successful of which was the Transradio Press Service. INS and UP started to sell their services to radio stations in 1935 in order to meet the new competition, marking the end of the "Press-Radio War." As the clouds of another war gathered over Europe in the late 1930's, the networks built the framework of their present formidable news organizations. The Press-Radio Bureau ceased to exist in 1940 as even the Associated Press saw the handwriting on the wall and started selling news to broadcasters on an unrestricted basis in 1941. Transradio expired in 1951.

Radio gained its greatest journalistic impetus during World War II. Its ability to be "on the spot" surpassed the best efforts of competing newspapers which could only put out "extra" editions hours after the public heard eyewitness accounts of events broadcast directly from the scene. The popularity of all-news radio formats, the addition of audio feeds by AP and UPI (the result of a merger between UP and INS), and the dominance of news among the remaining services provided by radio networks make it inconceivable that modern radio stations would end a newscast with the words, "For further details read your local newspaper," as they did in the 1930's when they temporarily surrendered their journalistic birthright.

... a committee consisting of one representative of The American Newspaper Publishers Association, one representative each from The United Press, The Associated Press and The International News Service, one representative from The National Association of Broadcasters, and one representative each from The National Broadcasting Company and The Columbia Broadcasting System, totalling seven members, with one vote each, should constitute a committee to set up with proper editorial control and supervision a Bureau designed to furnish to the radio broadcasters brief daily news bulletins for broadcasting purposes. The Chairman of the above Committee will be the representative of the American Newspaper Publishers Association and a member of the Publishers' National Radio Committee. All actions of this committee will be in conjunction with the Publishers' National Radio Committee.

The newspaper and press association members of this committee are authorized and empowered to select such editor or editors, and establish such a Bureau as may be necessary to carry out the purposes of this program, to wit:

To receive from each of the three principal press associations copies of their respective day and night press reports, from which shall be selected bulletins of not more than thirty words each, sufficient to fill two broadcast periods daily of not more than five minutes each.

It is proposed that a broadcast, to be based upon bulletins taken from the morning newspaper report, will be put on the air by the broadcasters not earlier



than 9:30, local station time, and the broadcast based upon the day newspaper report will not be put on the air by the broadcasters prior to 9 P.M., local station time.

It is agreed that these news broadcasts will not be sold for commercial purposes.

All expense incident to the functioning of this Bureau will be borne by the broadcasters. Any station may have access to these broadcast reports upon the basis of this program, upon its request and agreement to pay its proportionate share of the expense involved.

Occasional news bulletins of transcendent importance, as a matter of public service, will be furnished to broadcasters, as the occasion may arise at times other than the stated periods above. These bulletins will be written and broadcast in such a manner as to stimulate public interest in the reading of newspapers.

The broadcasters agree to arrange the broadcasts by their commentators in such a manner that these periods will be devoted to a generalization and background of general news situations and eliminate the present practice of the recital of spot news.

A part of this program is to secure the broadcasting of news by newspaper-owned stations and independently owned stations on a basis comparable to the foregoing schedule. The Press Associations will inform their clients or members concerning the broadcasting of news from press association reports as set forth in the foregoing schedule.

The Publishers' National Radio Committee will recommend to all newspaper publishers the above program for their approval, and will urge upon the members of The Associated Press and the management of The International News Service and The United Press the adoption of this program.

By this program it is believed that public interest will be served by making available to any radio station in the United States for broadcasting purposes brief daily reports of authentic news collected by the Press Associations, as well as making available to the public through the radio stations news of transcendent importance with the least possible delay.

### *MIND PROBES*

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1. The Biltmore Agreement suggests that radio networks placed their economic well-being above their journalistic responsibilities in 1933. Describe the ways in which this ordering of economic and journalistic priorities has (or hasn't) changed since then.

2. Consider the kinds of legislative proposals the ANPA might have initiated or supported in 1934 if the broadcasters had refused to go along with the Biltmore Agreement.

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- DANNA, SAMMY R., "The Rise of Radio News" and "The Press-Radio War," *Freedom of Information Center Reports 211 and 213*, reprinted with abridgment in Lawrence W. Lichty and Malachi C. Topping, eds., *American Broadcasting: A Sourcebook on the History of Radio and Television*. New York: Hastings House, 1975, pp. 338-50, 674-75.
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# President Roosevelt's Message to Congress

S. Doc. 144, 73d Congress, 2d Session

February 26, 1934

Bills to unify jurisdiction over all forms of interstate and foreign communication by wire and radio had been debated in Congress as early as 1929. There was particular concern over the less than diligent job of regulating the telephone industry being performed by the Interstate Commerce Commission whose main interest at the time was the railroads.

Soon after assuming office in 1933, President Franklin D. Roosevelt directed an interdepartmental committee to study the need for centralized federal regulation of telecommunications. He submitted the following legislative recommendation after receiving the committee's report, soon after which Senator Dill and Congressman Rayburn introduced bills that eventually emerged with the President's signature on June 19, 1934, as Public Law 416 of the 73d Congress—the Communications Act of 1934. (The Act, as amended to 1983, appears in this volume as Document 42.)

The only major controversy that arose during congressional consideration of the legislation occurred on the floor of the Senate when the Wagner-Hatfield amendment was debated. The amendment would have directed the Federal Communications Commission to license 25% of broadcasting facilities to educational and other nonprofit organizations. The broadcasting industry vigorously opposed this proposal, and § 307(c) was passed instead as a compromise measure. On January 22, 1935, the FCC recommended against adoption of the proposal contained in § 307(c) (see p. 152) based on its understanding that educational and other similar groups would be given ample access to commercial broadcast facilities. This proved not to be the case.

Congress had lived with the Radio Act of 1927 for 7 years, during which broadcasting, especially the networks, had grown by leaps and bounds. Considering the charges of monopoly and overcommercialization that were made at the time, it may seem strange that Congress saw fit to make no significant modifications in its regulatory philosophy and statutory provisions affecting broadcasting in 1934. It should not appear at all unusual, however, that the prospering radio industry strongly supported passage of the Communications Act, minus the Wagner-Hatfield amendment. The status quo of public policy in broadcasting was preserved when the newly created FCC took office on July 11, 1934.

*To the Congress:*

I have long felt that for the sake of clarity and effectiveness the relationship of the Federal Government to certain services known as utilities should be divided into three fields: Transportation, power, and communications. The problems of transportation are vested in the Interstate Commerce Commission, and the problems of power, its development, transmission, and distribution, in the Federal Power Commission.

In the field of communications, however, there is today no single Government agency charged with broad authority.

The Congress has vested certain authority over certain forms of communications in the Interstate Commerce Commission, and there is in addition the agency known as the Federal Radio Commission.

I recommend that the Congress create a new agency to be known as the Federal Communications Commission, such agency to be vested with the authority now lying in the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission—the services affected to be all of those which rely on wires, cables, or radio as a medium of transmission.

It is my thought that a new commission such as I suggest might well be organized this year by transferring the present authority for the control of communications of the Radio Commission and the Interstate Commerce Commission. The new body should, in addition, be given full power to investigate and study the business of existing companies and make recommendations to the Congress for additional legislation at the next session.

Franklin D. Roosevelt

The White House  
*February 26, 1934*

*MIND PROBES*

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1. President Roosevelt was more fond of radio than of the Republican controlled press. How do you think this may have influenced his position on communications legislation?
2. Trace the development of educational radio from 1920 to 1934. How likely is it that its problems would have been ameliorated if Congress had passed the Wagner-Hatfield amendment?

*RECOMMENDED READING*

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## "War of the Worlds"

FCC mimeos 30294, 30295, and 30432

October 31–November 7, 1938

By 1938 radio was firmly entrenched as the average American family's aural conduit to the world of entertainment and news. The audience had become accustomed to hearing President Roosevelt's "fireside chats," up-to-the-minute news bulletins about such events as the trial and execution of Bruno Hauptmann, and first-person descriptions of the explosion of the airship *Hindenburg* and the German occupation of Austria. For nearly three weeks in September, 1938, America riveted its collective ear to the radio loudspeaker to listen to commentators such as CBS' H. V. Kaltenborn describe and analyze the unfolding of the Munich crisis. England's Prime Minister Neville Chamberlain momentarily dissipated the threat of war by allowing Adolph Hitler to take over Czechoslovakia's Sudetenland.

A month later, on October 30, 1938, CBS broadcast the most memorable radio program of all time, "War of the Worlds" performed on the "Mercury Theatre on the Air," presided over by the prodigious 23-year-old stage actor, Orson Welles. Howard Koch's adaptation of H. G. Wells' nineteenth century novel freely deployed certain radio conventions to lend an air of authenticity to the science-fiction tale. The "drama" included what appeared to be remote pickups of hotel dance bands interrupted by bogus "bulletins" about meteor-like objects landing in New Jersey and other specifically identified locales. A fictitious on-the-spot reporter was obliterated on the air by what turned out to be Martian invaders. Actors playing scientists, military commanders, and government officials warned the listening audience of the gravity of the situation as the worsening holocaust was graphically described. Kenny Delmar, later to be featured as "Senator Claghorn" on "The Fred Allen Show," did a convincing vocal impersonation of President Roosevelt. It was conservatively estimated that six million people heard the broadcast. Many of them panicked, though fortunately no one was killed.

For Orson Welles the show produced instant fame. For the FCC the program created a touchy problem concerning program regulation that had to be handled with sensitivity and restraint, as the following releases indicate. "War of the Worlds" was a gripping demonstration of radio's credibility which pointed out the need for the broadcasting industry to distinguish clearly between fact and fancy in the ensuing world crisis.

On October 30, 1974, a local radio station in Providence, Rhode Island, broadcast its own adaptation of "War of the Worlds." Complaints from gullible listeners caused the FCC to sanction the station for failing "to broadcast sufficiently explicit announcements at the proper times during the program to prevent public alarm or panic." [*Capital Cities Communications, Inc.*, 54 FCC 2d 1035, 1038 (1975).] In 1977 the Swiss Broadcasting Company had to apologize to listeners for airing an all-too-convincing satire that conveyed the impression that neutron bombs had killed half a million people in a fictitious East-West confrontation in Germany. When in 1982 ABC telecast an evangelical show-within-a-show, "The Freddy Stone Hour" contained in the TV movie "Pray TV," displaying a fake 800 area code phone number, there were more than 15,000 attempts to reach the fictitious number.

Yet, American radio broadcasting stations are credited with calming a distraught public during such real emergencies as the regional electric power failures of 1965 and 1977. Broadcasting's believability remains an asset to be relied upon with discretion by broadcasters and the audience alike, lest it become a liability.

FOR IMMEDIATE RELEASE

Mimeo 30294  
October 31, 1938

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

Chairman Frank R. McNinch of the Federal Communications Commission said today: "I have this morning requested the Columbia Broadcasting Company by telegraph to forward to the Commission at once a copy of the script and also an electrical transcription of the 'War of the Worlds' which was broadcast last night and which the press indicates caused widespread excitement, terror and fright. I shall request prompt consideration of this matter by the Commission.

"I withhold final judgment until later, but any broadcast that creates such general panic and fear as this one is reported to have done is, to say the least, regrettable.

"The widespread public reaction to this broadcast, as indicated by the press, is another demonstration of the power and force of radio and points out again the serious public responsibility of those who are licensed to operate stations."

FOR IMMEDIATE RELEASE

Mimeo 30295  
October 31, 1938

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

STATEMENT OF COMMISSIONER T.A.M. CRAVEN CONCERNING THE  
RADIO DRAMATIZATION OF H.G. WELLS' "WAR OF THE WORLDS"  
AS BROADCAST BY COLUMBIA BROADCASTING SYSTEM ON THE  
NIGHT OF OCTOBER 30, 1938

In response to numerous requests for a statement concerning the broadcasting by the Columbia Broadcasting System of the radio dramatization of H. G. Wells' book entitled *War of the Worlds*, I am in agreement with the position taken by Chairman McNinch in this matter.

However, I feel that in any action which may be taken by the Commission, utmost caution should be utilized to avoid the danger of the Commission censoring what shall or what shall not be said over the radio.

Furthermore, it is my opinion that the Commission should proceed carefully in order that it will not discourage the presentation by radio of the dramatic arts. It is essential that we encourage radio to make use of the dramatic arts and the artists of this country. The public does not want a "spineless" radio.

It is also my opinion that, in any case, isolated instances of poor program service do not of necessity justify the revocation of a station's license, particularly when such station has an otherwise excellent record of good public service. I do not include in this category, however, criminal action by broadcasting station licensees.

FOR IMMEDIATE RELEASE

Mimeo 30432  
November 7, 1938

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

An informal conference was held today between Chairman Frank R. McNinch of the Federal Communications Commission and Lenox R. Lohr, President of the National Broadcasting Company, William S. Paley, President of the Columbia Broadcasting System, and Alfred J. McCosker, Chairman of the Board of the Mutual Broadcasting System.

Chairman McNinch emphasized that the discussion was necessarily an informal one; first, because the invitations to the meeting were issued by himself and not by the Commission, and, second, because neither he nor the Commission as a whole is attempting to exert any censorship of program content, that being definitely denied the Commission under the law.



In the invitation to the heads of the three networks, Mr. McNinch said that he wanted the informal discussion to center around "the use of the terms 'flash' and 'bulletin' in news broadcasts, dramatic programs and in advertising messages." Chairman McNinch felt that there might be developing an indiscriminate use of these words which could result in misleading or confusing the public.

The three network heads were in agreement that the word "flash" is now rarely used by any network and Lenox R. Lohr, President of the National Broadcasting Company, and William S. Paley, President of the Columbia Broadcasting System, agreed that it should be restricted to items of unusual importance or interest.

Mr. Alfred J. McCosker, Chairman of the Board of the Mutual Broadcasting System, also agreed, for his Station WOR, that "flash" should be restricted to items of unusual importance or interest and that he would submit this matter along with other matters covered by this news release to the members of the Mutual Broadcasting System for their consideration. This, he explained, was necessary because of the autonomous character of the Mutual network, and he had no authority to speak for the members of that network.

The three network heads saw no reason to alter the present practice in broadcasting news labeled as "bulletins."

The network heads agreed that the words "flash" and "bulletin" should be used with great discretion in the dramatization of fictional events, with a view never to using them where they might cause general alarm. It was believed that this could be accomplished without greatly weakening the value of the dramatic technique as such.

Chairman McNinch at the conclusion of the meeting expressed himself to the conferees as well pleased with what the records showed about actual network practices and the assurances to guard against any abuses. He said that he would hold similar informal discussions with other elements of the industry.

"I greatly appreciate," said Chairman McNinch, "the spirit of cooperation shown by the heads of the three networks, and they requested that I express for them their appreciation of the informality and helpfulness of the conference."

### *MIND PROBES*

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1. How did the meeting that took place between Chairman McNinch and the network heads in 1938 differ from those between Chairman Wiley and the network heads thirty-six years later? (See p. 71.)

2. At least two alternate hypotheses explain the FCC's mild action in this instance. Either the Commission initially overestimated public reaction to the program and backed off when it realized its error, or the Commission felt it lacked the power to take stronger action than it did. Which hypothesis seems most plausible? Can you suggest other explanations for the FCC's handling of this matter?

3. In 1983 NBC telecast a two-hour drama entitled "Special Bulletin." It concerned nuclear blackmailers whose atomic device ultimately detonated in Charleston, South Carolina. The drama borrowed many of the conventions of TV news actualities, attempting to blunt its misperception as reality but advising viewers some thirty-one times throughout the show of the fictional nature of this rather convincing drama. Nevertheless, many audience members were alarmed that they were witnessing the real thing.

Conversely, many TV newscast items are not intended to be taken seriously, as when the local weatherperson opens an umbrella in the studio, or when a sports announcer is depicted scoring a basket for the home team. Even serious news stories are interspersed with entertaining advertising messages.

The question arises whether fact and fiction are so intermingled in contemporary broadcasting as to make one virtually indistinguishable from the other as perceived by the audience. Are we entering a world of mental "faction" as the viewer looks to the TV tube for endless diversion, regardless of what is watched, be it news or non-news?

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- CANTRIL, HADLEY, *The Invasion from Mars: A Study in the Psychology of Panic*. Princeton, N.J.: Princeton University Press, 1940. (Reprinted New York: Harper & Row, 1966.)
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# Economic Injury

**Federal Communications Commission v.**

**Sanders Brothers Radio Station**

**309 U.S. 470**

**March 25, 1940**

How much competition should there be in broadcasting? Aside from prohibiting monopolistic practices, the Communications Act of 1934 is silent on the question, thus leaving its resolution to the FCC. In exercising its discretion to allocate frequencies and issue licenses, the Commission is free to determine the nature and extent of competition that will best serve the "public interest, convenience, and necessity."

This is no easy task. In a broadcasting system almost exclusively supported by advertising, is the public interest best served by licensing as many stations as the electromagnetic spectrum can contain, or by limiting stations to a number determined through economic analysis of available advertising revenues and estimates of capital costs and operating expenses? Is the public interest better served by a large number of competing stations operating on a flimsy financial footing, or by a smaller number of secure, economically protected stations?

Economic considerations frequently arise when a new station seeks to enter an existing station's service area. Broadcasting, after all, is a business. Business enterprises attempt to keep expenses low and revenues high in order to achieve the goal of maximum profitability. Competition enlarges the public's choice of program sources, but it tends to reduce profitability and can even bring about the demise of a station. Allegations of "economic injury," when properly made before the FCC, can forestall the advent of additional competition for program material as well as for audience and advertiser support.

Through the 1930's the FCC regularly considered economic injury protests, often resolving them on the basis of an area's "need for service" as illuminated by indicia such as available advertising revenue. A change of Commission policy late in the decade gave rise to the 1940

*Sanders Brothers* decision which upheld the FCC in the case at hand. The Supreme Court opinion is equivocal; it contains passages supporting protectionism and procompetitiveness that have provided grist for the regulatory mill ever since.

Following this partial vindication of its position, the Commission adopted an increasingly procompetitive stance whereby it consistently refused to decide economic injury protests until the Court of Appeals rendered its authoritative interpretation of *Sanders Brothers* in *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958). *Carroll* said, ". . . 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." (At 443.)

In the wake of *Carroll* the FCC ingeniously devised a succession of procedural impediments to the successful mounting of an intra-medium economic injury protest. The Commission's application of strict pleading standards to protestants was upheld in *WLVA, Inc. v. FCC*, 459 F.2d 1286 (D.C. Cir. 1972). It appears to be either impossible or self-defeating to prove economic injury that would diminish or destroy service. This is because a party seeking a license could replace the service to the public provided by an incumbent licensee who, in effect, places his own license on the line by pleading economic injury.

*Mr. Justice Roberts delivered the opinion of the Court.*

We took this case to resolve important issues of substance and procedure arising under the Communications Act of 1934, as amended.<sup>1</sup>

January 20, 1936, the Telegraph Herald, a newspaper published in Dubuque, Iowa, filed with the petitioner an application for a construction permit to erect a broadcasting station in that city. May 14, 1936, the respondent, who had for some years held a broadcasting license for, and had operated, Station WKBB at East Dubuque, Illinois, directly across the Mississippi River from Dubuque, Iowa, applied for a permit to move its transmitter and studios to the last named city and install its station there. August 18, 1936, respondent asked leave to intervene in the Telegraph Herald proceeding, alleging in its petition, *inter alia*, that there was an insufficiency of advertising revenue to support an additional station in Dubuque and insufficient talent to furnish programs for an additional station; that adequate service was being rendered to the community by Station WKBB and there was no need for any additional radio outlet in Dubuque and that the granting of the Telegraph Herald

<sup>1</sup> Act of June 19, 1934, c. 652, 48 Stat. 1064; Act of June 5, 1936, c. 511, 49 Stat. 1475; Act of May 20, 1937, c. 299, 50 Stat. 189, 47 U.S.C. 151, *et seq.*

application would not serve the public interest, convenience, and necessity. Intervention was permitted and both applications were set for consolidated hearing.

The respondent and the Telegraph Herald offered evidence in support of their respective applications. The respondent's proof showed that its station had operated at a loss; that the area proposed to be served by the Telegraph Herald was substantially the same as that served by the respondent and that, of the advertisers relied on to support the Telegraph Herald station, more than half had used the respondent's station for advertising.

An examiner reported that the application of the Telegraph Herald should be denied and that of the respondent granted. On exceptions of the Telegraph Herald, and after oral argument, the broadcasting division of petitioner made an order granting both applications, reciting that "public interest, convenience, and necessity would be served" by such an action. The division promulgated a statement of the facts and of the grounds of decision, reciting that both applicants were legally, technically, and financially qualified to undertake the proposed construction and operation; that there was need in Dubuque and the surrounding territory for the services of both stations, and that no question of electrical interference between the two stations was involved. A rehearing was denied and respondent appealed to the Court of Appeals for the District of Columbia. That court entertained the appeal and held that one of the issues which the Commission should have tried was that of alleged economic injury to the respondent's station by the establishment of an additional station and that the Commission had erred in failing to make findings on that issue. It decided that, in the absence of such findings, the Commission's action in granting the Telegraph Herald permit must be set aside as arbitrary and capricious.<sup>2</sup>

The petitioner's contentions are that under the Communications Act economic injury to a competitor is not a ground for refusing a broadcasting license and that, since this is so, the respondent was not a person aggrieved, or whose interests were adversely affected, by the Commission's action, within the meaning of § 402(b) of the Act which authorizes appeals from the Commission's orders.

The respondent asserts that the petitioner in argument below contented itself with the contention that the respondent had failed to produce evidence requiring a finding of probable economic injury to it. It is consequently insisted that the petitioner is not in a position here to defend its failure to make such findings on the ground that it is not required by the Act to consider any such issue. By its petition for rehearing in the court below, the Commission made clear its position as now advanced. The decision of the court below, and the challenge made in petition for rehearing and here by the Commission, raise a fundamental question as to the function and power of the Commission and we think that, on the record, it is open here.

<sup>2</sup>*Sanders Brothers Radio Station v. Federal Communications Commission*, 70 App. D.C. 297; 106 F.2d 321.

*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.

Section 307(a) of the Communications Act directs that "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." This mandate is given meaning and contour by the other provisions of the statute and the subject matter with which it deals.<sup>3</sup> The Act contains no express command that in passing upon an application the Commission must consider the effect of competition with an existing station. Whether the Commission should consider the subject must depend upon the purpose of the Act and the specific provisions intended to effectuate that purpose.

The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.

In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission,<sup>4</sup> the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such.<sup>5</sup> Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of the railroads,<sup>6</sup> in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act

<sup>3</sup> *Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, 285.

<sup>4</sup> See Title II §§ 201-221, 47 U.S.C. §§ 201-221.

<sup>5</sup> See § 3(h), 47 U.S.C. § 153(h).

<sup>6</sup> Compare *Texas & Pacific Ry. v. Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266, 277; *Chicago Junction Case*, 264 U.S. 258.

contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.<sup>7</sup>

But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.

Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

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 a 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. If such economic loss were a valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives,<sup>8</sup> which Congress would not have contemplated without granting the Commission powers of control over the rates, programs, and other activities of the business of broadcasting.

We conclude that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license.

*Second.* It does not follow that, because the licensee of a station cannot resist the grant of a license to another, on the ground that the resulting competition may work economic injury to him, he has no standing to appeal from an order of the Commission granting the application.

<sup>7</sup>See § 308(b), 47 U.S.C. § 308(b).

<sup>8</sup>See § 311, 47 U.S.C. § 311, relating to unfair competition and monopoly.

Section 402(b) of the Act provides for an appeal to the Court of Appeals of the District of Columbia (1) by an applicant for a license or permit, or (2) "by any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

The petitioner insists that as economic injury to the respondent was not a proper issue before the Commission it is impossible that § 402(b) was intended to give the respondent standing to appeal, since absence of right implies absence of remedy. This view would deprive subsection (2) of any substantial effect.

Congress had some purpose in enacting § 402(b) (2). It may have been of the opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.<sup>9</sup>

We hold, therefore, that the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect of the order of the Commission.

*Third.* Examination of the findings and grounds of decision set forth by the Commission discloses that the findings were sufficient to comply with the requirements of the Act in respect of the public interest, convenience, or necessity involved in the issue of the permit. In any event, if the findings were not as detailed upon this subject as might be desirable, the attack upon them is not that the public interest is not sufficiently protected but only that the financial interests of the respondent have not been considered. We find no reason for abrogating the Commission's order for lack of adequate findings.

*Fourth.* The respondent here renews a contention made in the Court of Appeals to the effect that the Commission used as evidence certain data and reports in its files without permitting the respondent, as intervenor before the Commission, the opportunity of inspecting them. The Commission disavows the use of such material as evidence in the cause and the Court of Appeals has found the disavowal veracious and sufficient. We are not disposed to disturb its conclusion.

The judgment of the Court of Appeals is *Reversed*.

Mr. Justice McReynolds took no part in the decision of this case.

#### *MIND PROBES*

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1. Station WKBB operated at a loss. Why would Sanders Brothers want to continue operating a money-losing station?

<sup>9</sup>Compare *Interstate Commerce Commission v. Oregon-Washington R. Co.*, 288 U.S. 14, 23-25.



2. In this decision the Court says that the Communications “Act recognizes that the field of broadcasting is one of free competition,” and that “the Act does not essay to regulate the business of the licensee.” Some interpret this as an absolute prohibition of FCC regulation of nontechnical aspects of broadcasting. Is this interpretation valid when the quoted extracts are viewed in the context of the surrounding language? Explain your view.

#### *RELATED READING*

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# The Mayflower Doctrine

**In the Matter of The Mayflower Broadcasting  
Corporation and The Yankee Network, Inc.  
(WAAB)  
8 FCC 333, 338  
January 16, 1941**

Many broadcasters took to the air in the 1920's in order to voice their own views. Such licensees regarded their stations as personal soapboxes just as newspaper publishers did in an earlier era. This trend faded as broadcasting developed into an advertiser-supported business operation more interested in avoiding controversy and making money than in spreading ideas. The number of radio stations broadcasting the editorial views of management was small in the 1930's, but stations WAAB and WNAC in Boston, both licensed to John Shepard III's Yankee Network, were among them for a time.

In 1939, WAAB's license renewal application became consolidated in a hearing with the mutually exclusive application of the Mayflower Broadcasting Corporation for a permit to construct a station using WAAB's frequency. One of Mayflower's owners was Lawrence Flynn, a former Yankee Network employee who had complained to the FCC about his ex-employer's editorializing.

In 1940 the FCC proposed to dismiss Mayflower's application because the new applicant had made misrepresentations to the FCC and was not financially qualified to be a licensee. The Commission also moved to renew WAAB's license without mentioning the editorials that had stopped more than a year before. But Mayflower successfully pressed the Commission to reconsider the case in light of WAAB's past editorializing. The FCC's final decision, reprinted below, changed nothing for Mayflower, but it did contain wording that licensees interpreted as an absolute ban on editorializing.

Why was this administrative fiat never subjected to a court test? Certainly WAAB, which had won its battle for license renewal, was un-

likely to appeal. Even if it had, its legal standing to protest the FCC prohibition against editorials was dubious since it had voluntarily discontinued the practice. This reflected the attitude of the industry at large; even the 1939 NAB Code discouraged editorializing and the sale of time for "presentation of controversial views." The broadcasters, in any case, had more significant matters on their minds as the chain broadcasting proceeding was grinding through its final stages before the Commission.

The subsequent entry of America into World War II precluded broadcaster concern about the ban of a practice in which few engaged. The desire to dissent on the air was remote as the industry lent itself to the harmonious spirit of the war effort through 1945. It wasn't until the issuance of the "Blue Book" a year later (see Document 22) that the broadcasting industry became agitated about editorializing. The "Mayflower Doctrine" effectively discouraged broadcast editorials until the FCC issued its "Fairness Doctrine" in 1949. (See Document 23.)

## DECISION AND ORDER

These proceedings were instituted upon the filing by The Mayflower Broadcasting Corporation of an application for a construction permit to authorize a new radio-broadcast station at Boston, Mass., to operate on the frequency 1410 kilocycles with power of 500 watts night and 1 kilowatt day, unlimited time. These are the facilities now assigned to Station WAAB, Boston, Mass. The Commission designated this application for hearing along with the applications of The Yankee Network, Inc. (licensee of Station WAAB) for renewal of licenses for this station's main and auxiliary transmitters. The hearing was held in Boston, Mass., during November 1939. On May 31, 1940, the Commission issued proposed findings of fact and conclusions proposing to deny the application of The Mayflower Broadcasting Corporation and to grant the applications of The Yankee Network, Inc., for renewal of licenses. Exceptions to the proposed findings and conclusions were filed by Mayflower Broadcasting Corporation and at its request oral argument was held on July 25, 1940, with The Yankee Network, Inc., participating. Due to the absence of a quorum of the Commission at that time, the case was reargued before the full Commission by counsel for both parties on September 26, 1940.

In its proposed findings the Commission concluded that The Mayflower Broadcasting Corporation was not shown to be financially qualified to construct and operate the proposed station and, moreover, that misrepresentations of fact were made to the Commission in the application. After careful consideration of the applicant's exceptions and of the oral arguments presented, the Commission is unable to change these conclusions. The proposed findings and conclusions as to the application of The Mayflower Broadcasting Corporation will therefore, be adopted and made final.

More difficult and less easily resolvable questions are, however, presented by the applications for renewal of The Yankee Network, Inc. The record shows without contradiction that beginning early in 1937 and continuing through September 1938, it was the policy of Station WAAB to broadcast so-called editorials from time to time urging the election of various candidates for political office or supporting one side or another of various questions in public controversy. In these editorials, which were delivered by the editor-in-chief of the station's news service, no pretense was made at objective, impartial reporting. It is clear—indeed the station seems to have taken pride in the fact—that the purpose of these editorials was to win public support for some person or view favored by those in control of the station.

No attempt will be made here to analyze in detail the large number of broadcasts devoted to editorials. The material in the record has been carefully considered and compels the conclusion that this licensee during the period in question, has revealed a serious misconception of its duties and functions under the law. Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcaster. It is equally clear that with the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. The public interest—not the private—is paramount. These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation. And while the day to day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission.

Upon such a review here, there can be no question that The Yankee Network, Inc., in 1937 and 1938 continued to operate in contravention of these principles. The record does show, however, that, in response to a request of the Commission for details as to the conduct of the station since September 1938, two affidavits were filed with the Commission by John Shepard 3d, president of The Yankee Network, Inc. Apparently conceding the departures from the requirements of public interest by the earlier conduct of the station, these affidavits state, and they are uncontradicted, that no editorials have been broadcast over Station WAAB since September 1938 and that it is not intended to depart from this uninterrupted policy. The station has no editorial policies. In the affidavits there is further a descrip-

tion of the station's procedure for handling news items and the statement is made that since September 1938 "no attempt has ever been or will ever be made to color or editorialize the news received" through usual sources. In response to a question from the bench inquiring whether the Commission should rely on these affidavits in determining whether to renew the licenses, counsel for The Yankee Network, Inc., stated at the second argument, "There are absolutely no reservations whatsoever, or mental reservations of any sort, character, or kind with reference to those affidavits. They mean exactly what they say in the fullest possible amplification that the Commission wants to give to them."

Relying upon these comprehensive and unequivocal representations as to the future conduct of the station and in view of the loss of service to the public involved in the deletion of this station, it has been concluded to grant the applications for renewal. Should any future occasion arise to examine into the conduct of this licensee, however, the Commission will consider the facts developed in this record in its review of the activities as a whole. . . .

### *MIND PROBES*

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1. If this decision had been appealed, do you think the FCC would have been upheld? Cite the statutory provisions and judicial precedents supporting your view.
2. Describe the ways in which WAAB might have continued to influence public opinion over the air without editorializing or violating the station's representations to the FCC.

### *RELATED READING*

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UNITED STATES CONGRESS, SENATE, COMMITTEE ON COMMERCE, *The FCC's Actions and the Broadcasters' Operations in Connection with the Commission's Fairness Doctrine*. Staff report for the Subcommittee on Communications [by Robert Lowe], 90th Congress, 2d Session. Washington, D.C.: Government Printing Office, 1968.

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# The Network Case

**National Broadcasting Co., Inc., et al. v. United**

**States et al.**

**319 U.S. 190**

**May 10, 1943**

A network provides programs and advertising revenues to its affiliated stations. Without networks, broadcasting in a vast country like the United States would not be a national communications medium. Network operations began as early as 1923 in America. The National Broadcasting Company originated in 1926, followed by the Columbia Broadcasting System in 1927 and the Mutual Broadcasting System in 1934. Throughout the "golden age" of radio in the 1930's and 1940's networks were as potent a force in the broadcasting industry as they are in television today.

In the late 1930's the FCC became concerned about the power of radio networks, especially NBC and CBS, whose affiliation contracts hampered the ability of station licensees to program as they saw fit and threatened the very structure of the competitive broadcasting system envisaged by Congress. The Commission was particularly anxious to end NBC's simultaneous operation of two networks, the Red and the Blue, a situation that had arisen as a result of the American Telephone and Telegraph Company's departure from active broadcasting in 1926 (see Document 5). The Red and Blue networks tended to counterprogram against one another, giving NBC a decided competitive advantage over CBS and MBS.

One important outcome of the FCC's chain broadcasting investigation and subsequent rulemaking was the corporate separation of the two networks in 1941, followed by the sale of the Blue Network in 1943 to Edward J. Noble, licensee of WMCA in New York City (which he sold) and chairman of the board of the Life Savers Corporation. In 1945 Noble's network was renamed the American Broadcasting Company. More than 20 years later, with the power of network radio on the

wane, ABC was granted a waiver of the very rule that brought about its creation, when it commenced operating four specialized radio networks. [See 11 FCC 2d 163 (1967).]

This key Supreme Court decision on which the Justices were divided (the vote was five to two) upheld the Commission's authority to issue regulations pertaining to business arrangements between networks and their affiliates. Aside from its treatment of the central issue of the regulation of competition, Justice Frankfurter's opinion is noteworthy for its examination of the legislative history of radio law and its clarification of the relationship between "public interest, convenience, and necessity" and freedom of speech in broadcasting.

What are perhaps the most misinterpreted words in the judicial history of broadcast regulation appear in this case. The majority opinion states, "But the Act does not restrict the Commission merely to supervision of the [radio] traffic. It puts upon the Commission the burden of determining the composition of that traffic." Many readers of this part of the decision have taken this to mean that the Court was approving FCC dictation of program content. In context, however, these two sentences simply say that the Commission has the authority to *select* licensees as well as to "supervise" them. "Traffic" in the Court's analogy refers to licensees, not to programs.

No decision of the Court has had as much influence on public policy in broadcasting as the "Network" case. By upholding the constitutionality of the Communications Act and stating that the Act confers broad, though elastically enumerated ("not niggardly but expansive") powers, the High Court provided a precedent that has been used ever since to ratify discretionary actions by the FCC within its scope of authority.

Networking in television proved to be as natural a part of broadcasting as it had been during radio's era of supremacy. But the limited number of desirable VHF channel assignments and the vastly greater expense of producing programs for TV made the networks a more dominant force than they ever had been prior to the ascendancy of television. Attempts to establish a viable fourth national commercial TV network have thus far failed for lack of enough VHF affiliates.

Since 1959 the FCC has applied more and more rules to TV networks in order to moderate their anti-competitive influence. For example, it is illegal for a TV station to option its time to a network; each network show must be individually "cleared" with every affiliate that chooses to carry it. Nevertheless, the economics of television station operation creates a "'practical reliance'" on the networks for most programming, and ABC, CBS, and NBC have responded to the stations' need by making available an increasing supply of network programs.

By the late 1960's the dominance of the TV networks as program

suppliers had reduced the flow of non-network first-run syndicated shows to a trickle. In 1970 the FCC attempted to encourage "the development of independent program sources" to benefit unaffiliated, affiliated, and UHF stations (23 FCC 2d 382, 395) by issuing rules reducing network programming during prime time, prohibiting domestic syndication by networks, and preventing networks from acquiring a financial interest in programs produced by others for non-network exhibition. These rules were upheld in *Mt. Mansfield Television, Inc. v. Federal Communications Commission*, 442 F.2d 470 (2d Cir. 1971). The original "prime time access rule" (PTAR I) was modified in 1974 (44 FCC 2d 1081), but court action delayed implementation of PTAR II [*National Association of Independent Television Producers and Distributors et al. v. FCC*, 502 F.2d 249 (2d Cir. 1974)], whereupon the Commission developed PTAR III [50 FCC 2d 829 (1975), affirmed by 516 F.2d 526 (2d Cir. 1975)] which became effective with the 1975-1976 TV season. PTAR III is similar to PTAR I with the addition of exemptions for such network programs as documentaries, children's shows, and live sports coverage that unpredictably runs over into prime time.

PTAR helped to revive the syndication field, but the typical TV viewer noticed little change on the home screen. It does not matter to the public if a game show reaches the local station through a network or through an independent distributor. Therefore, while the diversity of program sources was increased by PTAR, the diversity of programming remained virtually unchanged. TV stations that had formerly opposed PTAR came to favor its retention, for their profits improved under the rule.

A renewed testament to the power of the TV networks emerged in 1977 when the FCC responded to a petition for rule making submitted by the Westinghouse Broadcasting Company by instituting a comprehensive inquiry into network TV programming practices and policies (62 FCC 2d 548), the first such investigation in two decades. Its network inquiry staff report, issued three years later, pointed in the direction of expanded competition and opportunities to compete for the networks. In 1982 the FCC proposed to repeal the domestic syndication and financial interest rules.

Meanwhile the need to closely regulate radio networks diminished with the vast increase in the number of AM and FM stations and with the reduced reliance on networks for radio programs in the wake of TV's dominance as a mass medium since the early 1950's. In 1977 the FCC repealed all of the radio chain regulations upheld by the Court in 1943 except the "territorial exclusivity" rule. The Commission accompanied this action with a policy statement cautioning against the restrictive station-network practices formerly prohibited by rule. Radio network-



ing has proliferated in recent years, thanks to reduced station interconnection costs made possible through communication satellite distribution.

*Mr. Justice Frankfurter delivered the opinion of the Court.*

In view of our dependence upon regulated private enterprise in discharging the far-reaching rôle which radio plays in our society, a somewhat detailed exposition of the history of the present controversy and the issues which it raises is appropriate.

These suits were brought on October 30, 1941, to enjoin the enforcement of the Chain Broadcasting Regulations promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941. We held last Term in *Columbia System v. United States*, 316 U.S. 407, and *National Broadcasting Co. v. United States*, 316 U.S. 447, that the suits could be maintained under § 402(a) of the Communications Act of 1934, 48 Stat. 1093, 47 U.S.C. § 402(a) (incorporating by reference the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 28 U.S.C. § 47), and that the decrees of the District Court dismissing the suits for want of jurisdiction should therefore be reversed. On remand the District Court granted the Government's motions for summary judgment and dismissed the suits on the merits. 47 F. Supp. 940. The cases are now here on appeal. 28 U.S.C. § 47. Since they raise substantially the same issues and were argued together, we shall deal with both cases in a single opinion.

On March 18, 1938, the Commission undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain broadcasting<sup>1</sup> were required in the "public interest, convenience, or necessity." The Commission's order directed that inquiry be made, *inter alia*, in the following specific matters: the number of stations licensed to or affiliated with networks, and the amount of station time used or controlled by networks; the contractual rights and obligations of stations under their agreements with networks; the scope of network agreements containing exclusive affiliation provisions and restricting the network from affiliating with other stations in the same area; the rights and obligations of stations with respect to network advertisers; the nature of the program service rendered by stations licensed to networks; the policies of networks with respect to character of programs, diversification, and accommodation to the particular requirements of the areas served by the affiliated stations; the extent to which affiliated stations exercise control over programs, advertising contracts, and

<sup>1</sup>Chain broadcasting is defined in § 3 (p) of the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more connected stations." In actual practice, programs are transmitted by wire, usually leased telephone lines, from their point of origin to each station in the network for simultaneous broadcast over the air.

related matters; the nature and extent of network program duplication by stations serving the same area; the extent to which particular networks have exclusive coverage in some areas; the competitive practices of stations engaged in chain broadcasting; the effect of chain broadcasting upon stations not licensed to or affiliated with networks; practices or agreements in restraint of trade, or in furtherance of monopoly, in connection with chain broadcasting; and the scope of concentration of control over stations, locally, regionally, or nationally, through contracts, common ownership, or other means.

On April 6, 1938, a committee of three Commissioners was designated to hold hearings and make recommendations to the full Commission. This committee held public hearings for 73 days over a period of six months, from November 14, 1938, to May 19, 1939. Order No. 37, announcing the investigation and specifying the particular matters which would be explored at the hearings, was published in the Federal Register, 3 Fed. Reg. 637, and copies were sent to every station licensee and network organization. Notices of the hearings were also sent to these parties. Station licensees, national and regional networks, and transcription and recording companies were invited to appear and give evidence. Other persons who sought to appear were afforded an opportunity to testify. 96 witnesses were heard by the committee, 45 of whom were called by the national networks. The evidence covers 27 volumes, including over 8,000 pages of transcript and more than 700 exhibits. The testimony of the witnesses called by the national networks fills more than 6,000 pages, the equivalent of 46 hearing days.

The committee submitted a report to the Commission on June 12, 1940, stating its findings and recommendations. Thereafter, briefs on behalf of the networks and other interested parties were filed before the full Commission, and on November 28, 1940, the Commission issued proposed regulations which the parties were requested to consider in the oral arguments held on December 2 and 3, 1940. These proposed regulations dealt with the same matters as those covered by the regulations eventually adopted by the Commission. On January 2, 1941, each of the national networks filed a supplementary brief discussing at length the questions raised by the committee report and the proposed regulations.

On May 2, 1941, the Commission issued its Report on Chain Broadcasting, setting forth its findings and conclusions upon the matters explored in the investigation, together with an order adopting the Regulations here assailed. Two of the seven members of the Commission dissented from this action. The effective date of the Regulations was deferred for 90 days with respect to existing contracts and arrangements of network-operated stations, and subsequently the effective date was thrice again postponed. On August 14, 1941, the Mutual Broadcasting Company petitioned the Commission to amend two of the Regulations. In considering this petition the Commission invited interested parties to submit their views. Briefs were filed on behalf of all of the national networks, and oral argument was had before the Commission on September 12, 1941. And on October 11, 1941, the Commission (again with two members dissenting) issued a Supplemental Report, together

with an order amending three Regulations. Simultaneously, the effective date of the Regulations was postponed until November 15, 1941, and provision was made for further postponements from time to time if necessary to permit the orderly adjustment of existing arrangements. Since October 30, 1941, when the present suits were filed, the enforcement of the Regulations has been stayed either voluntarily by the Commission or by order of court.

Such is the history of the Chain Broadcasting Regulations. We turn now to the Regulations themselves, illumined by the practices in the radio industry disclosed by the Commission's investigation. 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*. In doing so, however, we do not overlook the admonition of the Commission that the Regulations as well as the network practices at which they are aimed are interrelated:

In considering above the network practices which necessitate the regulations we are adopting, we have taken each practice singly, and have shown that even in isolation each warrants the regulation addressed to it. But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly. (Report, p. 75.)

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, including 7 which operated on so-called clear channels with the maximum power available, 50 Kilowatts; in addition, NBC operated 5 other stations, 4 of which had power of 50 kilowatts, under management contracts with their licensees. 102 stations were affiliated exclusively with the Columbia Broadcasting System, Inc., which was also the licensee of 8 stations, 7 of which were clear-channel stations operating with power of 50 kilowatts. 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. (Report, p. 4.)

The Commission found that eight network abuses were amenable to correction within the powers granted it by Congress:

*Regulation 3.101—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.

Restraints having this effect [the Commission observed], are to be condemned as contrary to the public interest irrespective of whether it be assumed that Mutual programs are of equal, superior, or inferior quality. The

important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated. . . . Our conclusion is that the disadvantages resulting from these exclusive arrangements far outweigh any advantages. A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable, and which, by closing the door of opportunity in the network field, adversely affects the program structure of the entire industry. (Report, pp. 52, 57.)

Accordingly, the Commission adopted Regulation 3.101, providing as follows:

No license shall be granted to a standard 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.

*Regulation 3.102—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. For example, Mutual presented a popular program, known as “The American Forum of the Air,” in which prominent persons discussed topics of general interest. None of the Mutual stations in the Buffalo area decided to carry the program, and a Buffalo station not affiliated with Mutual attempted to obtain the program for its listeners. These efforts failed, however, on account of the “territorial exclusivity” provision in Mutual’s agreements with its outlets. The result was that this program was not available to the people of Buffalo.

The Commission concluded that

It is not in the public interest for the listening audience in an area to be deprived of network programs not carried by one station where other stations in that area are ready and willing to broadcast the programs. It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference. (Report, p. 59.)

Recognizing that the “territorial exclusivity” clause was unobjectionable in so far as it sought to prevent duplication of programs in the same area, the Commission limited itself to the situations in which the clause impaired the ability of the licensee to broadcast available programs. Regulation 3.102, promulgated to remedy this particular evil, provides as follows:

No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation 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 primary service area upon the programs of the network organization.

*Regulation 3.103—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. (Report, p. 61.)

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 freedom of action." (Report, p. 62.) Accordingly, the Commission adopted Regulation 3.103:

No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years.<sup>2</sup> *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

*Regulation 3.104—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

<sup>2</sup>Station licenses issued by the Commission normally last two years. Section 3.34 of the Commission's Rules and Regulations governing Standard and High-Frequency Broadcast Stations, as amended October 14, 1941.

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. For 29 outlets of NBC on the Pacific Coast, it also covered the entire broadcast day; for substantially all of the other NBC affiliates, it included 8½ hours on weekdays and 8 hours on Sundays. Mutual's contracts with about half of its affiliates contained such a provision, giving the network optional time for 3 or 4 hours on weekdays and 6 hours on Sundays.

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 found that

shifting a local commercial program may seriously interfere with the efforts of a [local] sponsor to build up a regular listening audience at a definite hour, and the long-term advertising contract becomes a highly dubious project. This hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service. . . . A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest. We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national sport transmissions. We believe that these considerations far outweigh any supposed advantages from "stability" of network operations under time options. We find that the optioning of time by licensee stations has operated against the public interest. (Report, pp. 63, 65.)

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. Regulation 3.104 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. The text of the Regulation follows:

No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a.m. to 1:00 p.m.; 1:00 p.m. to 6:00 p.m.; 6:00 p.m. to 11:00 p.m.; 11:00 p.m. to 8:00 a.m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the sta-

tion from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

*Regulation 3.105—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, or 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.” Similarly, the CBS contracts provided that if the station had “reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest, the station may, on 3 weeks’ prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the station shall be satisfied.”

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 agencies. 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 licensee has the duty of determining what programs shall be broadcast over his station’s facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory. (Report, pp. 39, 66.)

The Commission undertook in Regulation 3.105 to formulate the obligations of licensees with respect to supervision over programs:



No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

*Regulation 3.106—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. (Report, p. 67.)

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. Recognizing that these considerations called for flexibility in their application to particular situations, the Commission provided that "networks will be given full opportunity, on proper application for new facilities or renewal of existing licenses, to call to our attention any reasons why the principle should be modified or held inapplicable." (Report, p. 68.) Regulation 3.106 reads as follows:

No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network

organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard 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.

*Regulation 3.107—Dual network operation.* This regulation provides that: “No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation 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.” 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 Regulation 3.107, since there is no immediate threat of its enforcement by the Commission.

*Regulation 3.108—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.” (Report, p. 73.)

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.” (Report, p. 75.) Accordingly, the Commission adopted Regulation 3.108, which provides as follows:

No license shall be granted to a standard 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.

The appellants attack the validity of these Regulations along many fronts. They contend that the Commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934; that even if the Commission were authorized by the Act to deal with the matters comprehended by the Regulations, its action is nevertheless invalid because the Commission misconceived the scope of

the Act, particularly § 313 which deals with the application of the anti-trust laws to the radio industry; that the Regulations are arbitrary and capricious; that if the Communications Act of 1934 were construed to authorize the promulgation of the Regulations, it would be an unconstitutional delegation of legislative power; and that, in any event, the Regulations abridge the appellants' right of free speech in violation of the First Amendment. 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.

Federal regulation of radio<sup>3</sup> begins with the Wireless Ship Act of June 24, 1910, 36 Stat. 629, which forbade any steamer carrying or licensed to carry fifty or more persons to leave any American port unless equipped with efficient apparatus for radio communication, in charge of a skilled operator. The enforcement of this legislation was entrusted to the Secretary of Commerce and Labor, who was in charge of the administration of the marine navigation laws. But it was not until 1912, when the United States ratified the first international radio treaty, 37 Stat. 1565, that the need for general regulation of radio communication became urgent. In order to fulfill our obligations under the treaty, Congress enacted the Radio Act of August 13, 1912, 37 Stat. 302. This statute forbade the operation of radio apparatus without a license from the Secretary of Commerce and Labor; it also allocated certain frequencies for the use of the Government, and imposed restrictions upon the character of wave emissions, the transmission of distress signals, and the like.

The enforcement of the Radio Act of 1912 presented no serious problems prior to the World War. Questions of interference arose only rarely because there were more than enough frequencies for all the stations then in existence. The war accelerated the development of the art, however, and in 1921 the first standard broadcast stations were established. They grew rapidly in number, and by 1923 there were several hundred such stations throughout the country. The Act of 1912 had not set aside any particular frequencies for the use of private broadcast stations; consequently, the Secretary of Commerce selected two frequencies, 750 and 833 kilocycles, and licensed all stations to operate upon one or the other of these channels. The number of stations increased so rapidly, however, and the situation became so chaotic, that the Secretary, upon the recommendation of the National Radio Conferences which met in Washington in 1923 and 1924, established a policy of assigning specified frequencies to particular stations. The entire radio spectrum was divided into numerous bands, each allocated to a particular kind of service. The frequencies ranging from 550 to 1500 kilocycles (96 channels in all, since the channels were separated from each other by 10 kilocycles) were assigned to the

<sup>3</sup>The history of federal regulation of radio communication is summarized in Herring and Gross, *Telecommunications* (1936) 239-86; *Administrative Procedure in Government Agencies*, Monograph of the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 186, 76th Cong., 3d Sess., Part 3, dealing with the Federal Communications Commission, pp. 82-84; 1 Socolow, *Law of Radio Broadcasting* (1939) 38-61; Donovan, *Origin and Development of Radio Law* (1930).

standard broadcast stations. But the problems created by the enormously rapid development of radio were far from solved. The increase in the number of channels was not enough to take care of the constantly growing number of stations. Since there were more stations than available frequencies, the Secretary of Commerce attempted to find room for everybody by limiting the power and hours of operation of stations in order that several stations might use the same channel. The number of stations multiplied so rapidly, however, that by November, 1925, there were almost 600 stations in the country, and there were 175 applications for new stations. Every channel in the standard broadcast band was, by that time, already occupied by at least one station, and many by several. The new stations could be accommodated only by extending the standard broadcast band, at the expense of the other types of services, or by imposing still greater limitations upon time and power. The National Radio Conference which met in November, 1925, opposed both of these methods and called upon Congress to remedy the situation through legislation.

The Secretary of Commerce was powerless to deal with the situation. It had been held that he could not deny a license to an otherwise legally qualified applicant on the ground that the proposed station would interfere with existing private or Government stations. *Hoover v. Intercity Radio Co.*, 52 App. D.C. 339, 286 F. 1003. And on April 16, 1926, an Illinois district court held that the Secretary had no power to impose restrictions as to frequency, power, and hours of operation, and that a station's use of a frequency not assigned to it was not a violation of the Radio Act of 1912. *United States v. Zenith Radio Corp.*, 12 F.2d 614. This was followed on July 8, 1926, by an opinion of Acting Attorney General Donovan that the Secretary of Commerce had no power, under the Radio Act of 1912, to regulate the power, frequency or hours of operation of stations. 35 Ops. Atty. Gen. 126. The next day the Secretary of Commerce issued a statement abandoning all his efforts to regulate radio and urging that the stations undertake self-regulation.

But the plea of the Secretary went unheeded. From July, 1926, to February 23, 1927, when Congress enacted the Radio Act of 1927, 44 Stat. 1162, almost 200 new stations went on the air. These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard. The situation became so intolerable that the President in his message of December 7, 1926, appealed to Congress to enact a comprehensive radio law:

Due to the decisions of the courts, the authority of the department [of Commerce] under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocations set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value. I most urgently recommend that this legislation should be speedily enacted. (H. Doc. 483, 69th Cong., 2d Sess., p. 10.)

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.<sup>4</sup> 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 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.

The Radio Act of 1927 created the Federal Radio Commission, composed of five members, and endowed the Commission with wide licensing and regulatory powers. We do not pause here to enumerate the scope of the Radio Act of 1927 and of the authority entrusted to the Radio Commission, for the basic provisions of that Act are incorporated in the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151 *et seq.*, the legislation immediately before us. As we noted in *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137,

In its essentials the Communications Act of 1934 [so far as its provisions relating to radio are concerned] derives from the Federal Radio Act of 1927. . . . By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927.

Section 1 of the Communications Act states its “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.” Section 301 particularizes this general purpose with respect to radio:

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.

<sup>4</sup>See Morecroft, *Principles of Radio Communication* (3d ed. 1933) 355-402; Terman, *Radio Engineering* (2d ed. 1937) 593-645.

To that end a Commission composed of seven members was created, with broad licensing and regulatory powers.

Section 303 provides:

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; . . .
- (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 . . .;
- (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; . . .
- (i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting; . . .
- (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. . . .

The criterion governing the exercise of the Commission's licensing power is the "public interest, convenience, or necessity." § § 307(a)(d), 309(a), 310, 312. In addition, § 307(b) directs the Commission that

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.

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the 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," 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. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *New York Central Securities Co. v. United States*, 287 U.S. 12, 24. The

requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services . . ." *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 285.

The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio." § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Comm'n v. Sanders Radio Station*, 309 U.S. 470, 475. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation of radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." See *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 n. 2.

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. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "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."

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest." We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report:

With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging "the larger and more effective use of radio in the public interest" if we were to grant licenses to persons who persist in these practices. (Report, pp. 81, 82.)

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).

Generalities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission. Equally so, generalities empty of all concrete considerations of the actual bearing of regulations promulgated by the Commission to the subject-matter entrusted to it, cannot strike down exercises of power by the Commission. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define



broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

For the cramping construction of the Act pressed upon us, support cannot be found in its legislative history. The principal argument is that § 303(i), empowering the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting," intended to restrict the scope of the Commission's powers to the technical and engineering aspects of chain broadcasting. This provision comes from § 4(h) of the Radio Act of 1927. It was introduced into the legislation as a Senate committee amendment to the House bill. (H. R. 9971, 69th Cong., 1st Sess.) This amendment originally read as follows:

(C) The Commission, from time to time, as public convenience, interest, or necessity requires, shall— . . .

(j) When stations are connected by wire for chain broadcasting, determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting.

The report of the Senate Committee on Interstate Commerce, which submitted this amendment, stated that under the bill the Commission was given "complete authority . . . to control chain broadcasting." Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 3. The bill as thus amended was passed by the Senate, and then sent to conference. The bill that emerged from the conference committee, and which became the Radio Act of 1927, phrased the amendment in the general terms now contained in § 303(i) of the 1934 Act: the Commission was authorized "to make special regulations applicable to radio stations engaged in chain broadcasting." The conference reports do not give any explanation of this particular change in phrasing, but they do state that the jurisdiction conferred upon the Commission by the conference bill was substantially identical with that conferred by the bill passed by the Senate. See Sen. Doc. No. 200, 69th Cong., 2d Sess., p. 17; H. Rep. 1886, 69th Cong., 2d Sess., p. 17. We agree with the District Court that in view of this legislative history, § 303(i) cannot be construed as no broader than the first clause of the Senate amendment, which limited the Commission's authority to the technical and engineering phases of chain broadcasting. There is no basis for assuming that the conference intended to preserve the first clause, which was of limited scope, by agreeing upon a provision which was broader and more comprehensive than those it supplanted.<sup>5</sup>

<sup>5</sup>In the course of the Senate debates on the conference report upon the bill that became the Radio Act of 1927, Senator Dill, who was in charge of the bill, said: "While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting. As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any corporation guilty of monopoly shall not

A totally different source of attack upon the Regulations is found in § 311 of the Act, which authorizes the Commission to withhold licenses from persons convicted of having violated the anti-trust laws. Two contentions are made—first, that this provision puts considerations relating to competition outside the Commission's concern before an applicant has been convicted of monopoly or other restraints of trade, and second, that, in any event, the Commission misconceived the scope of its powers under § 311 in issuing the Regulations. Both of these contentions are unfounded. Section 311 derives from § 13 of the Radio Act of 1927, which expressly commanded, rather than merely authorized, the Commission to refuse a license to any person judicially found guilty of having violated the anti-trust laws. The change in the 1934 Act was made, in the words of Senator Dill, the manager of the legislation in the Senate, because "it seemed fair to the committee to do that." 78 Cong. Rec. 8825. The Commission was thus permitted to exercise its judgment as to whether violation of the anti-trust laws disqualified an applicant from operating a station in the "public interest." We agree with the District Court that "The necessary implication from this [amendment in 1934] was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee." 47 F. Supp. 940, 944.

That the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws certainly does not render irrelevant consideration by the Commission of the effect of such conduct upon the "public interest, convenience, or necessity." A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted. By clarifying in § 311 the scope of the Commission's authority in dealing with persons convicted of violating the anti-trust laws, Congress can hardly be deemed to have limited the concept of "public interest" so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest," merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.

only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked. . . . In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, having the power to protect against a monopoly, must give such protection. I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. Power must be lodged somewhere, and I myself am unwilling to assume in advance that the commission proposed to be created will be servile to the desires and demands of great corporations of this country." 68 Cong. Rec. 2881.

Alternatively, it 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. (Report, pp. 46, 83, 83 n. 3.)

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 Regulations are assailed as "arbitrary and capricious." If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade v. United States*, 314 U.S. 534, 548, is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existences of practices which it regarded as contrary to the "public interest." The Commission knew that the wisdom of any action it took would have to be tested by experience:

We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. . . . The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial. (Report, p. 88.)

The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Since there is no basis for any claim that the Commission failed to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. Here, as in *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24-25, the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary." *Ibid.* See *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 285; *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38. Compare *Panama Refining Co. v. Ryan*, 293 U.S. 388, 428; *Intermountain Rate Cases*, 234 U.S. 476, 486-89; *United States v. Lowden*, 308 U.S. 225.

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.

A procedural point calls for just a word. The District Court, by granting the Government’s motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros. v. United States*, 280 U.S. 420; *Acker v. United States*, 298 U.S. 426.

Affirmed.

Mr. Justice Black and Mr. Justice Rutledge took no part in the consideration or decision of these cases.

### *MIND PROBES*

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1. All but one of the chain regulations begin with the words, “No license shall be granted to a standard broadcast station . . .” Why weren’t the regulations phrased in terms more directly pertinent to the networks whose practices they sought to alter?

2. A dissent by Justice Murphy in which Justice Roberts joined suggested inconsistency between this decision and Document 19. To which passages of *Sanders Brothers* did the dissent refer?

### *RELATED READING*

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# The Blue Book

## Public Service Responsibility of Broadcast

### Licenseses

March 7, 1946

By 1945 it became clear that the "chain regulations" had done little to change the basic nature of broadcasting in America. Neither the decimation of the system predicted by the industry nor the improvements hoped for by the Commission came to pass. Affiliated stations continued to rely on networks for programming, for it was economically disadvantageous to do otherwise. The FCC questioned whether regulation of affiliation agreements alone was sufficient to achieve the objectives of the Communications Act. The end of the war would mark the start of a major rise in the number of authorized AM radio stations. FM radio and television broadcasting were soon to emerge from their cocoons as well. Might the Commission have to do something about programming directly?

The FCC began to examine what licensees proposed to broadcast when they filed applications and what they actually programmed. There were many discrepancies between "promise" and "performance." In April, 1945, the Commission started to grant temporary renewals to broadcasters whose applications raised programming questions. In February of 1946 the Hearst station in Baltimore, WBAL, was designated for hearing by the FCC for allegedly failing to operate as it said it would when it was granted a power increase five years before. Three weeks later the most thoroughly substantiated and reasoned expression of Commission programming policy was issued.

The "Blue Book" became the common name of the document because of the color of its cover and because of the tendency of the policy statement's opponents to associate it with the "blue pencil" of censorship and/or "blue-blooded" authoritarianism (since official documents of the British government were also called "blue-books"). The three people who were primarily responsible for its contents were FCC Commissioner Clifford Durr, Commission staff member Edward Brech-

er, and Charles Siepmann, former executive of the British Broadcasting Corporation and American academician who served as a consultant on the project in 1945.

Charles Denny, who assumed the chairmanship of the Commission less than two weeks prior to issuance of the "Blue Book," vowed that the policy statement would not be "bleached." Denny became an executive for the National Broadcasting Company in 1947, by which time the broadcasting industry's well-orchestrated cries of protest had all but buried the "Blue Book." The FCC proceeded with the WBAL hearings, which became a comparative contest when a competing application for the license was made by a group which included Washington newsman Drew Pearson. The "Blue Book" was interred a few years later when the Commission voted four to two to renew WBAL's license [15 FCC 1149 (1951)].

Neither vigorously enforced nor officially repudiated by the FCC, the very potency of the "Blue Book" rendered it ineffectual. Its theme of balanced programming as a necessary component of broadcast service in the public interest coupled with its emphasis on a reasonable ratio of unsponsored ("sustaining") programs posed too serious a threat to the profitability of commercial radio for either the industry, Congress, or the FCC to want to match regulatory promise with performance.

[Part I treated five examples (including WBAL), pointing out a "need for detailed review on renewal." It is omitted.—Ed.]

## **PART II. COMMISSION JURISDICTION WITH RESPECT TO PROGRAM SERVICE**

The contention has at times been made that Section 326 of the Communications Act, which prohibits censorship or interference with free speech by the Commission, precludes any concern on the part of the Commission with the program service of licensees. This contention overlooks the legislative history of the Radio Act of 1927, the consistent administrative practice of the Federal Radio Commission, the re-enactment of identical provisions in the Communications Act of 1934 with full knowledge by the Congress that the language covered a Commission concern with program service, the relevant court decisions, and this Commission's concern with program service since 1934.

The Communications Act, like the Radio Act of 1927, directs the Commission to grant licenses and renewals of licenses only if public interest, convenience and necessity will be served thereby. The first duty of the Federal Radio Commission, created by the Act of 1927, was to give concrete meaning to the phrase

“public interest” by formulating standards to be applied in granting licenses for the use of practically all the then available radio frequencies. From the beginning it assumed that program service was a prime factor to be taken into consideration. The renewal forms prepared by it in 1927 included the following questions:

- (11) Attach printed program for the last week.
- (12) *Why will the operation of the station be in the public convenience, interest and necessity?*
  - (a) Average amount of time weekly devoted to the following services
    - (1) entertainment
    - (2) religious
    - (3) commercial
    - (4) educational
    - (5) agricultural
    - (6) fraternal
  - (b) Is direct advertising conducted in the interest of the applicant or others?

Copies of this form were submitted for Congressional consideration.<sup>1</sup>

In its Annual Report to Congress for 1928, the Commission stated (p. 161):

The Commission believes it is entitled to consider the program service rendered by the various applicants, to compare them, and to favor those which render the best service.

The Federal Radio Commission was first created for a term of one year only. In 1928 a bill was introduced to extend this term and extensive hearings were held before the House Committee on Merchant Marine and Fisheries. The Commissioners appeared before the Committee and were questioned at length as to their administration of the Act. At that time Commissioner Caldwell reported that the Commission had taken the position that

... each station occupying a desirable channel should be kept on its toes to produce and present the best programs possible and, if any station slips from that high standard, another station which is putting on programs of a better standard should have the right to contest the first station's position and after hearing the full testimony, to replace it. (*Hearings on Jurisdiction*, p. 188.)

The Commissioner also reported that he had concluded, after 18 months' experience, that station selections should not be made on the basis of priority in use and stated that he had found that a policy—

... of hearings, by which there is presented full testimony on the demonstrated capacity of the station to render service, is a much better test of who is entitled to those channels. (*Ibid.*)

<sup>1</sup>*Hearings on Jurisdiction of Radio Commission*, House Committee on Merchant Marine and Fisheries, 1928, p. 26.



By 1929 the Commission had formulated its standard of the program service which would meet, in fair proportion, "the tastes, needs and desires of all substantial groups among the listening public." A well-rounded program service, it said, should consist of

entertainment, consisting of music of both classical and lighter grades, religion, education, and instruction, important public events, discussion of public questions, weather, market reports, and news and matters of interest to all members of the family. (Great Lakes Broadcasting Co., reported in F.R.C., 3d Annual Report, pp. 33-35.)

By the time Congress had under consideration replacing the Radio Act of 1927 with a new regulatory statute, there no longer existed any doubt that the Commission did possess the power to take over-all program service into account. The broadcasting industry itself recognized the "manifest duty" of the Commission to consider program service. In 1934, at hearings before the House Committee on Interstate Commerce on one of the bills which finally culminated in the Communications Act of 1934, the National Association of Broadcasters submitted a statement which contained the following (*Hearings on H.R. 8301, 73rd Cong.*, p. 117):

*It is the manifest duty of the licensing authority, in passing upon applications for licenses or the renewal thereof, to determine whether or not the applicant is rendering or can render an adequate public service. Such service necessarily includes broadcasting of a considerable proportion of programs devoted to education, religion, labor, agricultural and similar activities concerned with human betterment. In actual practice over a period of 7 years, as the records of the Federal Radio Commission amply prove, this has been the principal test which the Commission has applied in dealing with broadcasting applications. (Emphasis supplied.)*

In hearings before the same committee on the same bill (*H.R. 8301, 73rd Cong.*) Chairman Sykes of the Federal Radio Commission testified (pp. 350-352):

That act puts upon the individual licensee of a broadcast station the private initiative to see that those programs that he broadcasts are in the public interest. . . . Then that act makes those individual licensees responsible to the licensing authority to see that their operations are in the public interest.

Our licenses to broadcasting stations last for 6 months. *The law says that they must operate in the public interest, convenience, and necessity. When the time for a renewal of those station licenses comes up, it is the duty of the Commission in passing on whether or not that station should be relicensed for another licensing period, to say whether or not their past performance during the last license period has been in the public interest. (Emphasis supplied.)*

Under the law, of course, we cannot refuse a renewal until there is a hearing before the Commission. We would have to have a hearing before the Commission, to go thoroughly into the nature of all of the broadcasts of those stations, consider all of those broadcasts, and then say whether or not it was operating in the public interest.

In the full knowledge of this established procedure of the Federal Radio Commission, the Congress thereupon re-enacted the relevant provisions in the Communications Act of 1934.

In the course of the discussion of the 1934 Act, an amendment to the Senate bill was introduced which required the Commission to allocate 25 percent of all broadcasting facilities for the use of educational, religious, agricultural, labor, cooperative and similar non-profit-making organizations. Senator Dill, who was the sponsor in the Senate of both the 1927 and 1934 Acts, spoke against the amendment, stating that the Commission already had the power to reach the desired ends (78 *Cong. Rec.* 8843):

The difficulty probably is in the failure of the present Commission to take the steps that it ought to take to see to it that a larger use is made of radio facilities for education and religious purposes.

I may say, however, that the owners of large radio stations now operating have suggested to me that it might be well to provide in the license that a certain percentage of the time of a radio station shall be allotted to religious, educational, or non-profit users.

Senator Hatfield, a sponsor of the amendment, had also taken the position that the Commission's power was adequate, saying (78 *Cong. Rec.* 8835):

I have no criticism to make of the personnel of the Radio Commission, except that *their refusal literally to carry out the law of the land warrants the Congress of the United States writing into legislation the desire of Congress that educational institutions be given a specified portion of the radio facilities of our country.* (Emphasis supplied.)

The amendment was defeated and Section 307(c) of the Act was substituted which required the Commission to study the question and to report to Congress its recommendations.

The Commission made such a study and in 1935 issued a report advising against the enactment of legislation. The report stated:

Commercial stations are now responsible under the law, to render a public service, and the tendency of the proposal would be to lessen this responsibility.

The Commission feels that present legislation has the flexibility essential to attain the desired ends without necessitating at this time any changes in the law.

There is no need for a change in the existing law to accomplish the helpful purposes of the proposal.

In order for non-profit organizations to obtain the maximum service possible, cooperation in good faith by the broadcasters is required. *Such cooperation should, therefore, be under the direction and supervision of the Commission.* (Report of the Federal Communications Commission to Congress Pursuant to Sec. 307(c) of the Communications Act of 1934, Jan. 22, 1935.) (Emphasis supplied.)

On the basis of the foregoing legislative history there can be no doubt that Congress intended the Commission to consider overall program service in passing on applications. The Federal Communications Commission from the beginning accepted the doctrine that its public interest determinations, like those of its predecessor, must be based in part at least on grounds of program service. Thus early in 1935 it designated for joint hearing the renewal applications of Stations KGFJ, KFVB, KMPC, KRKD, and KIEV, in part "to determine the nature and character of the program service rendered . . ." *In re McGlasham et al.*, 2 F.C.C. 145, 149. In its decision, the Commission set forth the basis of its authority as follows:

Section 309(a) of the Communications Act of 1934 is an exact restatement of Section 11 of the Radio Act of 1927. This section provides that subject to the limitations of the Act the Commission may grant licenses if the public interest, convenience, and necessity will be served thereby. The United States Court of Appeals for the District of Columbia in the case of *KFKB Broadcasting Association, Inc. v. Federal Radio Commission*, 60 App. D.C. 79, held that under Section 11 of the Radio Act of 1927 the Radio Commission was necessarily called upon to consider the character and quality of the service to be rendered and that in considering an application for renewal an important consideration is the past conduct of the applicant. (2 F.C.C. 145, 149.)

The courts have agreed that the Commission may consider program service of a licensee in passing on its renewal application. In the first case in which an applicant appealed from a Commission decision denying the renewal of a station license in part because of its program service, the court simply assumed that program service should be considered in determining the question of public interest and summarized and adopted the Commission's findings concerning program service as a factor in its own decision.<sup>2</sup> In 1931, however, the question was squarely presented to the Court of Appeals when the *KFKB Broadcasting Association* contended that the action of the Commission in denying a renewal of its license because of the type of program material and advertising which it had broadcast, constituted censorship by the Commission. The Court sustained the Commission, saying:

It is apparent, we think, that the business is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, *the Commission is necessarily called upon to consider the character and quality of the service to be rendered.* In considering an application for a renewal of a license, an important consideration is the past conduct of the applicant, for "by their fruits shall ye know them." Matt. VII:20. Especially is this true in a case like the present, where the evidence clearly justifies the conclusion that the future conduct of the station will not differ from the past. (*KFKB Broadcasting Association v. Federal Radio Commission*, 47 F. 2d 670.) (Emphasis supplied.)

<sup>2</sup>*Technical Radio Laboratory v. Federal Radio Commission*, 59 App. D.C. 125, 36 F. (2d) 111.

In 1932, the Court affirmed this position in *Trinity Methodist Church v. Federal Radio Commission*, 62 F. (2d) 850, and went on to say that it is the "duty" of the Commission "to take notice of the appellant's conduct in his previous use of the permit."

The question of the nature of the Commission's power was presented to the Supreme Court in the *network* case. The contention was then made that the Commission's power was limited to technological matters only. The Court rejected this, saying (*National Broadcasting Company v. United States*, 319 U.S. 190, 216-27):

The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the service to be rendered have governed the application of the standard of "public interest, convenience, or necessity."

The foregoing discussion should make it clear not only that the Commission has the authority to concern itself with program service, but that it is under an affirmative duty, in its public interest determinations, to give full consideration to program service. Part III of this Report will consider some particular aspects of program service as they bear upon the public interest.

[Part III is omitted. It dealt at considerable length with the desirability of stations carrying sustaining, local live, and public issue discussion programming and eliminating advertising excesses.—Ed.]

#### PART IV. ECONOMIC ASPECTS

The problem of program service is intimately related to economic factors. A prosperous broadcasting industry is obviously in a position to render a better program service to the public than an industry which must pinch and scrape to make ends meet. Since the revenues of American broadcasting come primarily from advertisers, the terms and conditions of program service must not be such as to block the flow of advertising revenues into broadcasting. Finally, the public benefits when the economic foundations of broadcasting are sufficiently firm to insure a flow of new capital into the industry, especially at present when the development of FM and television is imminent.

A review of the economic aspects of broadcasting during recent years indicates that there are no economic considerations to prevent the rendering of a considerably broader program service than the public is currently afforded.\*

\*Sixteen tables of economic data supporting this view are omitted. [Ed.]

## PART V. SUMMARY AND CONCLUSIONS— PROPOSALS FOR FUTURE COMMISSION POLICY

### A. Role of the Public

Primary responsibility for the American system of broadcasting rests with the licensee of broadcast stations, including the network organizations. It is to the stations and networks rather than to federal regulation that listeners must primarily turn for improved standards of program service. The Commission, as the licensing agency established by Congress, has a responsibility to consider overall program service in its public interest determinations, but affirmative improvement of program service must be the result primarily of other forces.

One such force is self-regulation by the industry itself, through its trade associations.

Licensees acting individually can also do much to raise program service standards, and some progress has indeed been made. Here and there across the country, some stations have evidenced an increased awareness of the importance of sustaining programs, live programs, and discussion programs. Other stations have eliminated from their own program service the middle commercial, the transcribed commercial, the piling up of commercials, etc. This trend toward self-improvement, if continued, may further buttress the industry against the rising tide of informed and responsible criticism.

Forces outside the broadcasting industry similarly have a role to play in improved program service. There is need, for example, for professional radio critics, who will play in this field the role which literary and dramatic critics have long assumed in the older forms of artistic expression. It is, indeed, a curious instance of the time lag in our adjustment to changed circumstances that while plays and concerts performed to comparatively small audiences in the "legitimate" theater or concert hall are regularly reviewed in the press, radio's best productions performed before an audience of millions receive only occasional and limited critical consideration. *Publicity* for radio programs is useful, but limited in the function it performs. Responsible criticism can do much more than mere promotion; it can raise the standards of public appreciation and stimulate the free and unfettered development of radio as a new medium of artistic expression. The independent radio critic, assuming the same role long occupied by the dramatic critic and the literary critic, can bring to bear an objective judgment on questions of good taste and of artistic merit which lie outside the purview of this Commission. The reviews and critiques published weekly in *Variety* afford an illustration of the role that independent criticism can play; newspapers and periodicals might well consider the institution of similar independent critiques for the general public.

Radio listener councils can also do much to improve the quality of program service. Such councils, notably in Cleveland, Ohio, and Madison, Wisconsin, have already shown the possibilities of independent listener organization. First, they can provide a much needed channel through which listeners can convey to broadcasters the wishes of the vast but not generally articulate radio audience. Second, listener

councils can engage in much needed research concerning public tastes and attitudes. Third, listener councils can check on the failure of network affiliates to carry outstanding network sustaining programs, and on the local programs substituted for outstanding network sustaining programs. Fourth, they can serve to publicize and to promote outstanding programs—especially sustaining programs which at present suffer a serious handicap for lack of the vast promotional enterprise which goes to publicize many commercial programs. Other useful functions would also no doubt result from an increase in the number and an extension of the range of activities of listener councils, cooperating with the broadcasting industry but speaking solely for the interest of listeners themselves.

Colleges and universities, some of them already active in the field, have a like distinctive role to play. Together with the public schools, they have it in their power to raise a new generation of listeners with higher standards and expectations of what radio can offer.

In radio workshops, knowledge may be acquired of the techniques of radio production. There are already many examples of students graduating from such work who have found their way into the industry, carrying with them standards and conceptions of radio's role, as well as talents, by which radio service cannot fail to be enriched.

Even more important, however, is the role of colleges and universities in the field of radio research. There is room for a vast expansion of studies of the commercial, artistic and social aspects of radio. The cultural aspects of radio's influence provide in themselves a vast and fascinating field of research.

It is hoped that the facts emerging from this report and the recommendations which follow will be of interest to the groups mentioned. With them rather than with the Commission rests much of the hope for improved broadcasting quality.

#### B. Role of the Commission

While much of the responsibility for improved program service lies with the broadcasting industry and with the public, the Commission has a statutory responsibility for the public interest, of which it cannot divest itself. The Commission's experience with the detailed review of broadcast renewal applications since April 1945, together with the facts set forth in this report, indicate some current trends in broadcasting which, with reference to licensing procedure, require its particular attention.

In issuing and in renewing the licenses of broadcast stations the Commission proposes to give particular consideration to four program service factors relevant to the public interest. These are: (1) the carrying of sustaining programs, including network sustaining programs, with particular reference to the retention by licensees of a proper discretion and responsibility for maintaining a well-balanced program structure; (2) the carrying of local live programs; (3) the carrying of programs devoted to the discussion of public issues, and (4) the elimination of advertising excesses.

(1) *Sustaining programs.* The carrying of sustaining programs has always been deemed one aspect of broadcast operation in the public interest. Sustaining

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oted above . . . , perform a five-fold function in (a) maintaining an  
balance, (b) providing time for programs inappropriate for sponsor-  
ing time for programs serving particular minority tastes and interests,  
me for non-profit organizations—religious, civic, agricultural, labor,  
, and (e) providing time for experiment and for unfettered artistic

ly, the Commission concludes that one standard of operation in the  
s a reasonable proportion of time devoted to sustaining programs.  
if sustaining programs are to perform their traditional functions in  
system of broadcasting, they must be broadcast at hours when the  
is awake and listening. The time devoted to sustaining programs, accordingly,  
ould be reasonably distributed among the various segments of the broadcast day.

For the reasons set forth . . . , the Commission, in considering overall program  
balance, will also take note of network sustaining programs available to but not  
carried by a station, and of the programs which the station substitutes therefor.

(2) *Local live programs.* The Commission has always placed a marked  
emphasis, and in some cases perhaps an undue emphasis, on the carrying of local  
live programs as a standard of public interest. The development of network, tran-  
scription, and wire news services is such that no sound public interest appears to be  
served by continuing to stress local live programs exclusively at the expense of these  
other categories. Nevertheless, reasonable provision for local self-expression still re-  
mains an essential function of a station's operation . . . , and will continue to be so  
regarded by the Commission. In particular, public interest requires that such pro-  
grams should not be crowded out of the best listening hours.

(3) *Programs devoted to the discussion of public issues.* The crucial need  
for discussion programs, at the local, national, and international levels alike is  
universally realized . . . Accordingly, the carrying of such programs in reasonable  
sufficiency, and during good listening hours, is a factor to be considered in any find-  
ing of public interest.

(4) *Advertising excesses.* The evidence set forth . . . warrants the conclusion  
that some stations during some or many portions of the broadcast day have engaged  
in advertising excesses which are incompatible with their public responsibilities,  
and which threaten the good name of broadcasting itself.

As the broadcasting industry itself has insisted, the public interest clearly re-  
quires that the amount of time devoted to advertising matter shall bear a reasonable  
relationship to the amount of time devoted to programs. Accordingly, in its appli-  
cation forms the Commission will request the applicant to state how much time he  
proposes to devote to advertising matter in any one hour.

This by itself will not, of course, result in the elimination of some of the  
particular excesses described . . . This is a matter in which self-regulation by the  
industry may properly be sought and indeed expected. The Commission has no de-  
sire to concern itself with the particular length, content, or irritating qualities of  
particular commercial plugs.

### C. Procedural Proposals

In carrying out the above objectives, the Commission proposes substantially unchanged its present basic licensing procedures—namely, filing of a written application setting forth the proposed program service or station, the consideration of that application on its merits, and subsequent comparison of promise and performance when an application is received for renewal of the station license. The ends sought can best be achieved, so far as presently appears, by appropriate modification of the particular forms and procedures currently in use and by a generally more careful consideration of renewal applications.

The particular procedural changes proposed are set forth below. They will not be introduced immediately or simultaneously, but rather from time to time as circumstances warrant. Meanwhile, the Commission invites comment from licensees and from the public.

#### (1) Uniform Definitions and Program Logs

The Commission has always recognized certain basic categories of programs—e.g., commercial and sustaining, network, transcribed, recorded, local, live, etc. Such classifications must, under Regulation 3.404, be shown upon the face of the program log required to be kept by each standard broadcast station; and the Commission, like its predecessor, has always required data concerning such program classifications in its application forms.

Examination of logs shows, however, that there is no uniformity or agreement concerning what constitutes a “commercial” program, a “sustaining” program, a “network” program, etc. Accordingly, the Commission will adopt uniform definitions of basic program terms and classes, which are to be used in all presentations to the Commission. The proposed definitions are set forth below.

A *commercial program* (C) is any program the time for which is paid for by a sponsor *or* any program which is interrupted by a spot announcement (as defined below), at intervals of less than 15 minutes. A network program shall be classified as “commercial” if it is commercially sponsored on the network, even though the particular station is not paid for carrying it—unless all commercial announcements have been deleted from the program by the station.

(It will be noted that any program which is *interrupted* by a commercial announcement is classified as a commercial program, even though the purchaser of the interrupting announcement has not also purchased the time preceding and following. The result is to classify so-called “participating” programs as commercial. Without such a rule, a 15-minute program may contain five or even more minutes of advertising and still be classified as “sustaining.” Under the proposed definition, a program may be classified as “sustaining” although preceded and followed by spot announcements, but if a spot announcement *interrupts* a program, the program must be classified as “commercial.”)

A *sustaining program* (S) is any program which is *neither* paid for by a sponsor *nor* interrupted by a spot announcement (as defined below).



A *network* program (N) is any program furnished to the station by a network or another station. Transcribed delayed broadcasts of network programs are classified as "network," not "recorded." Programs are classified as network whether furnished by a nationwide, regional, or special network or by another station.

A *recorded* program (R) is any program which uses phonograph records, electrical transcriptions, or other means of mechanical reproduction in whole or in part—except where the recording is wholly incidental to the program and is limited to background sounds, sound effects, identifying themes, musical "bridges," etc. A program part transcribed or recorded and part live is classified as "recorded" unless the recordings are wholly incidental, as above. A transcribed delayed broadcast of a network program, however, is not classified as "recorded" but as "network."

A *wire* program (W) is any program the text of which is distributed to a number of stations by telegraph, teletype, or similar means, and read in whole or in part by a local announcer. Programs distributed by the wire news services are "wire" programs. A news program which is part wire and in part of local non-syndicated origin is classified as "wire" if more than half of the program is usually devoted to the reading verbatim of the syndicated wire text, but is classified as "live" if more than half is usually devoted to local news or comment.

(The above is a new program category. Programs in this category resemble network and transcribed programs in the respect that they are syndicated to scores or hundreds of stations. They resemble local live programs only in the respect that the words are vocalized by a local voice; the text is not local but syndicated. Such programs have an important role in broadcasting, especially in the dissemination of news. With respect to stations not affiliated with a network, the wire program for timely matter, plus the transcription for less urgent broadcasts affords a close approach to the services of a regular network. The only difficulty is that with respect to program classifications heretofore, the wire program has been merged with the local live program, which it resembles only superficially, preventing a statistical analysis of either. By establishing definitions for "wire commercial" and "wire sustaining," the Commission expects to make possible statistical studies with respect to such programs, and also to make more significant the statistical studies with respect to the "local live commercial" and "local live sustaining" categories.)

A *local live* program (L) is any local program which uses live talent exclusively, whether originating in the station's studios or by remote control. Programs furnished to a station by a network or another station, however, are not classified as "live" but as "network." A program which uses recordings in whole or in part, except in a wholly incidental manner, should not be classified as "live" but as "recorded." Wire programs, as defined above, should likewise not be classified as "live."

A *sustaining public service announcement* (PSA) is an announcement which is not paid for by a sponsor and which is devoted to a non-profit cause—e.g., war bonds, Red Cross, public health, civic announcements, etc. Promotional, "courtesy," participating announcements, etc. should not be classified as "sustaining public service announcements" but as "spot announcements." War Bond, Red Cross, civic and similar announcements for which the station receives remuneration should not

be classified as "sustaining public service announcements" but as "spot announcements."

A *spot announcement* (SA) is any announcement which is neither a sustaining public service announcement (as above defined) nor a station identification announcement (call letters and location). An announcement should be classified as a "spot announcement," whether or not the station receives remuneration, unless it is devoted to a nonprofit cause. Sponsored time signals, sponsored weather announcements, etc. are spot announcements. Unsponsored time signals, weather announcements, etc., are program matter and not classified as announcements. Station identification announcements should *not* be classified as either sustaining public service or spot announcements, if limited to call letters, location, and identification of the licensee and network.

The Commission further proposes to amend Regulation 3.404 to provide in part that the program log shall contain:

An entry classifying each program as "network commercial" (NC); "network sustaining" (NS); "recorded commercial" (RC); "recorded sustaining" (RS); "wire commercial" (WC); "wire sustaining" (WS); "local live commercial" (LC); or "local live sustaining" (LS); and classifying each announcement as "spot announcement" (SA) or "sustaining public service announcement" (PSA).

The adoption of uniform definitions will make possible a fairer comparison of program representations and performance, and better statistical analyses.

## (2) Segments of the Broadcast Day

The Commission has always recognized, as has the industry, that different segments of the broadcast day have different characteristics and that different types of programming are therefore permissible. For example, the *NAB Code*, until recently, and many stations permit a greater proportion of advertising during the day than at night. The Commission's Chain Broadcasting Regulations recognize four segments: 8 a.m.—1 p.m., 1 p.m.—6 p.m., 6 p.m.—11 p.m., and all other hours. Most stations make distinctions of hours in their rate cards.

In general, sustaining and live programs have tended to be crowded out of the best listening hours from 6 to 11 p.m., and also in a degree out of the period from 8 a.m. to 6 p.m. At least some stations have improved the ratios shown in reports to the Commission, but not the service rendered the public, by crowding sustaining programs into the hours after 11 p.m. and before dawn when listeners are few and sponsors fewer still. Clearly the responsibility for public service cannot be met by broadcasting public service programs only during such hours. A well-balanced program structure requires balance during the best listening hours.

Statistical convenience requires that categories be kept to a minimum. In general, the segments of the broadcast day established in the Chain Broadcasting Regulations appear satisfactory, except that no good purpose appears to be served in connection with program analysis by calculating separately the segments from

programs, as noted above . . . , perform a five-fold function in (a) maintaining an overall program balance, (b) providing time for programs inappropriate for sponsorship, (c) providing time for programs serving particular minority tastes and interests, (d) providing time for non-profit organizations—religious, civic, agricultural, labor, educational, etc., and (e) providing time for experiment and for unfettered artistic self-expression.

Accordingly, the Commission concludes that one standard of operation in the public interest is a reasonable proportion of time devoted to sustaining programs.

Moreover, if sustaining programs are to perform their traditional functions in the American system of broadcasting, they must be broadcast at hours when the public is awake and listening. The time devoted to sustaining programs, accordingly, should be reasonably distributed among the various segments of the broadcast day.

For the reasons set forth . . . , the Commission, in considering overall program balance, will also take note of network sustaining programs available to but not carried by a station, and of the programs which the station substitutes therefor.

(2) *Local live programs.* The Commission has always placed a marked emphasis, and in some cases perhaps an undue emphasis, on the carrying of local live programs as a standard of public interest. The development of network, transcription, and wire news services is such that no sound public interest appears to be served by continuing to stress local live programs exclusively at the expense of these other categories. Nevertheless, reasonable provision for local self-expression still remains an essential function of a station's operation . . . , and will continue to be so regarded by the Commission. In particular, public interest requires that such programs should not be crowded out of the best listening hours.

(3) *Programs devoted to the discussion of public issues.* The crucial need for discussion programs, at the local, national, and international levels alike is universally realized . . . Accordingly, the carrying of such programs in reasonable sufficiency, and during good listening hours, is a factor to be considered in any finding of public interest.

(4) *Advertising excesses.* The evidence set forth . . . warrants the conclusion that some stations during some or many portions of the broadcast day have engaged in advertising excesses which are incompatible with their public responsibilities, and which threaten the good name of broadcasting itself.

As the broadcasting industry itself has insisted, the public interest clearly requires that the amount of time devoted to advertising matter shall bear a reasonable relationship to the amount of time devoted to programs. Accordingly, in its application forms the Commission will request the applicant to state how much time he proposes to devote to advertising matter in any one hour.

This by itself will not, of course, result in the elimination of some of the particular excesses described . . . This is a matter in which self-regulation by the industry may properly be sought and indeed expected. The Commission has no desire to concern itself with the particular length, content, or irritating qualities of particular commercial plugs.

### C. Procedural Proposals

In carrying out the above objectives, the Commission proposes to continue substantially unchanged its present basic licensing procedures—namely, the requiring of a written application setting forth the proposed program service of the station, the consideration of that application on its merits, and subsequently the comparison of promise and performance when an application is received for a renewal of the station license. The ends sought can best be achieved, so far as presently appears, by appropriate modification of the particular forms and procedures currently in use and by a generally more careful consideration of renewal applications.

The particular procedural changes proposed are set forth below. They will not be introduced immediately or simultaneously, but rather from time to time as circumstances warrant. Meanwhile, the Commission invites comment from licensees and from the public.

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Examination of logs shows, however, that there is no uniformity or agreement concerning what constitutes a “commercial” program, a “sustaining” program, a “network” program, etc. Accordingly, the Commission will adopt uniform definitions of basic program terms and classes, which are to be used in all presentations to the Commission. The proposed definitions are set forth below.

A *commercial program* (C) is any program the time for which is paid for by a sponsor *or* any program which is interrupted by a spot announcement (as defined below), at intervals of less than 15 minutes. A network program shall be classified as “commercial” if it is commercially sponsored on the network, even though the particular station is not paid for carrying it—unless all commercial announcements have been deleted from the program by the station.

(It will be noted that any program which is *interrupted* by a commercial announcement is classified as a commercial program, even though the purchaser of the interrupting announcement has not also purchased the time preceding and following. The result is to classify so-called “participating” programs as commercial. Without such a rule, a 15-minute program may contain five or even more minutes of advertising and still be classified as “sustaining.” Under the proposed definition, a program may be classified as “sustaining” although preceded and followed by spot announcements, but if a spot announcement *interrupts* a program, the program must be classified as “commercial.”)

A *sustaining program* (S) is any program which is *neither* paid for by a sponsor *nor* interrupted by a spot announcement (as defined below).

A *network* program (N) is any program furnished to the station by a network or another station. Transcribed delayed broadcasts of network programs are classified as "network," not "recorded." Programs are classified as network whether furnished by a nationwide, regional, or special network or by another station.

A *recorded* program (R) is any program which uses phonograph records, electrical transcriptions, or other means of mechanical reproduction in whole or in part—except where the recording is wholly incidental to the program and is limited to background sounds, sound effects, identifying themes, musical "bridges," etc. A program part transcribed or recorded and part live is classified as "recorded" unless the recordings are wholly incidental, as above. A transcribed delayed broadcast of a network program, however, is not classified as "recorded" but as "network."

A *wire* program (W) is any program the text of which is distributed to a number of stations by telegraph, teletype, or similar means, and read in whole or in part by a local announcer. Programs distributed by the wire news services are "wire" programs. A news program which is part wire and in part of local non-syndicated origin is classified as "wire" if more than half of the program is usually devoted to the reading verbatim of the syndicated wire text, but is classified as "live" if more than half is usually devoted to local news or comment.

(The above is a new program category. Programs in this category resemble network and transcribed programs in the respect that they are syndicated to scores or hundreds of stations. They resemble local live programs only in the respect that the words are vocalized by a local voice; the text is not local but syndicated. Such programs have an important role in broadcasting, especially in the dissemination of news. With respect to stations not affiliated with a network, the wire program for timely matter, plus the transcription for less urgent broadcasts affords a close approach to the services of a regular network. The only difficulty is that with respect to program classifications heretofore, the wire program has been merged with the local live program, which it resembles only superficially, preventing a statistical analysis of either. By establishing definitions for "wire commercial" and "wire sustaining," the Commission expects to make possible statistical studies with respect to such programs, and also to make more significant the statistical studies with respect to the "local live commercial" and "local live sustaining" categories.)

A *local live* program (L) is any local program which uses live talent exclusively, whether originating in the station's studios or by remote control. Programs furnished to a station by a network or another station, however, are not classified as "live" but as "network." A program which uses recordings in whole or in part, except in a wholly incidental manner, should not be classified as "live" but as "recorded." Wire programs, as defined above, should likewise not be classified as "live."

A *sustaining public service announcement* (PSA) is an announcement which is not paid for by a sponsor and which is devoted to a non-profit cause—e.g., war bonds, Red Cross, public health, civic announcements, etc. Promotional, "courtesy," participating announcements, etc. should not be classified as "sustaining public service announcements" but as "spot announcements." War Bond, Red Cross, civic and similar announcements for which the station receives remuneration should not

be classified as "sustaining public service announcements" but as "spot announcements."

A *spot announcement* (SA) is any announcement which is neither a sustaining public service announcement (as above defined) nor a station identification announcement (call letters and location). An announcement should be classified as a "spot announcement," whether or not the station receives remuneration, unless it is devoted to a nonprofit cause. Sponsored time signals, sponsored weather announcements, etc. are spot announcements. Unsponsored time signals, weather announcements, etc., are program matter and not classified as announcements. Station identification announcements should *not* be classified as either sustaining public service or spot announcements, if limited to call letters, location, and identification of the licensee and network.

The Commission further proposes to amend Regulation 3.404 to provide in part that the program log shall contain:

An entry classifying each program as "network commercial" (NC); "network sustaining" (NS); "recorded commercial" (RC); "recorded sustaining" (RS); "wire commercial" (WC); "wire sustaining" (WS); "local live commercial" (LC); or "local live sustaining" (LS); and classifying each announcement as "spot announcement" (SA) or "sustaining public service announcement" (PSA).

The adoption of uniform definitions will make possible a fairer comparison of program representations and performance, and better statistical analyses.

## (2) Segments of the Broadcast Day

The Commission has always recognized, as has the industry, that different segments of the broadcast day have different characteristics and that different types of programming are therefore permissible. For example, the *NAB Code*, until recently, and many stations permit a greater proportion of advertising during the day than at night. The Commission's Chain Broadcasting Regulations recognize four segments: 8 a.m.—1 p.m., 1 p.m.—6 p.m., 6 p.m.—11 p.m., and all other hours. Most stations make distinctions of hours in their rate cards.

In general, sustaining and live programs have tended to be crowded out of the best listening hours from 6 to 11 p.m., and also in a degree out of the period from 8 a.m. to 6 p.m. At least some stations have improved the ratios shown in reports to the Commission, but not the service rendered the public, by crowding sustaining programs into the hours after 11 p.m. and before dawn when listeners are few and sponsors fewer still. Clearly the responsibility for public service cannot be met by broadcasting public service programs only during such hours. A well-balanced program structure requires balance during the best listening hours.

Statistical convenience requires that categories be kept to a minimum. In general, the segments of the broadcast day established in the Chain Broadcasting Regulations appear satisfactory, except that no good purpose appears to be served in connection with program analysis by calculating separately the segments from

8 a.m. to 1 p.m. and from 1 p.m. to 6 p.m. Accordingly, for present purposes it is proposed to merge these segments, so that the broadcast day will be composed of three segments only: 8 a.m.—6 p.m., 6 p.m.—11 p.m., and all other hours.

The categories set forth above, plus the segments herein defined, make possible a standard program log analysis as in the form shown below.

	8 a.m. 6 p.m.	6 p.m. 11 p.m.	All other hours	Total
Network commercial (NC)				
Network sustaining (NS)				
Recorded commercial (RC)				
Recorded sustaining (RS)				
Wire commercial (WC)				
Wire sustaining (WS)				
Live commercial (LC)				
Live sustaining (LS)				
Total <sup>1</sup>				
No. of Spot Announcements (SA)				
No. of Sustaining Public Service Announcements (PSA)				

<sup>1</sup> Totals should equal full operating time during each segment.

The above schedule will be uniformly utilized in Commission application forms and annual report forms in lieu of the various types of schedules now prevailing. In using it, stations may calculate the length of programs to the nearest five minutes.

### (3) Annual Reports and Statistics

For some years, the Commission has called for a statement of the number of hours devoted to various classes of programs each year, in connection with the Annual Financial Reports of broadcast stations and networks. Requiring such figures for an entire year may constitute a considerable accounting burden on the stations, and may therefore impair the quality of the reports. Accordingly, the Commission proposes hereafter to require these data in the Annual Financial Reports only for one week.

To make the proposed week as representative as possible of the year as a whole, the Commission will utilize a procedure heretofore sometimes used by stations in presentations to the Commission. At the end of each year, it will select at random a Monday in January or February, a Tuesday in March, a Wednesday in April, a Thursday in May or June, a Friday in July or August, a Saturday in September or October, and a Sunday in November or December, and will ask for detailed program analyses for these seven days. The particular days chosen will vary

from year to year, and will be drawn so as to avoid holidays and other atypical occasions.

The information requested will be in terms of the definitions and time periods set forth above. Statistical summaries and trends will be published annually.

The Commission will also call upon the networks for quarterly statements of the stations carrying and failing to carry network sustaining programs during a sample week in each quarter.

#### (4) Revision of Application Forms

Since the establishment of the Federal Radio Commission, applicants for new stations have been required to set forth their program plans, and applications have been granted in part on the basis of representations concerning program plans. Applications for renewal of license, assignment of license, transfer of control of licensee corporation, and modification of license have similarly included, in various forms, representations concerning program service rendered or to be rendered. The program service questions now asked on the Commission's application forms are not uniform, and not closely integrated with current Commission policy respecting program service. It is proposed, accordingly, to revise the program service questions on all Commission forms to bring them into line with the policies set forth in this report.

Specifically, applicants for new stations will be required to fill out, as part of Form 301 or Form 319, a showing of their proposed program structure, utilizing the uniform schedule set forth on page 161. Applicants for renewal of license, consent to transfer of assignment, and modification of license will be required to fill out the same uniform schedule, both for a sample week under their previous licenses, and as an indication of their proposed operation if the application in question is granted.

The Commission, of course, recognizes that there is need for flexibility in broadcast operation. An application to the Commission should not be a straitjacket preventing a licensee from rendering an even better service than originally proposed. To provide the necessary flexibility, the information supplied in the uniform schedule will be treated as a responsible estimate rather than a binding pledge. However, attention should be called to the fact that the need for trustworthiness is at least as important with respect to representations concerning program service as with respect to statements concerning financial matters.

Stations will also be asked whether they propose to render a well-balanced program service, or to specialize in programs of a particular type or addressed to a particular audience. If their proposal is for a specialized rather than a balanced program service, a showing will be requested concerning the relative need for such service in the community as compared with the need for an additional station affording a balanced program service. On renewal, stations which have proposed a specialized service will be expected to show the extent to which they have in fact fulfilled their proposals during the period of their license.



Stations affiliated with a network will further be required to list network sustaining programs not carried during a representative week, and the programs carried in place of such programs.

If the Commission is able to determine from an examination of the application that a grant will serve the public interest, it will grant forthwith, as heretofore. If the Commission is unable to make such a determination on the basis of the application it will, as heretofore, designate the application for hearing.

#### (5) Action on Renewals

With the above changes in Commission forms and procedures, the Commission will have available in connection with renewal applications, specific data relevant to the finding of public interest required by the statute.

First, it will have available all the data concerning engineering, legal, accounting and other matters, as heretofore.

Second, it will have available a responsible estimate of the overall program structure appropriate for the station in question, as estimated by the licensee himself when making his previous application.

Third, it will have available affirmative representations of the licensee concerning the time to be devoted to sustaining programs, live programs, discussion programs, and advertising matter.

Fourth, it will have available from the annual reports to the Commission data concerning the actual program structure of the station during a sample week in each year under the existing license.

Fifth, it will have available a statement of the overall program structure of the station during a week immediately preceding the filing of the application being considered, and information concerning the carrying of network sustaining programs.

Sixth, it will have available the station's representations concerning program service under the license applied for.

If the Commission is able to determine on the basis of the data thus available that a grant will serve the public interest, it will continue as heretofore, to grant forthwith; otherwise, as heretofore, it will designate the renewal application for hearing.

#### *MIND PROBES*

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1. Many broadcasters claimed that enforcement of the Blue Book would have constituted FCC censorship. To what degree does this charge appear to have been justified by the contents and tone of the document?

2. In 1946 the FCC was deeply concerned about advertisers dictating station programming practices. Has this tendency grown or declined? To what extent is contemporary broadcast programming tailored to advertisers' needs?

*RELATED READING*

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- Broadcasting and the Bill of Rights. Washington, D.C.: National Association of Broadcasters, 1947.
- MEYER, RICHARD J., "The Blue Book," *Journal of Broadcasting*, 6:3 (Summer 1962), 197-207.
- \_\_\_\_\_, "Reaction to the 'Blue Book,'" *Journal of Broadcasting*, 6:4 (Fall 1962), 295-312.
- SIEPMANN, CHARLES A., *Radio's Second Chance*. Boston: Little, Brown, 1946.

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# The Fairness Doctrine

In the Matter of Editorializing by Broadcast Licensees

13 FCC 1246

June 1, 1949

Dissatisfaction with the "Mayflower Doctrine" (Document 20) mounted with the end of the war and issuance of the "Blue Book." Several FCC decisions of the time emphasized the need for broadcasters to deal with public controversies in an evenhanded manner [*United Broadcasting Co. (WHKC)*, 10 FCC 515 (1945); *Sam Morris*, 11 FCC 197 (1946); *Robert Harold Scott*, 11 FCC 372 (1946)], but licensee editorials still were apparently banned. In 1947 the Commission was persuaded to take another look at *Mayflower*, and hearings were scheduled for 1948.

While these hearings were under way the "Richards" case surfaced. An organization of professional newspeople charged George A. Richards, licensee of maximum-power radio stations in Los Angeles, Detroit, and Cleveland, with slanting the news. This case would drag on through 1951. Doubtless Richards' attempts to manipulate public opinion through biased news coverage influenced the commissioners who were pondering what to do about *Mayflower*.

The "Fairness Doctrine" in effect reversed the "Mayflower Doctrine's" prohibition against licensee advocacy. More importantly, the policy statement recapitulated two decades of FRC and FCC case law and *dicta* as it set down basic ground rules for the treatment of controversial issues of public importance on the air. The constitutionality of the "Fairness Doctrine" itself was confirmed two decades later by the Supreme Court's *Red Lion* decision (Document 34).

The "additional views" of Commissioner Webster and the "separate views" of Commissioner Jones are omitted below, though Commissioner Hennock's brief and prophetic dissent is included. Since two commissioners did not participate at all in the decision, it appears that the "Fairness Doctrine" attracted no more than a bare majority of the full FCC; in fact, if Jones' "separate views" are taken to be a dissent (a not unreasonable interpretation), then this policy statement had the

support of only a plurality of the Commission. In 1949 it was inconceivable that the doctrine would achieve its later importance.

While relatively few broadcasters took advantage of the chance to editorialize in the 1950's, a marked increase occurred in the 1960's. The "Fairness Doctrine" was given statutory recognition when Congress amended § 315 of the Communications Act in 1959 (Public Law 274, 86th Congress). The FCC issued a "Fairness Primer" in 1964 (40 FCC 598), which summarized fifteen years of FCC rulings in a question-and-answer format. Beginning in 1967 the "Fairness Doctrine" was made to apply to a limited class of broadcast advertising (see Document 32). This ended in 1974 when the FCC issued its "Fairness Report" (48 FCC 2d 1), which reaffirmed the basic tenets of the "Fairness Doctrine" without significant modification.

## REPORT OF THE COMMISSION

1. This report is issued by the Commission in connection with its hearings on the above entitled matter held at Washington, D.C., on March 1, 2, 3, 4, and 5, and April 19, 20, and 21, 1948. The hearing had been ordered on the Commission's own motion on September 5, 1947, because of our belief that further clarification of the Commission's position with respect to the obligations of broadcast licensees in the field of broadcasts of news, commentary and opinion was advisable. It was believed that in view of the apparent confusion concerning certain of the Commission's previous statements on these vital matters by broadcast licensees and members of the general public, as well as the professed disagreement on the part of some of these persons with earlier Commission pronouncements, a reexamination and restatement of its views by the Commission would be desirable. And in order to provide an opportunity to interested persons and organizations to acquaint the Commission with their views, prior to any Commission determination, as to the proper resolution of the difficult and complex problems involved in the presentation of radio news and comment in a democracy, it was designated for public hearing before the Commission *en banc* on the following issues:

1. To determine whether the expression of editorial opinions by broadcast station licensees on matters of public interest and controversy is consistent with their obligations to operate their stations in the public interest.
2. To determine the relationship between any such editorial expression and the affirmative obligation of the licensees to insure that a fair and equal presentation of all sides of controversial issues is made over their facilities.

2. At the hearings testimony was received from some 49 witnesses representing the broadcasting industry and various interested organizations and

members of the public. In addition, written statements of their position on the matter were placed into the record by 21 persons and organizations who were unable to appear and testify in person. The various witnesses and statements brought forth for the Commission's consideration, arguments on every side of both of the questions involved in the hearing. Because of the importance of the issues considered in the hearing, and because of the possible confusion which may have existed in the past concerning the policies applicable to the matters which were the subject of the hearing, we have deemed it advisable to set forth in detail and at some length our conclusions as to the basic considerations relevant to the expression of editorial opinion by broadcast licensees and the relationship of any such expression to the general obligations of broadcast licensees with respect to the presentation of programs involving controversial issues.

3. In approaching the issues upon which this proceeding has been held, we believe that the paramount and controlling consideration is the relationship between the American system of broadcasting carried on through a large number of private licensees upon whom devolves the responsibility for the selection and presentation of program material, and the congressional mandate that this licensee responsibility is to be exercised in the interests of, and as a trustee for the public at large which retains ultimate control over the channels of radio and television communications. One important aspect of this relationship, we believe, results from the fact that the needs and interests of the general public with respect to programs devoted to news commentary and opinion can only be satisfied by making available to them for their consideration and acceptance or rejection, of varying and conflicting views held by responsible elements of the community. And it is in the light of these basic concepts that the problems of insuring fairness in the presentation of news and opinion and the place in such a picture of any expression of the views of the station licensee as such must be considered.

4. It is apparent that our system of broadcasting, under which private persons and organizations are licensed to provide broadcasting service to the various communities and regions, imposes responsibility in the selection and presentation of radio program material upon such licensees. Congress has recognized that the requests for radio time may far exceed the amount of time reasonably available for distribution by broadcasters. It provided, therefore, in Section 3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. It is the licensee, therefore, who must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of radio broadcasting, and who must select or be responsible for the selection of the particular news items to be reported or the particular local, State, national or international issues or questions of public interest to be considered, as well as the person or persons to comment or analyze the news or to discuss or debate the issues chosen as topics for radio consideration: "The life of each community involves a multitude of interests some dominant and all pervasive such as interest in public affairs, education and similar matters and some highly specialized and limited to few. The practical

day-to-day problem with which every licensee is faced is one of striking a balance between these various interests to reflect them in a program service which is useful to the community, and which will in some way fulfill the needs and interests of the many." *Capital Broadcasting Company*, 4 Pike & Fischer, R.R. 21; *The Northern Corporation (WMEX)*, 4 Pike & Fischer, R.R. 333, 338. And both the Commission and the courts have stressed that this responsibility devolves upon the individual licensees, and can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments. *National Broadcasting Company v. United States*, 319 U.S. 190 (upholding the Commission's chain broadcasting regulations, Section 3.101-3.108, 3.231-3.238, 3.631-3.628). *Churchhill Tabernacle v. Federal Communications Commission*, 160 F. 2d 244 (See, rules and regulations, Sections 3.109, 3.239, 3.639); *Allen T. Simmons v. Federal Communications Commission*, 169 F. 2d 670, *certiorari denied* 335 U.S. 846.

5. But the inevitability that there must be some choosing between various claimants for access to a licensee's microphone, does not mean that the licensee is free to utilize his facilities as he sees fit or in his own particular interests as contrasted with the interests of the general public. The Communications Act of 1934, as amended, makes clear that licenses are to be issued only where the public interest, convenience or necessity would be served thereby. And we think it is equally clear that one of the basic elements of any such operation is the maintenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole. Section 301 of the Communications Act provides that it is the purpose of the act to maintain the control of the United States over all channels of interstate and foreign commerce. Section 326 of the act provides that this control of the United States shall not result in any impairment of the right of free speech by means of such radio communications. It would be inconsistent with these express provisions of the act to assert that, while it is the purpose of the act to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless persons who are granted limited rights to be licensees of radio stations, upon a finding under Sections 307(a) and 309 of the act that the public interest, convenience, or necessity would be served thereby, may themselves make radio unavailable as a medium of free speech. The legislative history of the Communications Act and its predecessor, the Radio Act of 1927 shows, on the contrary, that Congress intended that radio stations should not be used for the private interest, whims, or caprices of the particular persons who have been granted licenses, but in manner which will serve the community generally and the various groups which make up the community.<sup>1</sup> And the courts have consistently upheld Commission action giv-

<sup>1</sup> Thus in the Congressional debates leading to the enactment of the Radio Act of 1927 Congressman (later Senator) White stated (67 Cong. Rec. 5479, March 12, 1926):

"We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will, may transmit and by the assertion in its stead of the doctrine

ing recognition to and fulfilling that intent of Congress. *KFKB Broadcasting Association v. Federal Radio Commission*, 47 F. 2d 670; *Trinity Methodist Church, South v. Federal Radio Commission*, 62 F. 2d 850, *certiorari denied*, 288 U.S. 599.

6. It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that portions of the radio spectrum are allocated to that form of radio communications known as radiobroadcasting. Unquestionably, then, the standard of public interest, convenience and necessity as applied to radiobroadcasting must be interpreted in the light of this basic purpose. The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.<sup>2</sup> It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

7. This affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues has been reaffirmed by the Commission in a long series of decisions. The *United Broadcasting Co. (WHKC)* case, 10 FCC 515, emphasized that this duty includes the making of reasonable provision for the discussion of controversial issues of public importance in the community served, and to make sufficient time available for full discussion thereof. The *Scott* case, 3 Pike & Fischer, Radio Regulation 259, stated our conclusions that this

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that the right of the public to service is superior to the right of any individual to use the ether . . . the recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. *If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.*" (Italics added.)

And this view that the interest of the listening public rather than the private interests of particular licensees was reemphasized as recently as June 9, 1948, in a unanimous report of the Senate Committee on Interstate and Foreign Commerce on S. 1333 (80th Cong.) which would have amended the present Communications Act in certain respects. See S. Rept. No. 1567, 80th Cong. 2nd Sess., pp. 14-15.

<sup>2</sup>Cf., *Thornhill v. Alabama*, 310 U.S. 88, 95, 102; *Associated Press v. United States*, 326 U.S. 1, 20.

duty extends to all subjects of substantial importance to the community coming within the scope of free discussion under the first amendment without regard to personal views and opinions of the licensees on the matter, or any determination by the licensee as to the possible unpopularity of the views to be expressed on the subject matter to be discussed among particular elements of the station's listening audience. Cf., *National Broadcasting Company v. United States*, 319 U.S. 190; *Allen T. Simmons*, 3 Pike & Fischer, R.R. 1029, *affirmed*; *Simmons v. Federal Communications Commission*, 169 F. 2d 670, *certiorari denied*, 335 U.S. 846; *Bay State Beacon*, 3 Pike & Fischer, R.R. 1455, *affirmed*; *Bay State Beacon v. Federal Communications Commission*, U.S. App. D.C., decided December 20, 1948; *Petition of Sam Morris*, 3 Pike & Fischer, R.R. 154; *Thomas N. Beach*, 3 Pike & Fischer R.R. 1784. And the Commission has made clear that in such presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise. *Mayflower Broadcasting Co.*, 8 F.C.C. 333; *United Broadcasting Co. (WHKC)* 10 F.C.C. 515; Cf. *WBNX Broadcasting Co., Inc.*, 4 Pike & Fischer, R.R. 244 (memorandum opinion). Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time can radio be maintained as a medium of freedom of speech for the people as a whole. These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public.

8. It has been suggested in the course of the hearings that licensees have an affirmative obligation to insure fair presentation of all sides of any controversial issue before any time may be allocated to the discussion or consideration of the matter. On the other hand, arguments have been advanced in support of the proposition that the licensee's sole obligation to the public is to refrain from suppressing or excluding any responsible point of view from access to the radio. We are of the opinion, however, that any rigid requirement that licensees adhere to either of these extreme prescriptions for proper station programming techniques would seriously limit the ability of licensees to serve the public interest. Forums and roundtable discussions, while often excellent techniques of presenting a fair cross section of differing viewpoints on a given issue, are not the only appropriate devices for radio discussion, and in some circumstances may not be particularly appropriate or advantageous. Moreover, in many instances the primary "controversy" will be whether or not the particular problem should be discussed at all; in such circumstances, where the licensee has determined that the subject is of sufficient import to receive broadcast attention, it would obviously not be in the public interest for spokesmen for one of the opposing points of view to be able to exercise a veto power over the entire presentation by refusing to broadcast its position. Fairness in such circumstances might require no more than that the licensee make a reasonable effort to



secure responsible representation of the particular position and, if it fails in this effort, to continue to make available its facilities to the spokesmen for such position in the event that, after the original programs are broadcast, they then decide to avail themselves of a right to reply to present their contrary opinion. It should be remembered, moreover, that discussion of public issues will not necessarily be confined to questions which are obviously controversial in nature, and, in many cases, programs initiated with no thought on the part of the licensee of their possibly controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views. In such cases, however, fairness can be preserved without undue difficulty since the facilities of the station can be made available to the spokesmen for the groups wishing to state views in opposition to those expressed in the original presentation when such opposition becomes manifest.

9. We do not believe, however, that the licensee's obligations to serve the public interest can be met merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time. If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

10. It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist. Undoubtedly, over a period of time some licensees may make honest errors of judgment. But there can be no doubt that any licensee hon-

estly desiring to live up to its obligation to serve the public interest and making a reasonable effort to do so, will be able to achieve a fair and satisfactory resolution of these problems in the light of the specific facts.

11. It is against this background that we must approach the question of "editorialization"—the use of radio facilities by the licensees thereof for the expression of the opinions and ideas of the licensee on the various controversial and significant issues of interest to the members of the general public afforded radio (or television) service by the particular station. In considering this problem it must be kept in mind that such editorial expression may take many forms ranging from the overt statement of position by the licensee in person or by his acknowledged spokesmen to the selection and presentation of news editors and commentators sharing the licensee's general opinions or the making available of the licensee's facilities, either free of charge or for a fee to persons or organizations reflecting the licensee's viewpoint either generally or with respect to specific issues. It should also be clearly indicated that the question of the relationship of broadcast editorialization, as defined above, to operation in the public interest, is not identical with the broader problem of assuring "fairness" in the presentation of news, comment or opinion, but is rather one specific facet of this larger problem.

12. It is clear that the licensee's authority to determine the specific programs to be broadcast over his station gives him an opportunity, not available to other persons, to insure that his personal viewpoint on any particular issue is presented in his station's broadcasts, whether or not these views are expressly identified with the licensee. And, in the absence of governmental restraint, he would, if he so choose, be able to utilize his position as a broadcast licensee to weight the scales in line with his personal views, or even directly or indirectly to propagandize in behalf of his particular philosophy or views on the various public issues to the exclusion of any contrary opinions. Such action can be effective and persuasive whether or not it is accompanied by any editorialization in the narrow sense of overt statement of particular opinions and views identified as those of licensee.

13. The narrower question of whether any overt editorialization or advocacy by broadcast licensees, identified as such is consonant with the operation of their stations in the public interest, resolves itself, primarily into the issue of whether such identification of comment or opinion broadcast over a radio or television station with the licensee, as such, would inevitably or even probably result in such overemphasis on the side of any particular controversy which the licensee chooses to espouse as to make impossible any reasonably balanced presentation of all sides of such issues or to render ineffective the available safeguards of that overall fairness which is the essential element of operation in the public interest. We do not believe that any such consequence is either inevitable or probable, and we have therefore come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness detailed above, is not contrary to the public interest.

14. The Commission has given careful consideration to contentions of those witnesses at the hearing who stated their belief that any overt editorialization or advocacy by broadcast licensee is *per se* contrary to the public interest. The main

arguments advanced by these witnesses were that overt editorialization by broadcast licensees would not be consistent with the attainment of balanced presentations since there was a danger that the institutional good will and the production resources at the disposal of broadcast licensees would inevitably influence public opinion in favor of the positions advocated in the name of the licensee and that, having taken an open stand on behalf of one position in a given controversy, a licensee is not likely to give a fair break to the opposition. We believe, however, that these fears are largely misdirected, and that they stem from a confusion of the question of overt advocacy in the name of the licensee, with the broader issue of insuring that the station's broadcasts devoted to the consideration of public issues will provide the listening public with a fair and balanced presentation of differing viewpoints on such issues, without regard to the particular views which may be held or expressed by the licensee. Considered, as we believe they must be, as just one of several types of presentation of public issues, to be afforded their appropriate and nonexclusive place in the station's total schedule of programs devoted to balanced discussion and consideration of public issues, we do not believe that programs in which the licensee's personal opinions are expressed are intrinsically more or less subject to abuse than any other program devoted to public issues. If it be true that station good will and licensee prestige, where it exists, may give added weight to opinion expressed by the licensee, it does not follow that such opinion should be excluded from the air any more than it should in the case of any individual or institution which over a period of time has built up a reservoir of good will or prestige in the community. In any competition for public acceptance of ideas, the skills and resources of the proponents and opponents will always have some measure of effect in producing the results sought. But it would not be suggested that they should be denied expression of their opinions over the air by reason of their particular assets. What is against the public interest is for the licensee "to stack the cards" by a deliberate selection of spokesmen for opposing points of view to favor one viewpoint at the expense of the other, whether or not the views of those spokesmen are identified as the views of the licensee or of others. Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views, or the forcefulness with which the view is expressed, but by making the microphone available for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation.

15. Similarly, while licensees will in most instances have at their disposal production resources making possible graphic and persuasive techniques for forceful presentation of ideas, their utilization for the promulgation of the licensee's personal viewpoints will not necessarily or automatically lead to unfairness or lack of balance. While uncontrolled utilization of such resources for the partisan ends of the licensee might conceivably lead to serious abuses, such abuses could as well exist where the station's resources are used for the sole use of his personal spokesmen. The prejudicial or unfair use of broadcast production resources would, in either case, be contrary to the public interest.

16. The Commission is not persuaded that a station's willingness to stand up

and be counted on these particular issues upon which the licensee has a definite position may not be actually helpful in providing and maintaining a climate of fairness and equal opportunity for the expression of contrary views. Certainly the public has less to fear from the open partisan than from the covert propagandist. On many issues, of sufficient importance to be allocated broadcast time, the station licensee may have no fixed opinion or viewpoint which he wishes to state or advocate. But where the licensee, himself, believes strongly that one side of a controversial issue is correct and should prevail, prohibition of his expression of such position will not of itself insure fair presentation of that issue over his station's facilities, nor would open advocacy necessarily prevent an overall fair presentation of the subject. It is not a sufficient answer to state that a licensee *should* occupy the position of an impartial umpire, where the licensee is *in fact* partial. In the absence of a duty to present all sides of controversial issues, overt editorialization by station licensees could conceivably result in serious abuse. But where, as we believe to be the case under the Communications Act, such a responsibility for a fair and balanced presentation of controversial public issues exists, we cannot see how the open espousal of one point of view by the licensee should necessarily prevent him from affording a fair opportunity for the presentation of contrary positions or make more difficult the enforcement of the statutory standard of fairness upon any licensee.

17. It must be recognized, however, that the licensee's opportunity to express his own views as part of a general presentation of varying opinions on particular controversial issues, does not justify or empower any licensee to exercise his authority over the selection of program material to distort or suppress the basic factual information upon which any truly fair and free discussion of public issues must necessarily depend. The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible. A licensee would be abusing his position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news. No discussion of the issues involved in any controversy can be fair or in the public interest where such discussion must take place in a climate of false or misleading information concerning the basic facts of the controversy.

18. During the course of the hearing, fears have been expressed that any effort on the part of the Commission to enforce a reasonable standard of fairness and impartiality would inevitably require the Commission to take a stand on the merits of the particular issues considered in the programs broadcast by the several licensees, as well as exposing the licensees to the risk of loss of license because of "honest mistakes" which they may make in the exercise of their judgment with respect to the broadcasts of programs of a controversial nature. We believe that these fears are wholly without justification, and are based on either an assumption of abuse of power by the Commission or a lack of proper understanding of the role of the Commission, under the Communications Act, in considering the program service of

broadcast licensees in passing upon applications for renewal of license. While this Commission and its predecessor, the Federal Radio Commission, have, from the beginning of effective radio regulation in 1927, properly considered that a licensee's overall program service is one of the primary indicia of his ability to serve the public interest, actual consideration of such service has always been limited to a determination as to whether the licensee's programming, taken as a whole, demonstrates that the licensee is aware of his listening public and is willing and able to make an honest and reasonable effort to live up to such obligations. The action of the station in carrying or refusing to carry any particular program is of relevance only as the station's actions with respect to such programs fits into its overall pattern of broadcast service, and must be considered in the light of its other program activities. This does not mean, of course, that stations may, with impunity, engage in a partisan editorial campaign on a particular issue or series of issues provided only that the remainder of its program schedule conforms to the statutory norm of fairness; a licensee may not utilize the portion of its broadcast service which conforms to the statutory requirements as a cover or shield for other programming which fails to meet the minimum standards of operation in the public interest. But it is clear that the standard of public interest is not so rigid that an honest mistake or error in judgment on the part of a licensee will be or should be condemned where his overall record demonstrates a reasonable effort to provide a balanced presentation of comment and opinion on such issues. The question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved. It does not require any appraisal of the merits of the particular issue to determine whether reasonable efforts have been made to present both sides of the question. Thus, in appraising the record of a station in presenting programs concerning a controversial bill pending before the Congress of the United States, if the record disclosed that the licensee had permitted only advocates of the bill's enactment to utilize its facilities to the exclusion of its opponents, it is clear that no independent appraisal of the bill's merits by the Commission would be required to reach a determination that the licensee has misconstrued its duties and obligations as a person licensed to serve the public interest. The Commission has observed, in considering this general problem that "the duty to operate in the public interest is no esoteric mystery, but is essentially a duty to operate a radio station with good judgment and good faith guided by a reasonable regard for the interests of the community to be served." *Northern Corporation (WMEX)*, 4 Pike & Fischer, R.R. 333, 339. Of course, some cases will be clearer than others, and the Commission in the exercise of its functions may be called upon to weigh conflicting evidence to determine whether the licensee has or has not made reasonable efforts to present a fair and well-rounded presentation of particular public issues. But the standard of reasonableness and the reasonable approximation of a statutory norm is not an arbitrary standard incapable of administrative or judicial determination, but, on the contrary, one of the basic standards of conduct in numerous fields of Anglo-American law. Like all other flexible standards of conduct, it is subject to abuse and arbitrary interpretation and application by the duly authorized reviewing authori-

ties. But the possibility that a legitimate standard of legal conduct might be abused or arbitrarily applied by capricious governmental authority is not and cannot be a reason for abandoning the standard itself. And broadcast licensees are protected against any conceivable abuse of power by the Commission in the exercising of its licensing authority by the procedural safeguards of the Communications Act and the Administrative Procedure Act, and by the right of appeal to the courts from final action claimed to be arbitrary or capricious.

19. There remains for consideration the allegation made by a few of the witnesses in the hearing that any action by the Commission in this field enforcing a basic standard of fairness upon broadcast licensees necessarily constitutes an "abridgment of the right of free speech" in violation of the first amendment of the United States Constitution. We can see no sound basis for any such conclusion. The freedom of speech protected against governmental abridgment by the first amendment does not extend any privilege to government licensees of means of public communications to exclude the expression of opinions and ideas with which they are in disagreement. We believe, on the contrary, that a requirement that broadcast licensees utilize their franchises in a manner in which the listening public may be assured of hearing varying opinions on the paramount issues facing the American people is within both the spirit and letter of the first amendment. As the Supreme Court of the United States has pointed out in the *Associated Press* monopoly case:

It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the first amendment should be read as a command that the Government was without power to protect that freedom. . . . *That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of free society. Surely a command that the Government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.* Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution but freedom to combine to keep others from publishing is not. (*Associated Press v. United States*, 326 U.S. 1 at p. 20.)

20. We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgment by the first amendment. *United States v. Paramount Pictures, Inc., et al.*, 334 U.S. 131, 166. But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest. Indeed, it seems indisputable that full effect can only be given to the concept of freedom of speech on the radio by giving precedence to the right of the American public to be informed on all sides of public questions over any such individual exploitation for private purposes. Any regulation of radio, especially a system of limited licensees, is in a real sense an abridgment of the inherent freedom of persons to express themselves by means of radio communications. It is however, a necessary and consti-

tutional abridgment in order to prevent chaotic interference from destroying the great potential of this medium for public enlightenment and entertainment. *National Broadcasting Company v. United States*, 319 U.S. 190, . . .; cf. *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266; *Fisher's Blend Station, Inc. v. State Tax Commission*, 277 U.S. 650. Nothing in the Communications Act or its history supports any conclusion that the people of the Nation, acting through Congress, have intended to surrender or diminish their paramount rights in the air waves, including access to radio broadcasting facilities to a limited number of private licensees to be used as such licensees see fit, without regard to the paramount interests of the people. The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees.

21. To recapitulate, the Commission believes that under the American system of broadcasting the individual licensees of radio stations have the responsibility for determining the specific program material to be broadcast over their stations. This choice, however, must be exercised in a manner consistent with the basic policy of the Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private interests of the licensee. This requires that licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community. The particular format best suited for the presentation of such programs in a manner consistent with the public interest must be determined by the licensee in the light of the facts of each individual situation. Such presentation may include the identified expression of the licensee's personal viewpoint as part of the more general presentation of views or comments on the various issues, but the opportunity of licensees to present such views as they may have on matters of controversy may not be utilized to achieve a partisan or one-sided presentation of issues. Licensee editorialization is but one aspect of freedom of expression by means of radio. Only insofar as it is exercised in conformity with the paramount right of the public to hear a reasonably balanced presentation of all responsible viewpoints on particular issues can such editorialization be considered to be consistent with the licensee's duty to operate in the public interest. For the licensee is a trustee impressed with the duty of preserving for the public generally radio as a medium of free expression and fair presentation.

#### **Dissenting Views of Commissioner Hennock**

I agree with the majority that it is imperative that a high standard of impartiality in the presentation of issues of public controversy be maintained by broadcast licensees. I do not believe that the Commission's decision, however, will bring about the desired end. The standard of fairness as delineated in the report is virtually

impossible of enforcement by the Commission with our present lack of policing methods and with the sanctions given us by law. We should not underestimate the difficulties inherent in the discovery of unfair presentation in any particular situation, or the problem presented by the fact that the sole sanction the Commission possesses is total deprivation of broadcast privileges in a renewal or revocation proceeding which may occur long after the violation.

In the absence of some method of policing and enforcing the requirement that the public trust granted a licensee be exercised in an impartial manner, it seems foolhardy to permit editorialization by licensees themselves. I believe that we should have such a prohibition, unless we can substitute for it some more effective method of insuring fairness. There would be no inherent evil in the presentation of a licensee's viewpoint if fairness could be guaranteed. In the present circumstances, prohibiting it is our only instrument for insuring the proper use of radio in the public interest.

### *MIND PROBES*

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1. If the founding fathers had been aware of the coming rise of the mass circulation press and broadcasting, would they have written into the First Amendment a provision much like the Fairness Doctrine?

2. Distinguish between "equal opportunities" as used in § 315 of the Communications Act and the "reasonable opportunity" requirement of the Fairness Doctrine.

### *RELATED READING*

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## The TV Freeze

Television broadcasting began in America on a restricted basis in 1939. The military priorities of World War II impeded TV's growth and the resumption of peacetime civilian activity was accompanied by slow expansion of the fledgling medium. By 1948, with perhaps a million television receivers in American homes, many new TV stations were planning to go on the air. But only 12 channels (numbered 2-13) in the very high frequency (VHF) portion of the radio spectrum had been allocated to TV broadcasting by the FCC. This was an insufficient supply in light of the burgeoning demand for a limited number of channel assignments in the most populous sections of the country. Additionally, the FCC's postwar assignment table was creating technical interference problems among TV stations already on the air.

The FCC instituted a "freeze" on the issuance of new TV station licenses effective September 30, 1948, in order to give itself time to consider these problems. The freeze, which lasted until July 1, 1952, limited the number of operating TV stations to 108. During the freeze TV set ownership increased twenty-fold, coast-to-coast network interconnection lines were built by AT&T, and programming underwent a transition from roller derbies and "simulcasts" of radio shows to "I Love Lucy" and "Today." TV established itself as a profitable mass medium between 1948 and 1952. In fact, the 108 pre-freeze TV stations remain the most lucrative in the industry.

Early in the freeze the FCC established its allocation and assignment goals:

*Priority No. 1.* To provide at least one television service to all parts of the United States.

*Priority No. 2.* To provide each community with at least one television broadcasting station.

*Priority No. 3.* To provide a choice of at least two television services to all parts of the United States.

*Priority No. 4.* To provide each community with at least two television broadcast stations.

*Priority No. 5.* Any channels which remain unassigned under the foregoing priorities will be assigned to the various communities

depending on the size of the population of such community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities.<sup>1</sup>

To achieve these objectives, the FCC allocated seventy additional channels (numbered 14-83) for TV broadcasting in the ultra high frequency (UHF) spectrum. The *Sixth Report and Order* ended the freeze by assigning 2,053 channels to 1,291 communities. The thaw was a signal for hundreds of additional stations to come on the air.

A paramount issue that arose during the long freeze was a request to establish a separate class of educational noncommercial TV stations. The failure to do so in AM radio had almost completely excluded educators from the first broadcast service. When the FCC initially allocated spectrum space for FM radio broadcasting in 1940, it established the precedent of reserving a portion of the FM band exclusively for educational noncommercial uses. The present-day FM reservation contains the twenty channels from 88 to 92 MHz, or one-fifth of the entire band.

Largely because of the urgings of Commissioner Frieda B. Hennock, the FCC proposed to establish an educational TV reservation in its *Third Notice*, issued late in the Freeze. This plan was formally adopted by the Commission in the *Sixth Report and Order*. There were 242 channel assignments (one-third of them VHF) reserved for educational telecasting. This number has increased vastly since 1952.

The documents below elaborate the rationale underlying the FCC decision. Much of the potential and some of the problems of "public television" stem from the policies arrived at during the freeze.

## A. THE THIRD NOTICE

**Third Notice of Proposed Rule Making (Appendix A)**  
**16 Fed. Reg. 3072, 3079**  
**March 21, 1951**

### VI. Non-commercial Educational Television

The existing channel Assignment Table adopted by the Commission in 1945 did not contain any reserved channels for the exclusive use of non-commercial educational television stations, and no changes in this respect were proposed by the

<sup>1</sup>*Notice of Further Proposed Rule Making in Docket Nos. 8736 . . .*, 14 Fed. Reg. 4483, 4485 (1949); restated in *Sixth Report and Order*, 41 FCC 148, 167 (1952).

Commission in its proposed table of July 11, 1949. However, in the Notice of Further Proposed Rule Making issued on the latter date the Commission pointed out that it had "received informal suggestions concerning the possible provision for non-commercial educational broadcast stations in the 470-890 mc. band." Interested parties were afforded the opportunity to file comments in the proceeding concerning these suggestions.

Prior to the hearing on this issue, a number of the parties supporting the reservation of channels for noncommercial educational purposes joined together to form the Joint Committee on Educational Television. This committee offered testimony in support of a request for reservation of channels in both the VHF and UHF portions of the spectrum.

In general, the need for non-commercial educational television stations was based upon the important contributions which noncommercial educational television stations can make in educating the people both in school—at all levels—and also the adult public. The need for such stations was justified upon the high quality type of programming which would be available on such stations—programming of an entirely different character from that available on most commercial stations.

The need for a reservation was based upon the fact that educational institutions of necessity proceed more slowly in applying for broadcast stations than commercial stations. Hence, if there is no reservation, the available channels are all assigned to commercial interests long before the educational institutions are ready to apply for them.

Some opposition to the reservation was presented at the hearing. In general, none of the witnesses opposed the idea of noncommercial educational stations. On the contrary, there was general agreement that such stations would be desirable. Objection was made to the idea of reservation because as stated by some witnesses, the experience of educational institutions in the use of AM and FM radio does not furnish sufficient assurance that the educational institutions would make use of the television channels. However, there was no objection even by these witnesses to a certain form of reservation provided it was for a reasonably short time.

In the Commission's view, the need for non-commercial educational television stations has been amply demonstrated on this record. The Commission further believes that educational institutions of necessity need a longer period of time to get prepared for television than do the commercial interests. The only way this can be done is by reserving certain channels for the exclusive use of non-commercial educational stations. Obviously, the period of time during which such reservation should exist is very important. The period must be long enough to give educational institutions a reasonable opportunity to do the preparatory work that is necessary to get authorizations for stations. The period must not be so long that frequencies remain unused for excessively long periods of time. The Commission will survey the general situation from time to time in order to insure that these objectives are not lost sight of.

Accordingly, the Commission in its Table of Assignments has indicated the specific assignments which are proposed to be reserved for non-commercial edu-

cational stations.<sup>12</sup> Rules concerning eligibility and use of the stations will be substantially the same as those set forth in subpart C of Part III of the Commission's rules and regulations. The reservation of the non-commercial educational stations is not in a single block as in the case of FM since the assignment problems discussed above would sharply curtail the usefulness of a block assignment.

The following method has been employed in making reservations. In all communities having three or more assignments (whether VHF or UHF) one channel has been reserved for a non-commercial educational station. Where a community has fewer than three assignments, no reservation has been made except in those communities which are primarily educational centers, where reservations have been made even where only one or two channels are assigned.<sup>13</sup> As between VHF and UHF, a UHF channel has been reserved where there are fewer than three VHF assignments, except for those communities which are primarily educational centers where a VHF channel has been reserved. Where three or more VHF channels are assigned to a community, a VHF channel has been reserved except in those communities where all VHF assignments have been taken up. In those cases, a UHF channel has been reserved.

It is recognized that in many communities the number of educational institutions exceed the reservation which is made. In such instances the various institutions concerned must enter into cooperative arrangements so as to make sure that the facilities are available to all on an equitable basis.

## B. SIXTH REPORT AND ORDER

17 Fed. Reg. 3905, 3908; 41 FCC 148, 158  
April 14, 1952

### The Educational Reservation

33. Section VI of Appendix A of the Third Notice contained a statement that as a matter of policy certain assignments in the VHF and UHF would be reserved for the exclusive use of non-commercial television stations. Careful consideration has been given to the exceptions taken to this policy proposal in com-

<sup>12</sup>The procedure set forth in paragraphs 12 and 13 of the notice is applicable to any specific assignment proposed to be reserved or to any request that a channel not proposed for reservation should be reserved.

<sup>13</sup>Forty-six communities were considered to be primarily educational centers in accordance with the testimony presented by the Joint Committee on Educational Television. However, this enumeration is not binding and consideration will be given to any proposal filed pursuant to paragraphs 12 and 13 of the notice providing for additions to or deletions from the enumeration.

ments filed by several parties<sup>12</sup> pursuant to paragraph 11 of the Third Notice. For the reasons set forth below, the Commission has concluded that the record does support its proposal<sup>13</sup> and it is hereby adopted in the public interest as the decision of the Commission.

34. The only comments directed against the proposal which fulfill the requirements of paragraph 11 of the Third Notice are those filed by NARTB-TV and Allen B. DuMont Laboratories, Inc. The others do not specify their objections nor do they cite the evidence on which their objections are based. It is difficult to ascertain in some cases whether the objection is in fact based upon the view that there is a failure of the record to support the proposal or upon some other general disagreement with the proposal. Since, however, the comments filed by NARTB-TV and DuMont clearly cover all the objections to the proposal made by any of the other parties, a discussion of their exceptions will cover those of the other parties, and it will not be necessary to determine whether the latter comments must be rejected for failure to comply with the provisions of paragraph 11 of the Third Notice.

35. In view of the rather comprehensive and detailed exceptions taken to section VI of Appendix A it is necessary to review the nature and extent of the Commission's proposal in the Third Notice. An extensive hearing was held by the Commission on the issue: whether television channels should be reserved for the exclusive use of noncommercial educational stations. A total of 76 witnesses testified on this issue.<sup>14</sup> Among the subjects upon which the proponents of reservation presented evidence were: the potential of educational television both for in-school and adult education, and as an alternative to commercial programming; the history of education's use of other broadcast media and of visual aids to education; the possibility of immediate or future utilization of television channels by public and private educational organizations and the methods whereby such utilization

<sup>12</sup>These parties are: NARTB-TV, Allen B. DuMont Laboratories, Inc., Radio Kentucky, Inc., Capitol Broadcasting Co., and the Tribune Co. Some comments were filed which challenged the power of the Commission under the Communications Act to reserve channels for this purpose. Such contentions have been disposed of by the Commission's Memorandum Opinion of July 13, 1951 (FCC 51-709). Other comments objected to the reservation of a channel in a given community. These objections have been considered in another portion of this report. The Joint Committee on Educational Television filed comments in support of the educational reservation, as did many individual educational institutions, and other civic non-profit organizations.

<sup>13</sup>Communications Measurements Laboratories, Inc., has taken issue with the use of the words "nation wide" in describing the reservation of channels for this purpose. The proposal is self-explanatory in this respect. Although channels have been reserved throughout the nation, the reservation does not set apart any single channel or group of channels on a nation-wide basis.

<sup>14</sup>Of this number, all but five were called by educational organizations or testified in their own behalf in support of the position taken by such organizations in favor of an affirmative resolution of the question. Two other witnesses were in favor of the principle of reservations but differed with witnesses presented on behalf of educational groups with respect to the manner and extent of reservation.

could be effectuated; the type of program material which could be presented over noncommercial television stations; the history of and prospects for educational organizations' securing broadcast opportunities from commercial broadcasters; and the number of channels, both UHF and VHF, which would be required to satisfy the needs of education throughout the country. The witnesses who opposed the principle of reservation, contending that it was unlikely that educators would make sufficient use of the reserved channels to warrant withholding them from commercial applicants, and that the best results could be achieved by cooperation between educational groups and commercial broadcasters, testified principally about the past record of educators in broadcasting, the cost of a television station, and cooperation between commercial broadcasters and educational institutions.

36. On the basis of the record thus compiled, the Commission concluded, as set forth in the Third Notice, that there is a need for noncommercial educational television stations; that because educational institutions require more time to prepare for television than commercial interests, a reservation of channels is necessary to insure that such stations come into existence; that such reservations should not be for an excessively long period and should be surveyed from time to time; and that channels in both the VHF and UHF bands should be reserved in accordance with the method there set forth.

37. It has been contended that the record in this proceeding fails to support the Commission's proposal in three basic respects; that it has not been shown that educational organizations will, in fact, require a longer period of time to prepare to apply for television stations than commercial broadcasters; that it should have been found that the reservation of channels for this purpose will result in a waste of valuable frequency space because of nonusage and because of the limited audience appeal that educational stations will have; and that no feasible plan for stable utilization of channels by educational institutions has been advanced, particularly with respect to the problem of licensee responsibility.

38. None of the commenting parties have contended that the record has failed to support the findings of the Commission in the Third Notice that, based on the important contributions such stations can make in the education of the in-school and adult public, there is a need for noncommercial educational stations. The objections to the Commission's proposal must, therefore, refer to the desire and the ability, as evidenced in the record, of the educational community to construct and operate such stations.<sup>15</sup> We conclude that the record shows the desire and ability of education to make a substantial contribution to the use of television. There is much evidence in the record concerning the activities of educational organizations in AM and FM broadcasting. It is true and was to be expected that edu-

<sup>15</sup> DuMont, in its Comments in Opposition to Comments and Proposals of Other Parties, has submitted the results of a survey which bear upon this question. Insofar as the survey bears upon any specific reservation, DuMont had the opportunity to present it in the portion of the hearing dealing with Appendix C. The Third Notice was not intended to permit the filing of new material on the matters which were already the subject of hearing. DuMont had an opportunity to present this type of evidence in the general phase of the proceeding.

cation has not utilized these media to the full extent that commercial broadcasters have, in terms of number of stations and number of hours of operation. However, it has also been shown that many of the educational institutions which are engaged in aural broadcasting are doing an outstanding job in the presentation of high quality programming, and have been getting excellent public response. And most important in this connection, it is agreed that the potential of television for education is much greater and more readily apparent than that of aural broadcasting, and that the interest of the educational community in the field is much greater than it was in aural broadcasting. Further, the justification for an educational station should not, in our view, turn simply on account of audience size. The public interest will clearly be served if these stations are used to contribute significantly to the educational process of the nation. The type of programs which have been broadcast by educational organizations, and those which the record indicates can and would be televised by educators, will provide a valuable complement to commercial programming.

39. We do not think there is merit in the contention that the record, with respect to the general phase of the hearing, does not support the general principle of a reservation of channels for educational purposes as set out in the Third Notice because it does not contain detailed information with regard to the desire, ability and qualifications of the educational organizations to construct a noncommercial educational station, or the competing commercial interests which desire to bring television service to the public. In preparing a proposed Assignment Table for the entire nation which would provide the framework for the growth of television for many years to come, we could not limit our perspective to immediate demand for educational stations under circumstances where all communities did not have an opportunity to give full consideration to the possibilities of television for educational purposes and to mobilize their resources. Moreover, evidence of specific demand for educational television was submitted for several communities in the general phase of the hearing, and in addition there was presented an estimate of the number of channels required for this purpose for one section of the country based upon the size of the various communities and their general educational requirements. We do not think it unreasonable to believe that general principles of assignment may be derived from such evidence, and that such principles may validly be applied to comparable communities for the purposes of drawing up a nation-wide assignment plan. See, e.g., *The New England Divisions Case*, 261 U.S. 184; 197-199 (1923).

40. Moreover, the Third Notice provided for the contesting of specific reservations in any community. The Assignment Table adopted below has been prepared after consideration of the specific evidence in support of, as well as in objection to, specific proposed reservations and after consideration of the overall needs of all communities for television service.

41. The great preponderance of evidence presented to the Commission has been to the effect that the actual process of formulating plans and of enacting necessary legislation or of making adequate financing available is one which will generally require more time for educational organizations than for commercial interests. The record does, of course, show that there are some educational institutions which are

now ready to apply for television broadcasting licenses, but this in no wise detracts from the unavoidable conclusion that the great mass of educational institutions must move more slowly and overcome hurdles not present for commercial broadcasters, and that to insure an extensive, rather than a sparse and haphazard development of educational television, channels must be reserved by the Commission at this time. There is moreover, abundant testimony in the record that the very fact of reserving channels would speed the development of educational television. It was pointed out that it is much easier for those seeking to construct educational television stations to raise funds and get other necessary support if the channels are definitely available, than if it is problematical whether a channel may be procured at all.

42. With regard to possible waste of the reserved channels by nonuse, it is contended that evidence offered in the general portion of the hearing, concerning the record of performance of noncommercial educational agencies in aural broadcasting, and their plans and abilities to meet the installation and programming costs of television, can lead only to the conclusion that waste of limited spectrum space through nonusage will result from the reservation of channels for noncommercial educational stations. To whatever extent the position taken in these exceptions is that any immediate nonuse of channel space available for television constitutes a waste of channels, the Commission cannot agree. The basic nature of a reservation in itself implies some nonuse; to attribute waste of spectrum to the Commission's proposal concerning the use of certain channels by noncommercial educational stations without attributing it to those assignments in the table for smaller cities, which may not be used for some time, is misleading. The very purpose of the Assignment Table is to reserve channels for the communities there listed to forestall a haphazard, inefficient or inequitable distribution of television service in the United States throughout the many years to come. Moreover, as pointed out in another portion of this report, the whole of the Table of Assignments including the reservations of channels for use by noncommercial educational stations is subject to alteration in appropriate rule making proceedings in the future, and any assignment, whether an educational reservation or not, may be modified if it appears in the public interest to do so.

43. We do not believe that in order to support our decision to reserve channels for noncommercial educational stations it is necessary that we be able to find on the basis of the record before us, in the general phase of the hearing, that the educational community of the United States has demonstrated either collectively or individually that it is financially qualified at this time to operate television stations. One of the reasons for having the reservation is that the Commission recognizes that it is of the utmost importance to this nation that a reasonable opportunity be afforded educational institutions to use television as a noncommercial educational medium, and that at the same time it will generally take the educational community longer to prepare for the operation of its own television stations than it would for some commercial broadcasters. This approach is exactly the same as that underlying the Assignment Table as a whole, since reservations of commercial channels



have been made in many smaller communities to insure that they not be foreclosed from ever having television stations.

44. Although the record in the general phase of the proceedings does not contain any detailed showing on a community-by-community basis that the educational organizations have made detailed investigation of the costs incident to the construction and operation of television stations and of the exact sources from which such funds could be derived in the near future, nevertheless, the record, as a whole, does indicate that educational organizations in most communities where reservation has finally been made will actually seek the necessary funds. Furthermore, interested persons have had an opportunity to present evidence in the city-by-city portion of the hearings as to whether such funds will be sought or will become available in specific communities. It will admittedly be a difficult and time consuming process in most instances, but the likelihood of ultimate success, and the importance to the public of the objective sought, warrants the action taken. Several educational institutions, it was indicated on the record as early as the general portion of the hearing, had applied for television stations. The amounts of money spent by other public and private educational groups in aural broadcasting indicates that the acquisition of sufficient funds for television would not be an insurmountable obstacle. It has been shown, for example, that considerable sums have already been spent on visual aids to education. Television is clearly a fertile field for endowment, and it seems probable that sufficient funds can be raised both through this method and through the usual sources of funds for public and private education to enable the construction and operation of many noncommercial educational stations. As concerns the costs of operation there is the possibility of cooperative programming and financing among several educational organizations in large communities. The record indicates that educational institutions will unite in the construction and operation of noncommercial educational television stations. Such cooperative effort will, of course, help to make such stations economically feasible. The fact that somewhat novel problems may arise with respect to the selection and designation of licensees in this field does not—as some have contended—constitute a valid argument against the concept of educational reservations.

45. Several alternative methods for utilizing television in education have been presented to the Commission, but we do not think that any of them is satisfactory. One proposal is to utilize a microwave relay or wired circuit system of television for in-school educational programs. It appears that the cost of a wired circuit for the schools in larger cities might be prohibitive; but the determinative objection to such a proposal is that it would ignore very significant aspects of educational television. It is clear from the record that an important part of the educator's effort in television will be in the field of adult education in the home, as well as the provision of after school programs for children.

46. The NARTB-TV contended that the solution lay in the voluntary cooperation of educators and commercial broadcasters in the presentation of educational programs on commercial facilities. We conclude, however, that this sort of voluntary cooperation cannot be expected to accomplish all the important objectives of

educational television. In order for an educational program to achieve its purpose it is necessary that broadcast time be available for educators on a regular basis. An audience cannot be built up if educators are forced to shift their broadcast period from time to time. Moreover, the presentation of a comprehensive schedule of programs comprising a number of courses and subjects which are designed for various age and interest groups may require large periods of the broadcast day which would be difficult if not impossible to obtain on commercial stations.

47. Another alternative was proposed by Senator Edwin C. Johnson of Colorado. This proposal is elaborated in the Senator's statement:

It is my belief as I have repeatedly said that the Commission could and should impose a condition on all television licenses that a certain amount of time be made available for educational purposes in the public interest as a sustaining feature. In this matter, television can become available for educational work now without saddling schools with the enormous burden and expense of constructing and operating a noncommercial educational station. . . . It is my considered opinion that the Commission can best serve the public interest and at the same time extend extremely profitable assistance to the educational processes of this country by imposing a condition in each television license issued which would require the availability of appropriate time for educational purposes.

48. It must be remembered that the provision for noncommercial educational television stations does not relieve commercial licensees from their duty to carry programs which fulfill the educational needs and serve the educational interests of the community in which they operate. This obligation applies with equal force to all commercial licensees whether or not a noncommercial educational channel has been reserved in their community, and similarly will obtain in communities where noncommercial educational stations will be in operation.

49. Aside from the question of the legal basis of a rule which would accomplish Senator Johnson's proposal, the Commission feels it would be impracticable to promulgate a rule requiring that each commercial television licensee devote a specified amount of time to educational programs. A proper determination as to the appropriate amount of time to be set aside is subject to so many different and complex factors, difficult to determine in advance, that the possibility of such a rule is most questionable. Thus, the number of stations in the community, the total hours operated by each station, the number of educational institutions in the community, the size of the community, and countless other factors, each of which will vary from community to community, would make any uniform rule applicable to all TV stations unrealistic. All things considered, it appears to us that the reservation of channels for noncommercial educational stations, together with continued adherence by commercial stations to the mandate of serving the educational needs of the community, is the best method of achieving the aims of educational television. . . .

### Partial Commercial Operation by Educational Stations

54. In its comments the University of Missouri . . . requests that the Commission authorize “. . . commercial operation on the channels reserved for educational institutions to an amount equal to 50 percent of the broadcast day.” It appears from the evidence that funds in the amount of \$350,000 are presently available to the University for the construction of a television station, but that no funds are available for the operation of such a station. Accordingly, the University requests that the Commission permit educational institutions to use the reserved assignments to operate stations on a limited commercial non-profit basis. It is urged that if its request is granted the following objectives will be attained:

- A. More educational institutions will be in a position to construct and operate television stations throughout the country to the benefit of the public at large without materially affecting the strictly commercial stations;
- B. Educational television stations will be able, through income received from commercial programs, to better program their stations; and
- C. That the commercial programs televised will break the monotony of continuous educational subjects so as to permit the stations to attract and hold audiences.

55. A similar proposal, that the Commission extend the reservation to include all educational institutions which are operated on a nonprofit basis, is made by the Bob Jones University (WMUU) Greenville, South Carolina. The Bob Jones University argues that “. . . the reservation of the privilege of a commercial income commensurate with the operating expense of the educational station . . .” will result in the encouragement and aid to television broadcasting by educational institutions.

56. KFRU, Inc., Columbia, Missouri, opposed the request of the University of Missouri. In its reply to the University, KFRU states that it has no objection to the proposed reservation of Channel 8 for noncommercial educational purposes in Columbia, Missouri. However, it opposes the request of the University for partial commercial operation on the grounds that such an operation would give the educational institution unfair competitive advantages over a commercial licensee.

57. It is our view that the request of the University of Missouri and the Bob Jones University must be denied. In the Third Notice we stated:

In general, the need for noncommercial educational television stations was based upon the important contributions which noncommercial educational television stations can make in educating the people both in school—at all levels—and also the adult public. The need for such stations was justified upon the high quality type of programming which would be available on such stations—programming of an entirely different character from that available on most commercial stations.

A grant of the requests of the University of Missouri and Bob Jones University for partial commercial operation by educational institutions would tend to vitiate the differences between commercial operation and noncommercial educational operation. It is recognized that the type of operation proposed by these Universities may be accomplished by the licensing of educational institutions in the commercial television broadcast service. But in our view achievement of the objective for which special educational reservations have been established—i.e., the establishment of a genuinely educational type of service—would not be furthered by permitting educational institutions to operate in substantially the same manner as commercial applicants though they may choose to call it limited commercial nonprofit operation. . . .

### *MIND PROBES*

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1. Paragraph 48 of the *Sixth Report and Order* states that commercial stations will be expected to continue to meet their educational responsibilities to their communities, even if educational television stations are operating. List the ways in which local commercial TV stations serve your community's educational needs and interests.

2. The FCC in 1952 rejected the proposal that educational stations be permitted to accept a limited amount of commercial advertising for fear that the differences between commercial and noncommercial educational licensee operations would thereby be debased. (See paragraph 57.) Consider the extent to which these differences have been undercut by public TV station programming patterns, corporate program underwriting, frequent on-air appeals for viewer funding, §§ 399A and 399B of the Communications Act, etc.

### *RELATED READING*

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- POWELL, JOHN W., *Channels of Learning: The Story of Educational Television*. Washington, D.C.: Public Affairs Press, 1962.
- WOOD, DONALD N., and DONALD G. WYLIE, *Educational Telecommunications*. Belmont, Cal.: Wadsworth, 1977.

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# The 1960 Programming Policy Statement

Report and Statement of Policy re:  
Commission en banc Programming Inquiry  
25 Fed. Reg. 7291; 44 FCC 2303  
July 29, 1960

Issued fourteen years after the "Blue Book" (Document 22), the "1960 Programming Policy Statement" was much milder in tone than its predecessor. Nevertheless, the 1946 and 1960 policy statements are remarkably similar in many respects. Both documents place responsibility for programming with the licensee. Both rely on industry self-regulation to achieve compliance with FCC programming objectives to a great extent. The "Blue Book" and the "1960 Programming Policy Statement" both recognize the need for balanced programming, including local live programs, public affairs presentations, and the elimination of advertising excesses. However, the "Blue Book's" well-supported inclusion of sustaining programs as a necessary element of balanced scheduling is expressly rejected in the 1960 statement.

A new element was introduced by the FCC in the 1960 policy statement—licensee ascertainment. This required the broadcaster to discover the "tastes, needs, and desires" of people in the local service area through surveys of community leaders and the general public; to evaluate the findings of such surveys; and to propose programs responsive to the evaluated "tastes, needs, and desires." The lawfulness of the ascertainment requirement was upheld in *Henry v. FCC*, 302 F. 2d 191 (D.C. Cir. 1962), cert. denied, 371 U.S. 821.

The program proposal section of FCC application forms was revised to reflect the growing importance of licensee ascertainment in the 1960's. In 1971 the Commission issued its first ascertainment "primer" (27 FCC 2d 650) in which primary emphasis was placed on programming responsive to community "problems" rather than "tastes, needs,

and desires." The same emphasis was displayed in 1976's "Renewal Ascertainment Primer" (57 FCC 2d 418), which made ascertainment a continuous requirement.

Formal ascertainment was eliminated as an obligation of commercial radio stations in the radio deregulation proceeding concluded by the FCC in 1981. (See Document 39.) It would seem to be a matter of time before the requirement is abolished for other classes of licensees, consistent with the Commission's adoption of "postcard renewal" for radio and TV renewal applicants in 1981 (*Revision of Applications for Renewal of Licenses . . .*, 46 Fed. Reg. 26236). This procedural change makes it unnecessary for broadcasters to file programming data with the FCC unless they are selected to be among the small proportion of applicants required to submit "audit forms."

As for what remains of the 1960 statement, it is superficially complied with in most respects. In recent years the Commission has become increasingly content neutral in its regulatory activities, preferring to acquiesce to licensee discretion in programming matters. However, programming still can be a factor of decisional significance in comparative hearing situations. (See Document 29.)

. . . In considering the extent of the Commission's authority in the area of programming it is essential first to examine the limitations imposed upon it by the First Amendment to the Constitution and Section 326 of the Communications Act.

The First Amendment to the United States Constitution reads as follows:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 326 of the Communications Act of 1934, as amended, provides that:

Nothing in this chapter 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.

The communication of ideas by means of radio and television is a form of expression entitled to protection against abridgement by the First Amendment to the Constitution. In *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948) the Supreme Court stated:

We have no doubt that moving pictures, like newspapers and radio are included in the press, whose freedom is guaranteed by the First Amendment.

As recently as 1954 in *Superior Films v. Department of Education*, 346 U.S. 587, Justice Douglas in a concurring opinion stated:

Motion pictures are, of course, a different medium of expression than the radio, the stage, the novel or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas.

Moreover, the free speech protection of the First Amendment is not confined solely to the exposition of ideas nor is it required that the subject matter of the communication be possessed of some value to society. In *Winters v. New York*, 333 U.S. 507, 510 (1948) the Supreme Court reversed a conviction based upon a violation of an ordinance of the City of New York which made it punishable to distribute printed matter devoted to the publication of accounts of criminal deeds and pictures of bloodshed, lust or crime. In this connection the Court said:

We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. . . . Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

Notwithstanding the foregoing authorities, the right to the use of the airwaves is conditioned upon the issuance of a license under a statutory scheme established by Congress in the Communications Act in the proper exercise of its power over commerce.<sup>1</sup> The question therefore arises as to whether because of the characteristics peculiar to broadcasting which justifies the government in regulating its operation through a licensing system, there exists the basis for a distinction as regards other media of mass communication with respect to application of the free speech provisions of the First Amendment? In other words, does it follow that because one may not engage in broadcasting without first obtaining a license, the terms thereof may be so framed as to unreasonably abridge the free speech protection of the First Amendment?

We recognize that the broadcasting medium presents problems peculiar to itself which are not necessarily subject to the same rules governing other media of communication. As we stated in our Petition in *Grove Press, Inc. and Readers Subscription, Inc. v. Robert K. Christenberry* (Case No. 25,861) filed in the U.S. Court of Appeals for the Second Circuit,

radio and TV programs enter the home and are readily available not only to the average normal adult but also to children and to the emotionally immature. . . . Thus, for example, while a nudist magazine may be within the protection of the First Amendment . . . the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464. . . . Similarly, regardless of whether the "four-letter words" and sexual description, set forth in "Lady Chatterley's Lover," (when considered in the context of the

<sup>1</sup>*NBC v. United States*, 319 U.S. 190 (1943).

whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise similar public interest and Section 1464 questions.

Nevertheless it is essential to keep in mind that "the basic principles of freedom of speech and the press like the First Amendment's command do not vary."<sup>2</sup>

Although the Commission must determine whether the total program service of broadcasters is reasonably responsive to the interests and needs of the public they serve, it may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program. To do so would "lay a forbidden burden upon the exercise of liberty protected by the Constitution."<sup>3</sup> The Chairman of the Commission during the course of his testimony recently given before the Senate Independent Offices Subcommittee of the Committee on Appropriations expressed the point as follows:

Mr. Ford. When it comes to questions of taste, unless it is downright profanity or obscenity, I do not think that the Commission has any part in it.

I don't see how we could possibly go out and say this program is good and that program is bad. That would be a direct violation of the law.<sup>4</sup>

In a similar vein Mr. Whitney North Seymour, President-elect of the American Bar Association, stated during the course of this proceeding that while the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.<sup>5</sup>

Nevertheless, several witnesses in this proceeding have advanced persuasive arguments urging us to require licensees to present specific types of programs on the theory that such action would enhance freedom of expression rather than tend to abridge it. With respect to this proposition we are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgement of freedom of speech and press flatly forbids governmental interference, benign or otherwise. The First Amendment "while regarding freedom in religion, in speech and printing and in assembling and petitioning the government for redress of grievances as fundamental and precious to all, seeks only to forbid that Congress should meddle therein." (*Powe v. United States*, 109 F. 2d 147)

As recently as 1959 in *Farmers Educational and Cooperative Union of America v. WDAY, Inc.* 360 U.S. 525, the Supreme Court succinctly stated:

<sup>2</sup> *Burstyn v. Wilson*, 343 U.S. 495, 503 (1952).

<sup>3</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 307.

<sup>4</sup> Hearings before the Subcommittee of the Committee on Appropriations, United States Senate, 86th Congress, 2nd Session on H.R. 11776 at page 775.

<sup>5</sup> Memorandum of Mr. Whitney North Seymour, Special Counsel to the National Association of Broadcasters at page 7.



... expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication.

An examination of the foregoing authorities serves to explain why the day-to-day operation of a broadcast station is primarily the responsibility of the individual station licensee. Indeed, Congress provided in Section 3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. Hence, the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the fulfillment of the public interest requires the free exercise of his independent judgment. Accordingly, the Communications Act "does not essay to regulate the business of the licensee. The Commission is given no supervisory control over programs, of business management or of policy . . . The Congress intended to leave competition in the business of broadcasting where it found it . . ." <sup>6</sup> The regulatory responsibility of the Commission in the broadcast field essentially involves the maintenance of a 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.

In addition, there appears a second problem quite unrelated to the question of censorship that would enter into the Commission's assumption of supervision over program content. The Commission's role as a practical matter, let alone a legal matter, cannot be one of program dictation or program supervision. In this connection we think the words of Justice Douglas are particularly appropriate.

The music selected by one bureaucrat may be as offensive to some as it is soothing to others. The news commentator chosen to report on the events of the day may give overtones to the news that pleases the bureaucrat but which rile the . . . audience. The political philosophy which one radio sponsor exudes may be thought by the official who makes up the programs as the best for the welfare of the people. But the man who listens to it . . . may think it marks the destruction of the Republic. . . . Today it is a business enterprise working out a radio program under the auspices of government. Tomorrow it may be a dominant, political or religious group. . . . Once a man is forced to submit to one type of program, he can be forced to submit to another. It may be but a short step from a cultural program to a political program. . . . The strength of our system is in the dignity, resourcefulness and the intelligence of our people. Our confidence is in their ability to make the wisest choice. That system cannot flourish if regimentation takes hold. <sup>7</sup>

Having discussed the limitations upon the Commission in the consideration of programming, there remains for discussion the exceptions to those limitations and

<sup>6</sup> *FCC v. Sanders Brothers*, 309 U.S. 470 (1940).

<sup>7</sup> *Public Utilities Commission v. Pollak*, 343 U.S. 451, 468, Dissenting Opinion.

the area of affirmative responsibility which the Commission may appropriately exercise under its statutory obligation to find that the public interest, convenience and necessity will be served by the granting of a license to broadcast.

In view of the fact that a broadcaster is required to program his station in the public interest, convenience and necessity, it follows despite the limitations of the First Amendment and Section 326 of the Act, that his freedom to program is not absolute. The Commission does not conceive that it is barred by the Constitution or by statute from exercising any responsibility with respect to programming. It does conceive that the manner or extent of the exercise of such responsibility can introduce constitutional or statutory questions. It readily concedes that it is precluded from examining a program for taste or content, unless the recognized exceptions to censorship apply: for example, obscenity, profanity, indecency, programs inciting to riots, programs designed or inducing toward the commission of crime, lotteries, etc. These exceptions, in part, are written into the United States Code and, in part, are recognized in judicial decision. See Sections 1304, 1343, and 1464 of Title 18 of the United States Code (lotteries; fraud by radio; utterance of obscene, indecent or profane language by radio). It must be added that such traditional or legislative exceptions to a strict application of the freedom of speech requirements of the United States Constitution may very well also convey wider scope in judicial interpretation as applied to licensed radio than they have had or would have as applied to other communications media. The Commission's petition in the *Grove* case, *supra*, urged the court not unnecessarily to refer to broadcasting, in its opinion, as had the District Court. Such reference subsequently was not made though it must be pointed out there is no evidence that the motion made by the FCC was a contributing factor. It must nonetheless be observed that this Commission conscientiously believes that it should make no policy or take any action which would violate the letter or the spirit of the censorship prohibitions of Section 326 of the Communications Act.

As stated by the Supreme Court of the United States in *Joseph Burstyn, Inc. v. Wilson*, *supra*:

... Nor does it follow that motion pictures are necessarily subject to the precise rule governing any other particular method of expression. Each method tends to present its own peculiar problem. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule.

A review of the Communications Act as a whole clearly reveals that the foundation of the Commission's authority rests upon the public interest, convenience and necessity.<sup>8</sup> The Commission may not grant, modify or renew a broadcast station license without finding that the operation of such station is in the public interest. Thus, faithful discharge of its statutory responsibilities is absolutely necessary

<sup>8</sup> §307(d), 308, 309, *inter alia*.

in connection with the implacable requirement that the Commission approve no such application for license unless it finds that "public interest, convenience, and necessity would be served." While the public interest standard does not provide a blueprint of all of the situations to which it may apply, it does contain a sufficiently precise definition of authority so as to enable the Commission to properly deal with the many and varied occasions which may give rise to its application. A significant element of the public interest is the broadcaster's service to the community. In the case of *NBC v. United States*, 319 U.S. 190, the Supreme Court described this aspect of the public interest as follows:

An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by broadcasts. . . . The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation of radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity."

Moreover, apart from this broad standard which we will further discuss in a moment, there are certain other statutory indications.

It is generally recognized that programming is of the essence of radio service. Section 307(b) of the Communications Act requires the Commission to "make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Under this section the Commission has consistently licensed stations with the end objective of either providing new or additional programming service to a community, area or state, or of providing a new or additional "outlet" for broadcasting from a community, area, or state. Implicit in the former alternative is increased radio reception; implicit in the latter alternative is increased radio transmission and, in this connection, appropriate attention to local live programming is required.

Formerly by reason of administrative policy, and since September 14, 1959, by necessary implication from the amended language of Section 315 of the Communications Act, the Commission has had the responsibility for determining whether licensees "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." This responsibility usually is of the generic kind and thus, in the absence of unusual circumstances, is not exercised with regard to particular situations but rather in terms of operating policies of stations as viewed over a reasonable period of time. This, in the past, has meant a review, usually in terms of filed complaints, in connection with the applications made each three year period for renewal of station licenses. However, that has been a practice largely traceable to workload necessities, and therefore not so limited by law. Indeed the Commission recently has expressed its views to the Congress that it would be desira-

ble to exercise a greater discretion with respect to the length of licensing periods within the maximum three year license period provided by Section 307(d). It has also initiated rulemaking to this end.

The foundation of the American system of broadcasting was laid in the Radio Act of 1927 when Congress placed the basic responsibility for all matter broadcast to the public at the grass roots level in the hands of the station licensee. That obligation was carried forward into the Communications Act of 1934 and remains unaltered and undivided. The licensee, is, in effect, a "trustee" in the sense that his license to operate his station imposes upon him a non-delegable duty to serve the public interest in the community he had chosen to represent as a broadcaster.

Great confidence and trust are placed in the citizens who have qualified as broadcasters. The primary duty and privilege to select the material to be broadcast to his audience and the operation of his component of this powerful medium of communication is left in his hands. As was stated by the Chairman in behalf of this Commission in recent testimony before a Congressional Committee:<sup>9</sup>

Thus far Congress has not imposed by law an affirmative programming requirement on broadcast licenses. Rather, it has heretofore given licensees a broad discretion in the selection of programs. In recognition of this principle, Congress provided in section 3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. To this end the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the fulfillment of such responsibility requires the free exercise of his independent judgment.

As indicated by former President Hoover, then Secretary of Commerce, in the Radio Conference of 1922-25:

The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, country wide in distribution. There is no proper line of conflict between the broadcaster and the listener, nor would I attempt to array one against the other. Their interests are mutual, for without the one the other could not exist.

There have been few developments in industrial history to equal the speed and efficiency with which genius and capital have joined to meet radio needs. The great majority of station owners today recognize the burden of service and gladly assume it. Whatever other motive may exist for broadcasting, the pleasing of the listener is always the primary purpose . . .

The greatest public interest must be the deciding factor. I presume that few will dissent as to the correctness of this principle, for all will agree that public good must ever balance private desire; but its acceptance leads to important and far-reaching practical effects, as to which there may not be the same unanimity, but from which, nevertheless, there is no logical escape.

<sup>9</sup>Testimony of Frederick W. Ford, May 16, 1960, before the Subcommittee on Communications of the Committee on Interstate & Foreign Commerce, United States Senate.

The confines of the licensee's duty are set by the general standard "the public interest, convenience or necessity."<sup>10</sup> 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. It is the duty of the Commission, in the first instance, to select persons as licensees who meet the qualifications laid down in the Act, and on a continuing basis to review the operations of such licensees from time to time to provide reasonable assurance to the public that the broadcast service it receives is such as its direct and justifiable interest requires.

Historically it is interesting to note that in its review of station performance the Federal Radio Commission sought to extract the general principles of broadcast service which should (1) guide the licensee in his determination of the public interest and (2) be employed by the Commission as an "index" or general frame of reference in evaluating the licensee's discharge of his public duty. The Commission attempted no precise definition of the components of the public interest but left the discernment of its limit to the practical operation of broadcast regulation. It required existing stations to report the types of service which had been provided and called on the public to express its views and preferences as to programs and other broadcast services. It sought information from as many sources as were available in its quest of a fair and equitable basis for the selection of those who might wish to become licensees and the supervision of those who already engaged in broadcasting.

The spirit in which the Radio Commission approached its unprecedented task was to seek to chart a course between the need of arriving at a workable concept of the public interest in station operation, on the one hand, and the prohibition laid on it by the First Amendment to the Constitution of the United States and by Congress in Section 29 of the Federal Radio Act against censorship and interference with free speech, on the other. The Standards or guidelines which evolved from that process, in their essentials, were adopted by the Federal Communications Commission and have remained as the basis for evaluation of broadcast service. They have in the main, been incorporated into various codes and manuals of network and station operation.

It is emphasized, that these standards or guidelines should in no sense constitute a rigid mold for station performance, nor should they be considered as a Commission formula for broadcast service in the public interest. Rather, they should be considered as indicia of the types and areas of service which, on the basis of experience, have usually been accepted by the broadcasters as more or less included in the practical definition of community needs and interests.

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

<sup>10</sup>Cf. Communications Act of 1934, as amended, *inter alia*, Secs. 307, 309.

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, as the principal broadcast fare of the vast majority of television stations throughout the country.<sup>11</sup>

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.

The elements set out above are neither all-embracing nor constant. We re-emphasize that they do not serve and have never been intended as a rigid mold or fixed formula for station operations. The ascertainment of the needed elements of

<sup>11</sup>The Commission, in recognition of this problem as it affects the licensees, has recently recommended to the Congress enactment of legislation providing for direct regulation of networks in certain respects. [Enactment did not occur.—Ed.]

the broadcast matter to be provided by a particular licensee for the audience he is obligated to serve remains primarily the function of the licensee. His honest and prudent judgments will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the licensee.

The programs provided first by "chains" of stations and then by networks have always been recognized by this Commission as of great value to the station licensee in providing a well-rounded community service. The importance of network programs need not be re-emphasized as they have constituted an integral part of the well-rounded program service provided by the broadcast business in most communities.

Our own observations and the testimony in this inquiry have persuaded us that there is no public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating station performance. However, this does not relieve the station from responsibility for retaining the flexibility to accommodate public needs.

Sponsorship of public affairs, and other similar programs may very well encourage broadcasters to greater efforts in these vital areas. This is borne out by statements made in this proceeding in which it was pointed out that under modern conditions sponsorship fosters rather than diminishes the availability of important public affairs and "cultural" broadcast programming. There is some convincing evidence, for instance, that at the network level there is a direct relation between commercial sponsorship and "clearance" of public affairs and other "cultural" programs. Agency executives have testified that there is unused advertising support for public affairs type programming. The networks and some stations have scheduled these types of programs during "prime time."

The Communications Act<sup>12</sup> provides that the Commission may grant construction permits and station licenses, or modifications or renewals thereof, "only upon written application" setting forth the information required by the Act and the Commission's Rules and Regulations. If, upon examination of any such application, the Commission shall find the public interest, convenience, and necessity would be served by the granting thereof, it shall grant said application. If it does not so find, it shall so advise the applicant and other known parties in interest of all objections to the application and the applicant shall then be given an opportunity to supply additional information. If the Commission cannot then make the necessary finding, the application is designated for hearing and the applicant bears the burden of providing proof of the public interest.

During our hearings there seemed to be some misunderstanding as to the nature and use of the "statistical" data regarding programming and advertising required by our application forms. We wish to stress that no one may be summarily judged as to the service he has performed on the basis of the information contained in his application. As we said long ago:

<sup>12</sup>Section 308(a).

It should be emphasized that the statistical data before the Commission constitute an index only of the manner of operation of the stations and are not considered by the Commission as conclusive of the over-all operation of the stations in question.

Licensees will have an opportunity to show the nature of their program service and to introduce other relevant evidence which would demonstrate that in actual operation the program service of the station is, in fact, a well rounded program service and is in conformity with the promises and representations previously made in prior applications to the Commission.<sup>13</sup>

As we have said above, the principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his community or service area, for broadcast service.

To enable the Commission in its licensing functions to make the necessary public interest finding, we intend to revise Part IV of 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 preplanned 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.

By the care spent in obtaining and reflecting the views thus obtained, which clearly cannot be accepted without attention to the business judgment of the licensee if his station is to be an operating success, will the standard of programming in the public interest be best fulfilled. This would not ordinarily be the case if program formats have been decided upon by the licensee before he undertakes his planning and consultation, for the result would show little stimulation on the part of the two local groups above referenced. And it is the composite of their contributive planning, led and sifted by the expert judgment of the licensee, which will assure to the station the appropriate attention to the public interest which will permit the Commission to find that a license may issue. By his narrative development, in his application, of the planning, consulting, shaping, revising, creating, dis-

<sup>13</sup>Public Notice (98501), Sept. 20, 1946, "Status of Standard Broadcast Applications."



carding and evaluation of programming thus conceived or discussed, the licensee discharges the public interest facet of his business calling without Government dictation or supervision and permits the Commission to discharge its responsibility to the public without invasion of spheres of freedom properly denied to it. By the practicality and specificity of his narrative the licensee facilitates the application of expert judgment by the Commission. Thus, if a particular kind of educational program could not be feasibly assisted (by funds or service) by educators for more than a few time periods, it would be idle for program composition to place it in weekly focus. Private ingenuity and educational interest should look further, toward implemental suggestions of practical yet constructive value. The broadcaster's license is not intended to convert his business into "an instrumentality of the federal government";<sup>14</sup> neither, on the other hand, may he ignore the public interest which his application for a license should thus define and his operations thereafter reasonably observe.

Numbers of suggestions were made during the *en banc* hearings concerning possible uses by the Commission of codes of broadcast practices adopted by segments of the industry as part of a process of self-regulation. While the Commission has not endorsed any specific code of broadcast practices, we consider the efforts of the industry to maintain high standards of conduct to be highly commendable and urge that the industry persevere in these efforts.

The Commission recognizes that submissions, by applicants, concerning their past and future programming policies and performance provide one important basis for deciding whether—insofar as broadcast services are concerned—we may properly make the public interest finding requisite to the grant of an application for a standard FM or television broadcast station. The particular manner in which applicants are required to depict their proposed or past broadcast policies and services (including the broadcasting of commercial announcements) may therefore, have significant bearing upon the Commission's ability to discharge its statutory duties in the matter. Conscious of the importance of reporting requirements, the Commission on November 24, 1958 initiated proceedings (Docket No. 12673) to consider revisions to the rules prescribing the form and content of reports on broadcast programming.

Aided by numerous helpful suggestions offered by witnesses in the recent *en banc* hearings on broadcast programming, the Commission is at present engaged in a thorough study of this subject. Upon completion of that study we will announce, for comment by all interested parties, such further revisions to the present reporting requirements as we think will best conduce to an awareness, by broadcasters, of their responsibilities to the public and to effective, efficient processing, by the Commission, of applications for broadcast licenses and renewals.

To this end, we will initiate further rule making on the subject at the earliest practicable date.

<sup>14</sup>"The defendant is not an instrumentality of the federal government but a privately owned corporation." *McIntire v. Wm. Penn Broadcasting Co.*, 151 F. 2d 597, 600.

*MIND PROBES*

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1. The 1960 statement says on p. 194 that the "First Amendment forbids government interference asserted in aid of free speech, as well as governmental action repressive of it." But in the *Red Lion* decision (Document 34), the Supreme Court said on p. 286, "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . ." Are these views consistent? If not, which one is preferable? Which is the law of the land?

2. Draft a programming policy statement for the current year to which the FCC could subscribe and that would pass statutory and constitutional muster.

*RELATED READING*

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FORD, FREDERICK W., "The Meaning of the 'Public Interest, Convenience or Necessity,'" *Journal of Broadcasting*, 5:3 (Summer 1961), 205-18.  
"Note: Judicial Review of FCC Program Diversity Regulations" [by Francis S. Blake], *Columbia Law Review*, 75:2 (March 1975), 401-40.

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# The Great Debates Law

Public Law 677, 86th Congress

August 24, 1960

This temporary suspension of § 315 permitted broadcast stations to carry the so-called "Great Debates" between John F. Kennedy and Richard M. Nixon in 1960 without offering "equal time" to the many splinter party presidential aspirants. The Senate Joint Resolution was passed only after the major parties' candidates were selected at the national political conventions. Congress has never passed a subsequent suspension, and 1964, 1968, and 1972 saw no joint broadcast appearances by presidential candidates.

In 1975 the FCC re-interpreted § 315(a)(4)'s exemption of "on-the-spot coverage of bona fide news events" to permit licensees to carry candidates' debates and news conferences arranged by nonbroadcasters free of the "equal time" obligation [*Aspen Institute*, 55 FCC 2d 697, *affirmed*, *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890]. Accordingly, when the League of Women Voters arranged debates between Gerald Ford and Jimmy Carter in 1976 and Carter and Ronald Reagan in 1980, broadcast coverage was allowed. By 1981 the FCC was recommending congressional repeal of § 315.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That that part of section 315(a) of the Communications Act of 1934, as amended, which requires any licensee of a broadcast station who permits any person who is a legally qualified candidate for any public office to use a broadcasting station to afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, is suspended for the period of the 1960 presidential and vice presidential campaigns with respect to nominees for the offices of President and Vice President of the United States. Nothing in the foregoing shall be construed as relieving broadcasters from the obligation imposed upon them under this Act to operate in the public interest.

(2) The Federal Communications Commission shall make a report to the Congress, not later than March 1, 1961, with respect to the effect of the provisions of this joint resolution and any recommendations the Commission may have for amendments to the Communications Act of 1934 as a result of experience under the provisions of this joint resolution.

### *MIND PROBES*

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1. In what way is a candidate's ability to emerge victoriously from a TV debate encounter related to his/her ability to fill the office sought?

2. Despite increased campaign expenditures, the extension of voting rights to previously ineligible young adults, and the TV debates of 1976 and 1980, the proportion of eligible voters casting a ballot in presidential elections has declined markedly since the first debates were televised in 1960. Some allege this decline in active voter participation is caused by TV-induced voter apathy; television has turned politics into just another spectator sport. After reaching your own conclusion on this proposition, suggest ways in which broadcasting could be used to buck the trend.

### *RELATED READING*

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CHESTER, EDWARD W., *Radio, Television and American Politics*. New York: Sheed and Ward, 1969.

KRAUS, SIDNEY, ed., *The Great Debates*. Bloomington: Indiana University Press, 1962.

\_\_\_\_\_, ed., *The Great Debates: Carter vs. Ford, 1976*. Bloomington: Indiana University Press, 1979.

UNITED STATES CONGRESS, SENATE, SUBCOMMITTEE ON FREEDOM OF COMMUNICATIONS OF THE SUBCOMMITTEE ON COMMUNICATIONS OF THE COMMITTEE ON COMMERCE, *Final Report Pursuant to S. Res. 305, 86th Congress, Parts I-VI, 87th Congress, 1st and 2d Sessions*. Washington, D.C.: Government Printing Office, 1961-1962.

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## The "Vast Wasteland"

Address by Newton N. Minow to the National  
Association of Broadcasters, Washington, D.C.\*  
May 9, 1961

Newton N. Minow served only 28 months as FCC Chairman, but no commissioner before or since matched his impact on the general public and broadcasting. A Chicago lawyer and associate of Adlai E. Stevenson, Minow was named to the Commission early in 1961 by President John F. Kennedy. He resigned in the middle of 1963 to take a more lucrative legal position in private industry.

This speech alarmed broadcasters, made newspaper headlines, and evoked favorable public response and comment in the print media. It signaled the start of a new regulatory activism and an end to the corruption that riddled the FCC in the closing years of the Eisenhower administration, when two commissioners (including a Chairman) were forced to resign because of their scandalous dealings with some of the broadcasters they were supposed to regulate.

Some aspects of Minow's regulatory program, outlined in this address, attracted wide support and were realized in the following 2 years. Educational television station construction was given a \$32 million boost when Congress passed the "ETV Facilities Act of 1962" (Public Law 87-447, approved May 1, 1962). The prospects for UHF television brightened with enactment of the "All Channel Receiver Law" (Public Law 87-529, approved July 10, 1962) which added §§ 303(s) and 330 to the Communications Act. But protection of Pay TV from near-infanticide and reduction of broadcast advertising excesses were among the regulatory objectives Minow failed to achieve because of his short stay in office and the shifting regulatory climate following his departure.

It was Minow's outspoken discontent with television programming and his vow to lead the FCC to review broadcast content more closely

\*Reprinted with permission from Newton N. Minow, *Equal Time: The Private Broadcaster and the Public Interest*, ed. Lawrence Laurent (New York: Atheneum, 1964), pp. 48-64.

when acting on license renewals that made broadcasters apprehensive. Anxious not to find out if the Chairman really meant what he said, networks and stations alike attempted to make the "vast wasteland" bloom with more public affairs programs, improved children's offerings, and a de-emphasis on violent action shows. The change proved to be as temporary as Minow's tenure at the FCC. More lasting was the technique of "regulation by raised eyebrow" that Minow used with considerable success in this speech and which his successors have continued to employ in the delicate area of broadcast programming with varied results.

Governor Collins, Distinguished Guests, Ladies and Gentlemen:

Thank you for this opportunity to meet with you today. This is my first public address since I took over my new job. When the New Frontiersmen rode into town, I locked myself in my office to do my homework and get my feet wet. But apparently I haven't managed to stay out of hot water. I seem to have detected a certain nervous apprehension about what I might say or do when I emerged from that locked office for this, my maiden station break.

First, let me begin by dispelling a rumor. I was not picked for this job because I regard myself as the fastest draw on the New Frontier.

Second, let me start a rumor. Like you, I have carefully read President Kennedy's messages about the regulatory agencies, conflict of interest and the dangers of *ex parte* contracts. And of course, we at the Federal Communications Commission will do our part. Indeed, I may even suggest that we change the name of the FCC to The Seven Untouchables!

It may also come as a surprise to some of you, but I want you to know that you have my admiration and respect. Yours is a most honorable profession. Anyone who is in the broadcasting business has a tough row to hoe. You earn your bread by using public property. When you work in broadcasting, you volunteer for public service, public pressure and public regulation. You must compete with other attractions and other investments, and the only way you can do it is to prove to us every three years that you should have been in business in the first place.

I can think of easier ways to make a living.

But I cannot think of more satisfying ways.

I admire your courage—but that doesn't mean I would make life any easier for you. Your license lets you use the public's airwaves as trustees for 180 million Americans. The public is your beneficiary. If you want to stay on as trustees, you must deliver a decent return to the public—not only to your stockholders. So, as a representative of the public, your health and your product are among my chief concerns.

As to your health: let's talk only of television today. In 1960 gross broadcast revenues of the television industry were over \$1,268,000,000; profit before taxes

was \$243,900,000—an average return on revenue of 19.2 percent. Compare this with 1959, when gross broadcast revenues were \$1,163,900,000 and profit before taxes was \$222,300,000, an average return on revenue of 19.1 percent. So, the percentage increase of total revenues from 1959 to 1960 was 9 percent, and the percentage increase of profit was 9.7 percent. This, despite a recession. For your investors, the price has indeed been right.

I have confidence in your health.

But not in your product.

It is with this and much more in mind that I come before you today.

One editorialist in the trade press wrote that "the FCC of the New Frontier is going to be one of the toughest FCC's in the history of broadcast regulation." If he meant that we intend to enforce the law in the public interest, let me make it perfectly clear that he is right—we do.

If he meant that we intend to muzzle or censor broadcasting, he is dead wrong.

It would not surprise me if some of you had expected me to come here today and say in effect, "Clean up your own house or the government will do it for you."

Well, in a limited sense, you would be right—I've just said it.

But I want to say to you earnestly that it is not in that spirit that I come before you today, nor is it in that spirit that I intend to serve the FCC.

I am in Washington to help broadcasting, not to harm it; to strengthen it, not weaken it; to reward it, not punish it; to encourage it, not threaten it; to stimulate it, not censor it.

Above all, I am here to uphold and protect the public interest.

What do we mean by "the public interest"? Some say the public interest is merely what interests the public.

I disagree.

So does your distinguished president, Governor Collins. In a recent speech he said, "Broadcasting, to serve the public interest, must have a soul and a conscience, a burning desire to excel, as well as to sell; the urge to build the character, citizenship and intellectual stature of people, as well as to expand the gross national product. . . . By no means do I imply that broadcasters disregard the public interest. . . . But a much better job can be done, and should be done."

I could not agree more.

And I would add that in today's world, with chaos in Laos and the Congo aflame, with Communist tyranny on our Caribbean doorstep and relentless pressure on our Atlantic alliance, with social and economic problems at home of the gravest nature, yes, and with technological knowledge that makes it possible, as our President has said, not only to destroy our world but to destroy poverty around the world—in a time of peril and opportunity, the old complacent, unbalanced fare of action-adventure and situation comedies is simply not good enough.

Your industry possesses the most powerful voice in America. It has an inescapable duty to make that voice ring with intelligence and with leadership. In a few years this exciting industry has grown from a novelty to an instrument of over-

whelming impact on the American people. It should be making ready for the kind of leadership that newspapers and magazines assumed years ago, to make our people aware of their world.

Ours has been called the jet age, the atomic age, the space age. It is also, I submit, the television age. And just as history will decide whether the leaders of today's world employed the atom to destroy the world or rebuild it for mankind's benefit, so will history decide whether today's broadcasters employed their powerful voice to enrich the people or debase them.

If I seem today to address myself chiefly to the problems of television, I don't want any of you radio broadcasters to think we've gone to sleep at your switch—we haven't. We still listen. But in recent years most of the controversies and cross-currents in broadcast programming have swirled around television. And so my subject today is the television industry and the public interest.

Like everybody, I wear more than one hat. I am the Chairman of the FCC. I am also a television viewer and the husband and father of other television viewers. I have seen a great many television programs that seemed to me eminently worthwhile, and I am not talking about the much-bemoaned good old days of "Playhouse 90" and "Studio One."

I am talking about this past season. Some were wonderfully entertaining, such as "The Fabulous Fifties," the "Fred Astaire Show" and the "Bing Crosby Special"; some were dramatic and moving, such as Conrad's "Victory" and "Twilight Zone"; some were marvelously informative, such as "The Nation's Future," "CBS Reports," and "The Valiant Years." I could list many more—programs that I am sure everyone here felt enriched his own life and that of his family. When television is good, nothing—not the theater, not the magazines or newspapers—nothing is better.

But when television is bad, nothing is worse. I invite you to sit down in front of your television set when your station goes on the air and stay there without a book, magazine, newspaper, profit-and-loss sheet or rating book to distract you—and keep your eyes glued to that set until the station signs off. I can assure you that you will observe a vast wasteland.

You will see a procession of game shows, violence, audience participation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, Western badmen, Western good men, private eyes, gangsters, more violence and cartoons. And, endlessly, commercials—many screaming, cajoling and offending. And most of all, boredom. True, you will see a few things you will enjoy. But they will be very, very few. And if you think I exaggerate, try it.

Is there one person in this room who claims that broadcasting can't do better?

Well, a glance at next season's proposed programing can give us little heart. Of seventy-three and a half hours of prime evening time, the networks have tentatively scheduled fifty-nine hours to categories of "action-adventure," situation comedy, variety, quiz and movies.

Is there one network president in this room who claims he can't do better?

Well, is there at least one network president who believes that the other networks can't do better?



Gentlemen, your trust accounting with your beneficiaries is overdue. Never have so few owed so much to so many.

Why is so much of television so bad? I have heard many answers: demands of your advertisers; competition for ever higher ratings; the need always to attract a mass audience; the high cost of television programs; the insatiable appetite for programming material—these are some of them. Unquestionably these are tough problems not susceptible to easy answers.

But I am not convinced that you have tried hard enough to solve them.

I do not accept the idea that the present over-all programming is aimed accurately at the public taste. The ratings tell us only that some people have their television sets turned on, and of that number, so many are tuned to one channel and so many to another. They don't tell us what the public might watch if they were offered half a dozen additional choices. A rating, at best, is an indication of how many people saw what you gave them. Unfortunately it does not reveal the depth of the penetration, or the intensity of reaction, and it never reveals what the acceptance would have been if what you gave them had been better—if all the forces of art and creativity and daring and imagination had been unleashed. I believe in the people's good sense and good taste, and I am not convinced that the people's taste is as low as some of you assume.

My concern with the rating services is not with their accuracy. Perhaps they are accurate. I really don't know. What, then, is wrong with the ratings? It's not been their accuracy—it's been their use.

Certainly I hope you will agree that ratings should have little influence where children are concerned. The best estimates indicate that during the hours of 5 to 6 P.M., 60 percent of your audience is composed of children under twelve. And most young children today, believe it or not, spend as much time watching television as they do in the schoolroom. I repeat—let that sink in—most young children today spend as much time watching television as they do in the schoolroom. It used to be said that there were three great influences on a child: home, school and church. Today there is a fourth great influence, and you ladies and gentlemen control it.

If parents, teachers and ministers conducted their responsibilities by following the ratings, children would have a steady diet of ice cream, school holidays and no Sunday School. What about your responsibilities? Is there no room on television to teach, to inform, to uplift, to stretch, to enlarge the capacities of our children? Is there no room for programs deepening their understanding of children in other lands? Is there no room for a children's news show explaining something about the world to them at their level of understanding? Is there no room for reading the great literature of the past, teaching them the great traditions of freedom? There are some fine children's shows, but they are drowned out in the massive doses of cartoons, violence and more violence. Must these be your trademarks? Search your consciences and see if you cannot offer more to your young beneficiaries, whose future you guide so many hours each and every day.

What about adult programming and ratings? You know, newspaper publishers take popularity ratings too. The answers are pretty clear; it is almost always the comics, followed by the advice-to-the-lovelorn columns. But, ladies and gentlemen,

the news is still on the front page of all newspapers, the editorials are not replaced by more comics, the newspapers have not become one long collection of advice to the lovelorn. Yet newspapers do not need a license from the government to be in business—they do not use public property. But in television—where your responsibilities as public trustees are so plain—the moment that the ratings indicate that Westerns are popular, there are new imitations of Westerns on the air faster than the old coaxial cable could take us from Hollywood to New York. Broadcasting cannot continue to live by the numbers. Ratings ought to be the slave of the broadcaster, not his master. And you and I both know that the rating services themselves would agree.

Let me make clear that what I am talking about is balance. I believe that the public interest is made up of many interests. There are many people in this great country, and you must serve all of us. You will get no argument from me if you say that, given a choice between a Western and a symphony, more people will watch the Western. I like Westerns and private eyes too—but a steady diet for the whole country is obviously not in the public interest. We all know that people would more often prefer to be entertained than stimulated or informed. But your obligations are not satisfied if you look only to popularity as a test of what to broadcast. You are not only in show business; you are free to communicate ideas as well as relaxation. You must provide a wider range of choices, more diversity, more alternatives. It is not enough to cater to the nation's whims—you must also serve the nation's needs.

And I would add this—that if some of you persist in a relentless search for the highest rating and the lowest common denominator, you may very well lose your audience. Because, to paraphrase a great American who was recently my law partner, the people are wise, wiser than some of the broadcasters—and politicians—think.

As you may have gathered, I would like to see television improved. But how is this to be brought about? By voluntary action by the broadcasters themselves? By direct government intervention? Or how?

Let me address myself now to my role, not as a viewer, but as Chairman of the FCC. I could not if I would chart for you this afternoon in detail all of the actions I contemplate. Instead, I want to make clear some of the fundamental principles which guide me.

First: the people own the air. They own it as much in prime evening time as they do at 6 o'clock Sunday morning. For every hour that the people give you, you owe them something. I intend to see that your debt is paid with service.

Second: I think it would be foolish and wasteful for us to continue any worn-out wrangle over the problems of payola, rigged quiz shows, and other mistakes of the past. There are laws on the books which we will enforce. But there is no chip on my shoulder. We live together in perilous, uncertain times; we face together staggering problems; and we must not waste much time now by rehashing the clichés of past controversy. To quarrel over the past is to lose the future.

Third: I believe in the free enterprise system. I want to see broadcasting improved and I want you to do the job. I am proud to champion your cause. It is not

rare for American businessmen to serve a public trust. Yours is a special trust because it is imposed by law.

Fourth: I will do all I can to help educational television. There are still not enough educational stations, and major centers of the country still lack usable educational channels. If there were a limited number of printing presses in this country, you may be sure that a fair proportion of them would be put to educational use. Educational television has an enormous contribution to make to the future, and I intend to give it a hand along the way. If there is not a nationwide educational television system in this country, it will not be the fault of the FCC.

Fifth: I am unalterably opposed to governmental censorship. There will be no suppression of programing which does not meet with bureaucratic tastes. Censorship strikes at the taproot of our free society.

Sixth: I did not come to Washington to idly observe the squandering of the public's airwaves. The squandering of our airwaves is no less important than the lavish waste of any precious natural resource. I intend to take the job of Chairman of the FCC very seriously. I believe in the gravity of my own particular sector of the New Frontier. There will be times perhaps when you will consider that I take myself or my job *too* seriously. Frankly, I don't care if you do. For I am convinced that either one takes this job seriously—or one can be seriously taken.

Now, how will these principles be applied? Clearly, at the heart of the FCC's authority lies its power to license, to renew or fail to renew, or to revoke a license. As you know, when your license comes up for renewal, your performance is compared with your promises. I understand that many people feel that in the past licenses were often renewed *pro forma*. I say to you now: renewal will not be *pro forma* in the future. There is nothing permanent or sacred about a broadcast license.

But simply matching promises and performance is not enough. I intend to do more. I intend to find out whether the people care. I intend to find out whether the community which each broadcaster serves believes he has been serving the public interest. When a renewal is set down for hearing, I intend—wherever possible—to hold a well-advertised public hearing, right in the community you have promised to serve. I want the people who own the air and the homes that television enters to tell you and the FCC what's been going on. I want the people—if they are truly interested in the service you give them—to make notes, document cases, tell us the facts. For those few of you who really believe that the public interest is merely what interests the public—I hope that these hearings will arouse no little interest.

The FCC has a fine reserve of monitors—almost 180 million Americans gathered around 56 million sets. If you want those monitors to be your friends at court—it's up to you.

Some of you may say, "Yes, but I still do not know where the line is between a grant of a renewal and the hearing you just spoke of." My answer is: why should you want to know how close you can come to the edge of the cliff? What the Commission asks of you is to make a conscientious good-faith effort to serve the public interest. Every one of you serves a community in which the people would benefit by educational, religious, instructive or other public service programing. Every one

of you serves an area which has local needs—as to local elections, controversial issues, local news, local talent. Make a serious, genuine effort to put on that programing. When you do, you will not be playing brinkmanship with the public interest.

What I've been saying applies to broadcast stations. Now a station break for the networks:

You know your importance in this great industry. Today, more than one-half of all hours of television station programing comes from the networks; in prime time, this rises to more than three-fourths of the available hours.

You know that the FCC has been studying network operations for some time. I intend to press this to a speedy conclusion with useful results. I can tell you right now, however, that I am deeply concerned with concentration of power in the hands of the networks. As a result, too many local stations have foregone any efforts at local programing, with little use of live talent and local service. Too many local stations operate with one hand on the network switch and the other on a projector loaded with old movies. We want the individual stations to be free to meet their legal responsibilities to serve their communities.

I join Governor Collins in his views so well expressed to the advertisers who use the public air. I urge the networks to join him and undertake a very special mission on behalf of this industry: you can tell your advertisers, "This is the high quality we are going to serve—take it or other people will. If you think you can find a better place to move automobiles, cigarettes and soap—go ahead and try."

Tell your sponsors to be less concerned with costs per thousand and more concerned with understanding per millions. And remind your stockholders that an investment in broadcasting is buying a share in public responsibility.

The networks can start this industry on the road to freedom from the dictatorship of numbers.

But there is more to the problem than network influences on stations or advertiser influences on networks. I know the problems networks face in trying to clear some of their best programs—the informational programs that exemplify public service. They are your finest hours, whether sustaining or commercial, whether regularly scheduled or special; these are the signs that broadcasting knows the way to leadership. They make the public's trust in you a wise choice.

They should be seen. As you know, we are readying for use new forms by which broadcast stations will report their programing to the Commission. You probably also know that special attention will be paid in these reports to public service programing. I believe that stations taking network service should also be required to report the extent of the local clearance of network public service programing, and when they fail to clear them, they should explain why. If it is to put on some outstanding local program, this is one reason. But, if it is simply to carry some old movie, that is an entirely different matter. The Commission should consider such clearance reports carefully when making up its mind about the licensee's over-all programing.

We intend to move—and as you know, indeed the FCC was rapidly moving in

other new areas before the new administration arrived in Washington. And I want to pay my public respects to my very able predecessor, Fred Ford, and my colleagues on the Commission who have welcomed me to the FCC with warmth and cooperation.

We have approved an experiment with pay TV, and in New York we are testing the potential of UHF broadcasting. Either or both of these may revolutionize television. Only a foolish prophet would venture to guess the direction they will take, and their effect. But we intend that they shall be explored fully—for they are part of broadcasting's new frontier.

The questions surrounding pay TV are largely economic. The questions surrounding UHF are largely technological. We are going to give the infant pay TV a chance to prove whether it can offer a useful service; we are going to protect it from those who would strangle it in its crib.

As for UHF, I'm sure you know about our test in the canyons of New York City. We will take every possible positive step to break through the allocations barrier into UHF. We will put this sleeping giant to use, and in the years ahead we may have twice as many channels operating in cities where now there are only two or three. We may have a half-dozen networks instead of three.

I have told you that I believe in the free enterprise system. I believe that most of television's problems stem from lack of competition. This is the importance of UHF to me: with more channels on the air, we will be able to provide every community with enough stations to offer service to all parts of the public. Programs with a mass-market appeal required by mass-product advertisers certainly will still be available. But other stations will recognize the need to appeal to more limited markets and to special tastes. In this way we can all have a much wider range of programs.

Television should thrive on this competition—and the country should benefit from alternative sources of service to the public. And, Governor Collins, I hope the NAB will benefit from many new members.

Another, and perhaps the most important, frontier: television will rapidly join the parade into space. International television will be with us soon. No one knows how long it will be until a broadcast from a studio in New York will be viewed in India as well as in Indiana, will be seen in the Congo as it is seen in Chicago. But as surely as we are meeting here today, that day will come—and once again our world will shrink.

What will the people of other countries think of us when they see our Western badmen and good men punching each other in the jaw in between the shooting? What will the Latin American or African child learn of America from our great communications industry? We cannot permit television in its present form to be our voice overseas.

There is your challenge to leadership. You must reexamine some fundamentals of your industry. You must open your minds and open your hearts to the limitless horizons of tomorrow.

I can suggest some words that should serve to guide you:

Television and all who participate in it are jointly accountable to the American public for respect for the special needs of children, for community responsibility, for the advancement of education and culture, for the acceptability of the program materials chosen, for decency and decorum in production, and for propriety in advertising. This responsibility cannot be discharged by any given group of programs, but can be discharged only through the highest standards of respect for the American home, applied to every moment of every program presented by television.

Program materials should enlarge the horizons of the viewer, provide him with wholesome entertainment, afford helpful stimulation, and remind him of the responsibilities which the citizen has toward his society.

These words are not mine. They are yours. They are taken literally from your own Television Code. They reflect the leadership and aspirations of your own great industry. I urge you to respect them as I do. And I urge you to respect the intelligent and farsighted leadership of Governor LeRoy Collins and to make this meeting a creative act. I urge you at this meeting and, after you leave, back home, at your stations and your networks, to strive ceaselessly to improve your product and to better serve your viewers, the American people.

I hope that we at the FCC will not allow ourselves to become so bogged down in the mountain of papers, hearings, memoranda, orders and the daily routine that we close our eyes to the wider view of the public interest. And I hope that you broadcasters will not permit yourselves to become so absorbed in the chase for ratings, sales and profits that you lose this wider view. Now more than ever before in broadcasting's history the times demand the best of all of us.

We need imagination in programing, not sterility; creativity, not imitation; experimentation, not conformity; excellence, not mediocrity. Television is filled with creative, imaginative people. You must strive to set them free.

Television in its young life has had many hours of greatness—its "Victory at Sea," its Army-McCarthy hearings, its "Peter Pan," its "Kraft Theater," its "See It Now," its "Project 20," the World Series, its political conventions and campaigns, the Great Debates—and it has had its endless hours of mediocrity and its moments of public disgrace. There are estimates that today the average viewer spends about 200 minutes daily with television, while the average reader spends thirty-eight minutes with magazines and forty minutes with newspapers. Television has grown faster than a teenager, and now it is time to grow up.

What you gentlemen broadcast through the people's air affects the people's taste, their knowledge, their opinions, their understanding of themselves and of their world. And their future.

The power of instantaneous sight and sound is without precedent in mankind's history. This is an awesome power. It has limitless capabilities for good—and for evil. And it carries with it awesome responsibilities—responsibilities which you and I cannot escape.

In his stirring Inaugural Address, our President said, "And so, my fellow Americans: ask not what your country can do for you—ask what you can do for your country."

Ladies and Gentlemen:

Ask not what broadcasting can do for you—ask what you can do for broadcasting.

I urge you to put the people's airwaves to the service of the people and the cause of freedom. You must help prepare a generation for great decisions. You must help a great nation fulfill its future.

Do this, and I pledge you our help.

### *MIND PROBES*

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1. Does Minow's description of television programming accurately and fairly characterize the medium's output today? In what ways has TV fare gotten better or worse since 1961?
2. Is such public exhortation by an FCC Chairman trying to persuade the TV industry to bring programming into line with bureaucratic objectives an admission that programming policy statements won't do the job?

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# President Kennedy's Statement on Communication Satellite Policy

Senate Report No. 1584, 87th Congress, 2d Session

(pp. 25-27)

July 24, 1961

Russia's successful launch of the first artificial Earth satellite, Sputnik I, on October 4, 1957, was hailed as an event of major significance throughout the world. For America it marked the start of efforts to equal or surpass the Soviet accomplishment. President Kennedy gave high priority to the United States' space effort, pledging even to land a man on the moon—a feat that was first achieved in July, 1969.

The National Aeronautics and Space Administration launched its first experimental communications satellite, Echo I, on August 12, 1960. Others followed, including synchronous satellites, heralding the arrival of global communication free of land lines. The potential of satellites to serve as functional alternatives to cable, telephone, telegraph, and even terrestrial broadcast transmitters presented thorny questions of public policy. Early in his administration President Kennedy provided policy leadership in the statement below, which led to enactment of the Communications Satellite Act a year later (Public Law 87-624, approved August 31, 1962). The Communications Satellite Corporation (Comsat) authorized by this law was incorporated on February 1, 1963, as a private firm, regulated by the FCC, and given a monopoly over American international communications via satellite. Through interaction with the International Telecommunications Satellite Consortium (INTELSAT), Comsat became an effective "carrier's carrier," a common carrier providing services to other common carriers such as AT&T.



The 1962 Comsat Act said little about the use of satellites for domestic communications. When the FCC was faced with the first proposal to operate a domestic system in 1965, it found itself sailing in uncharted waters. It took 7 years before the Commission finally enunciated its policy guidelines [*Domestic Communications-Satellite Facilities*, 35 FCC 2d 844 (1972)], which encouraged competition in domestic satellite operations by permitting open entry in a branch of communication that had previously been dominated by monopolistic policies and practices.

By the late 1970's both international and domestic point-to-point communication via satellite had become commonplace. Domestic satellites are often used instead of terrestrial relay systems to interconnect broadcast stations, cable systems, networks, and pay programming suppliers.

In 1980 a Comsat subsidiary, the Satellite Television Corporation, filed the first application to establish a direct broadcast satellite (DBS) system that would eventually provide several channels of home-receivable subscription television nationwide. Other applicants soon sought DBS licenses, one of whom (CBS) proposed to distribute high-definition TV that could improve the resolution of the U.S. television picture. The FCC adopted interim DBS guidelines in 1982 (*Development of Regulatory Policy in Regard to Direct Broadcast Satellites . . .*, 90 FCC 2d 676) despite opposition from powerful broadcasting interests who would prefer to see the status quo maintained and the push of technological progress delayed.

Science and technology have progressed to such a degree that communication through the use of space satellites has become possible. Through this country's leadership, this competence should be developed for global benefit at the earliest practicable time.

To accomplish this practical objective, increased resources must be devoted to the task and a coordinated national policy should guide the use of those resources in the public interest. Consequently, on March 25, 1961, I asked the Congress for additional funds to accelerate the use of space satellites for worldwide communications. Also, on June 15, I asked the Vice President to have the Space Council make the necessary studies and policy recommendations for the optimum development and operation of such system. This has been done. The primary guideline for the preparation of such recommendations was that public interest objectives be given the highest priority.

I again invite all nations to participate in a communication satellite system, in the interest of world peace and closer brotherhood among peoples throughout the world.

The present status of the communication satellite programs, both civil and military, is that of research and development. To date, no arrangements between the Government and private industry contain any commitments as to an operational system.

#### **A. POLICY OF OWNERSHIP AND OPERATION**

Private ownership and operation of the U.S. portion of the system is favored, provided that such ownership and operation meet the following policy requirements:

1. New and expanded international communications services be made available at the earliest practicable date;
2. Make the system global in coverage so as to provide efficient communication service throughout the whole world as soon as technically feasible, including service where individual portions of the coverage are not profitable;
3. Provide opportunities for foreign participation through ownership or otherwise, in the communications satellite system;
4. Nondiscriminatory use of and equitable access to the system by present and future authorized communications carriers;
5. Effective competition, such as competitive bidding, in the acquisition of equipment used in the system;
6. Structure of ownership or control which will assure maximum possible competition;
7. Full compliance with antitrust legislation and with the regulatory controls of the Government;
8. Development of an economical system, the benefits of which will be reflected in oversea communication rates.

#### **B. POLICY OF GOVERNMENT RESPONSIBILITY**

In addition to its regulatory responsibilities, the U.S. Government will—

1. Conduct and encourage research and development to advance the state of the art and to give maximum assurance of rapid and continuous scientific and technological progress;
2. Conduct or maintain supervision of international agreements and negotiations;
3. Control all launching of U.S. spacecraft;
4. Make use of the commercial system for general governmental purposes and establish separate communications satellite systems when required to meet unique

government needs which cannot, in the national interest, be met by the commercial system;

5. Assure the effective use of the radio-frequency spectrum;
6. Assure the ability to discontinue the electronic functioning of satellites when required in the interest of communication efficiency and effectiveness;
7. Provide technical assistance to newly developing countries in order to help attain an effective global system as soon as practicable;
8. Examine with other countries the most constructive role for the United Nations, including the ITU,\* in international space communications.

### C. COORDINATION

I have asked the full cooperation of all agencies of the Government in the vigorous implementation of the policies stated herein. The National Aeronautics and Space Council will provide continuing policy coordination and will also have responsibility for recommending to me any actions needed to achieve full and prompt compliance with the policy. With the guidelines provided here, I am anxious that development of this new technology to bring the farthest corner of the globe within reach by voice and visual communication, fairly and equitably available for use, proceed with all possible promptness.

### *MIND PROBES*

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1. What factors retard the use of international communication satellites for broadcasting directly to foreign audiences?
2. Consider the advantages and disadvantages of replacing our present broadcasting system, which is dependent on a large number of terrestrial transmitters, with a system based on a combination of direct broadcast satellites and satellite-interconnected cable systems.

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# Policy Statement on Comparative Broadcast Hearings

1 FCC 2d 393

July 28, 1965

Until 1965 the FCC weighed the relative public interest merits of licensing each of several prospective broadcasters competing for a single authorization without the benefit of clear standards to guide the outcome of the comparative hearing that determined the victorious applicant. Commission decisions in such cases were justly criticized for their inconsistency and arbitrariness. The issuance of this policy statement helped to clarify the major comparative criteria and their relative importance. Two commissioners dissented because they felt that adoption of the statement deprived the FCC and applicants of a desirable degree of flexibility.

Although footnote number 1 disclaims the applicability of the policy statement to comparative *renewal* proceedings, in 1969 the FCC applied the document's criteria in favoring the application of a challenger over a Boston telecaster's renewal bid [(*WHDH, Inc.*, 16 FCC 2d 1 (1969))]. On reconsideration, the Commission pointed out that the incumbent was anything but a typical renewal applicant [17 FCC 2d 856, 872-3 (1969)]. But the fears of those who wondered if their licenses would be renewed if similarly challenged could not be allayed when two court decisions adverse to broadcasters were handed down within the month following FCC reconsideration of the Boston case: the Supreme Court's *Red Lion* opinion (Document 34) and the Court of Appeals' reversal of FCC renewal of TV station WLBT (see Document 30). Broadcasters felt that the regulatory walls were tumbling down on them in mid-1969.

Concerned that a rash of license challengers would force the FCC to favor new applicants over incumbent licensees with absentee ownership and holdings in other media, the broadcasting industry urged Congress to pass protective legislation. When the measure (S. 2004, also known as the "Pastore bill") appeared unlikely to gain passage, the FCC issued a "Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants" [22 FCC 2d 424 (1970)] that virtually guaranteed renewal to licensees whose programming was unmarred by serious deficiencies. The renewal policy statement was struck down in court [*Citizens Communications Center et al. v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971)], whereupon the Commission resumed dealing with comparative renewals on a case-by-case basis that consistently favored incumbents without the need for a statement of policy.

After this practice produced several court remands, the FCC articulated a standard that related an incumbent broadcaster's level of past performance (*i.e.*, superior, substantial, or minimal) to the degree of preference it would receive in a comparative renewal proceeding. Thus, the incumbent's expectancy of renewal, a factor the Commission related to public benefits, would be recognized and no irrebuttable presumption of renewal would be erected contrary to the Communications Act's § 309(e) "full hearing" requirement.

Application of this standard received court ratification in *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982). There remains substantial pressure, however, for clarification of FCC comparative renewal standards and congressional relief in the form of a two-tiered hearing whose first stage would grant renewal on a noncomparative basis to incumbents who had performed in accordance with legislatively articulated standards.

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

<sup>1</sup>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.

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. It should also be of value to the examiners who initially decide the cases and to the Review Board to which the basic review of examiners' decisions in this area has been delegated. See Section 0.365 of our Rules, 47 CFR 0.365.<sup>3</sup>

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. We recognize, of course, that a general statement cannot dispose of all problems or decide cases in advance. Thus, for example, a case where a party proposes a specialized service will have to be given somewhat different consideration. Difficult cases will remain difficult. 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 diffusion 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

<sup>2</sup>"[T]he doctrine of *stare decisis* is not generally applicable to the decisions of administrative tribunals," *Kentucky Broadcasting Corp. v. Federal Communications Commission*, 84 U.S. App. D.C. 383, 385, 174 F.2d 38, 40.

<sup>3</sup>On June 15, 1964 the rule was amended to give the Review Board authority to review initial decisions of hearing examiners in comparative television cases, a function formerly performed only by the Commission itself.

<sup>4</sup>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, 139 F.2d 677, *cert. den.* 342 U.S. 830.

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, followed by other interests in the remainder of the proposed service area<sup>5</sup> and, finally, generally in the United States. However, control of large interests elsewhere in the same state or region may well be more significant than control of a small medium of expression (such as a weekly newspaper) in the same community. 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;

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 regional or national coverage; and 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.

<sup>5</sup>Sections 73.35(a), 73.240(a)(1) and 73.636(a)(1) of our rules, 47 CFR 73.35(a), 73.240(a)(1), 73.636(a)(1), prohibit common control of stations in the same service (AM, FM and TV) within prescribed overlap areas. Less than controlling ownership interests and significant managerial positions in stations and other media within and without such areas will be considered when held by persons with any ownership or significant managerial interest in an applicant.



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 programming 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.<sup>6</sup> 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. To the extent that the time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis. In assessing proposals, we will also look to the positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management. We will accord particular weight to staff positions held by the owners, such as general manager, station manager, program director, business manager, director of news, sports or public service broadcasting, and sales manager. Thus, although positions of less responsibility will be considered, especially if there will be full-time integration by those holding those positions, they cannot be given the decisional significance attributed to the integration of stockholders exercising policy functions. Merely consultative positions will be given no weight.

Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. While, for the reasons given above, integration of ownership and management is important *per se*, its value is increased if the participating owners are local residents and if they have experience in the field. Participation in station affairs on the basis described above by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs.<sup>7</sup> 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. Mere diversity of business interests will not be considered. Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence (which is expected to accompany meaningful participation) will also be accorded less weight than present residence of several years' duration.

<sup>6</sup>As with other proposals, it is important that integration proposals be adhered to on a permanent basis. See *Tidewater Teleradio, Inc.*, 24 Pike & Fischer, R.R. 653.

<sup>7</sup>Of course, full-time participation is also necessarily accompanied by residence in the area.

Previous broadcasting experience includes activity which would not qualify as a past broadcast record, i.e., where there was not ownership responsibility for a station's performance. Since emphasis upon this element could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage,<sup>8</sup> it will be deemed of minor significance. It may be examined qualitatively, upon an offer of proof of particularly poor or good previous accomplishment.

The discussion above has assumed full-time, or almost full-time, participation in station operation by those with ownership interests. We recognize that station ownership by those who are local residents and, to a markedly lesser degree, by those who have broadcasting experience, may still be of some value even where there is not the substantial participation to which we will accord weight under this heading. Thus, local residence complements the statutory scheme and Commission allocation policy of licensing a large number of stations throughout the country, in order to provide for attention to local interests, and local ownership also generally accords with the goal of diversifying control of broadcast stations. Therefore, a slight credit will be given for the local residence of those persons with ownership interests who cannot be considered as actively participating in station affairs on a substantially full-time basis but who will devote some time to station affairs, and a very slight credit will similarly be given for experience not accompanied by full-time participation. Both of these factors, it should be emphasized, are of minor significance. No credit will be given either the local residence or experience of any person who will not put his knowledge of the community (or area) or experience to any use in the operation of the station.

3. *Proposed program service.* The United States Court of Appeals for the District of Columbia Circuit has stated that, "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." *Johnston Broadcasting Co. v. Federal Communications Commission*, 85 U.S. App. D.C. 40, 48, 175 F.2d 351, 359. 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 29, 1960 "Report and Statement of Policy Re: Commission *en banc* Programming Inquiry," 25 F.R. 7291, 20 Pike & Fischer, R.R. 1901, and need not be repeated here.<sup>9</sup> And the applicant has the responsibility for a reasonable knowledge of the

<sup>8</sup> Lack of experience, unlike a high concentration of control, is remediable. See *Sunbeam Television Corp. v. Federal Communications Commission*, 100 U.S. App. D.C. 82, 243 F.2d 26.

<sup>9</sup> Specialized proposals necessarily have to be considered on a case-to-case basis. We will examine the need for the specialized service as against the need for a general-service station where the question is presented by competing applicants.

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.

Decisional significance will be accorded only to material and substantial differences between applicants' proposed program plans. See *Johnston Broadcasting Co. v. Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F.2d 351. Minor differences in the proportions of time allocated to different types of programs will not be considered. Substantial differences will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service. For example, an unusual attention to local community matters for which there is a demonstrated need, may still be urged. We will not assume, however, that an unusually high percentage of time to be devoted to local or other particular types of programs is necessarily to be preferred. Staffing plans and other elements of planning will not be compared in the hearing process except where an inability to carry out proposals is indicated.<sup>10</sup>

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.

No independent factor of likelihood of effectuation of proposals will be utilized. The Commission expects every licensee to carry out its proposals, subject to factors beyond its control, and subject to reasonable judgment that the public's needs and interests require a departure from original plans. If there is a substantial indication that any party will not be able to carry out its proposals to a significant degree, the proposals themselves will be considered deficient.<sup>11</sup>

**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.

<sup>10</sup>We will similarly not give independent consideration to proposed studios or other equipment. These are also elements of a proposed operation which are necessary to carry out the program plans, and which are expected to be adequate. They will be inquired into only upon a petition to amend the issues which indicates a serious deficiency.

<sup>11</sup>It should be noted here that the absence of an issue on program plans and policies will not preclude cross-examination of the parties with respect to their proposals for participation in station operation, i.e., to test the validity of integration proposals.

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).

If a past record warrants consideration, the particular reasons, if any, which may have accounted for that record will be examined to determine whether they will be present in the proposed operation. For example, an extraordinary record compiled while the owner fully participated in operation of the station will not be accorded full credit where the party does not propose similar participation in the operation of the new station for which he is applying.

5. *Efficient use of frequency.*<sup>12</sup> 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. The nature of an efficient operation may depend upon the nature of the facilities applied for, i.e., whether they are in the television or FM bands where geographical allocations have been made, or in the standard broadcast (AM) band where there are no such fixed allocations. In addition, the possible variations of situations in comparative hearings are numerous. Therefore, it is not feasible here to delineate the outlines of this element, and we merely take this occasion to point out that the element will be considered where the facts warrant.

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. Since substantial demerits may be appropriate in some cases where disqualification is not warranted, petitions to add an issue on conduct relating to character will be entertained. In the absence of a designated issue, character evidence will not be taken. Our intention here is not only to avoid unduly prolonging the hearing process, but also to avoid those situations where an applicant con-

<sup>12</sup>This factor as discussed here is not to be confused with the determination to be made of which of two communities has the greater need for a new station. See *Federal Communications Commission v. Allentown Broadcasting Corp.* 349 U.S. 358.

verts the hearing into a search for his opponents' minor blemishes, no matter how remote in the past or how insignificant.

7. *Other factors.* As we stated at the outset, our interest in the consistency and clarity of decision and in expedition of the hearing process is not intended to preclude the full examination of any relevant and substantial factor. We will thus favorably consider petitions to add issues when, but only when, they demonstrate that significant evidence will be adduced.<sup>13</sup>

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 openmindedness.

Cases to be decided by either the Review Board or, where the Review Board has not been delegated that function, by the Commission itself, will be decided under the policies here set forth. So too, future designations for hearing will be made in accordance with this statement. Where cases are now in hearing, the hearing examiner will be expected to follow this statement to the extent practicable. Issues already designated will not be changed, but evidence should be adduced only in accordance with this statement. Thus, evidence on issues which we have said will no longer be designated in the absence of a petition to add an issue, should not be accepted unless the party wishing to adduce the evidence makes an offer of proof to the examiner which demonstrates that the evidence will be of substantial value under the criteria discussed herein. Since we are not adopting new criteria which would call for the introduction of new evidence, but rather restricting the scope somewhat of existing factors and explaining their importance more clearly, there will be no element of surprise which might affect the fairness of a hearing. It is, of course, traditional judicial practice to decide cases in accordance with principles in effect at the time of decision. Administrative finality is also important. Therefore, cases which have already been decided, either by the Commission or, where appropriate, by the Review Board, will not be reconsidered. We believe that our purpose to improve the hearing and decisional process in the future does not require upsetting decisions already made, particularly in light of the basically clarifying nature of this document.

<sup>13</sup> Where a narrow question is raised, for example on one aspect of financial qualification, a narrowly drawn issue will be appropriate. In other circumstances, a broader inquiry may be required. This is a matter for *ad hoc* determination.

*MIND PROBES*

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1. It has been suggested that licenses be awarded by the FCC to the highest bidder, or that licensees be selected by lot, as authorized by § 309(i). Compare these proposed methods with the comparative hearing method with respect to their efficiency, fairness, and likelihood of ultimately serving the public interest.

2. Many stations are purchased from existing licensees with FCC approval. Section 310(d) of the Communications Act prohibits the Commission from subjecting transfer applications to comparative scrutiny. To what extent does this situation defeat this document's high regard for diversification of control? What, if anything, should be done about it?

*RELATED READING*

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# Citizen Standing

Office of Communication of the United Church of  
Christ v. Federal Communications Commission\*  
359 F.2d 994 (D.C. Cir.)  
March 25, 1966

Throughout its history the FCC had received comments and complaints from the public. These were dutifully filed away and rarely was anything done about them. Although the Commission required licensees to seek out conflicting views on controversial issues of public importance and ascertain community needs, tastes, and desires (or "problems"), the agency itself seldom actively solicited the public's views on the radio and television services they were receiving. Like other federal regulatory bodies, the FCC gradually aligned itself with the interests of the broadcasting industry it was established to regulate. It was as if the Commission believed the public was an entity whose interests could best be served by ignoring them.

The *United Church of Christ* case changed this situation by providing a degree of legal clout to ordinary citizens. This 1966 decision establishes the right of representatives of the general public to intervene in broadcast licensing proceedings before the FCC. Prior to this historic decision only other broadcasters alleging economic injury or electrical interference (see, for example, Document 19) were granted standing to intervene. *United Church of Christ* is the Magna Carta (but not a *carte blanche*) for active public participation in broadcast regulation.

Following this decision, the FCC held the required hearing, but it placed the major burden of proof on the public intervenors instead of the renewal applicant. Since little weight or credence was given to the intervenors' testimony, WLBT's license was renewed. The case then returned to the Court of Appeals. In Warren Burger's last opinion before he was appointed Chief Justice of the United States, the appellate body

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sternly vacated the renewal and ordered the FCC to consider new applicants for the channel [*Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969)]. WLBT was operated on an interim basis by a non-profit and racially mixed group of local residents while the FCC's comparative proceeding slowly wended its way through the 1970's. In 1979 the license was granted to a local group headed by Aaron Henry, one of the appellants in this case.

Few citizens' petitions to deny renewal were nearly as effective as the one concerning WLBT. But many have been satisfactorily resolved through negotiations between complaining members of the public and broadcasters. The FCC put forth standards governing such meetings of the mind in *Agreements between Broadcast Licensees and the Public*, 57 FCC 2d 42 (1975).

The public participation movement in FCC licensing and rulemaking actions reached its height in the 1970's. Declining financial support, court defeats, an expanded communication policy agenda, and de-regulatory activities have diffused the impact of citizen groups on broadcasting in the 1980's. However, the public remains a potent factor in regulating the electronic media.

### *Burger, Circuit Judge:*

This is an appeal from a decision of the Federal Communications Commission granting to the Intervenor a one-year renewal of its license to operate television station WLBT in Jackson, Mississippi. Appellants filed with the Commission a timely petition to intervene to present evidence and arguments opposing the renewal application. The Commission dismissed Appellants' petition and, without a hearing, took the unusual step of granting a restricted and conditional renewal of the license. Instead of granting the usual three-year renewal, it limited the license to one year from June 1, 1965, and imposed what it characterizes here as "strict conditions" on WLBT's operations in that one-year probationary period.

The questions presented are (a) whether Appellants, or any of them, have standing before the Federal Communications Commission as parties in interest under Section 309(d) of the Federal Communications Act<sup>1</sup> to contest the renewal of a broadcast license; and (b) whether the Commission was required by Section 309(e)<sup>2</sup> to conduct an evidentiary hearing on the claims of the Appellants prior to acting on renewal of the license.

Because the question whether representatives of the listening public have standing to intervene in a license renewal proceeding is one of first impression, we

<sup>1</sup> 74 Stat. 890 (1960), 47 U.S.C. § 309(d) (1964).

<sup>2</sup> 78 Stat. 193 (1964), 47 U.S.C. § 309(e) (1964).



have given particularly close attention to the background of these issues and to the Commission's reasons for denying standing to Appellants.

## BACKGROUND

The complaints against Intervenor embrace charges of discrimination on racial and religious grounds and of excessive commercials. As the Commission's order indicates, the first complaints go back to 1955 when it was claimed that WLBT had deliberately cut off a network program about race relations problems on which the General Counsel of the NAACP was appearing and had flashed on the viewers' screens a "Sorry, Cable Trouble" sign. In 1957 another complaint was made to the Commission that WLBT had presented a program urging the maintenance of racial segregation and had refused requests for time to present the opposing viewpoint. Since then numerous other complaints have been made.

When WLBT sought a renewal of its license in 1958, the Commission at first deferred action because of complaints of this character but eventually granted the usual three-year renewal because it found that, while there had been failures to comply with the Fairness Doctrine, the failures were isolated instances of improper behavior and did not warrant denial of WLBT's renewal application.

Shortly after the outbreak of prolonged civil disturbances centering in large part around the University of Mississippi in September 1962, the Commission again received complaints that various Mississippi radio and television stations, including WLBT, had presented programs concerning racial integration in which only one viewpoint was aired. In 1963 the Commission investigated and requested the stations to submit detailed factual reports on their programs dealing with racial issues. On March 3, 1964, while the Commission was considering WLBT's responses, WLBT filed the license renewal application presently under review.

To block license renewal, Appellants filed a petition in the Commission urging denial of WLBT's application and asking to intervene in their own behalf and as representatives of "all other television viewers in the State of Mississippi." The petition<sup>3</sup> stated that the Office of Communication of the United Church of Christ is an instrumentality of the United Church of Christ, a national denomination with substantial membership within WLBT's prime service area. It listed Appellants Henry and Smith as individual residents of Mississippi, and asserted that both owned television sets and that one lived within the prime service area of WLBT; both are described as leaders in Mississippi civic and civil rights groups. Dr. Henry is president of the Mississippi NAACP; both have been politically active. Each has had a number of controversies with WLBT over allotment of time to present views in opposition to those expressed by WLBT editorials and programs. Appellant United Church of Christ at Tougaloo is a congregation of the United Church of Christ within WLBT's area.

<sup>3</sup>By "petition," we refer to both the original petition and the reply to WLBT's opposition to the initial petition.

The petition claimed that WLBT failed to serve the general public because it provided a disproportionate amount of commercials and entertainment and did not give a fair and balanced presentation of controversial issues, especially those concerning Negroes, who comprise almost forty-five percent of the total population within its prime service area;<sup>4</sup> it also claimed discrimination against local activities of the Catholic Church.

Appellants claim standing before the Commission on the grounds that:

- (1) They are individuals and organizations who were denied a reasonable opportunity to answer their critics, a violation of the Fairness Doctrine.
- (2) These individuals and organizations represent the nearly one half of WLBT's potential listening audience who were denied an opportunity to have their side of controversial issues presented, equally a violation of the Fairness Doctrine, and who were more generally ignored and discriminated against in WLBT's programs.
- (3) These individuals and organizations represent the total audience, not merely one part of it, and they assert the right of all listeners, regardless of race or religion, to hear and see balanced programming on significant public questions as required by the Fairness Doctrine<sup>5</sup> and also their broad interest that the station be operated in the public interest in all respects.

The Commission denied the petition to intervene on the ground that standing is predicated upon the invasion of a legally protected interest or an injury which is direct and substantial and that "petitioners . . . can assert no greater interest or claim of injury than members of the general public." The Commission stated in its denial, however, that as a general practice it "does consider the contentions advanced in circumstances such as these, irrespective of any questions of standing or related matters," and argues that it did so in this proceeding.

Upon considering Petitioners' claims and WLBT's answers to them on this basis, the Commission concluded that

serious issues are presented whether the licensee's operations have fully met the public interest standard. Indeed, it is a close question whether to designate for hearing these applications for renewal of license.

<sup>4</sup>The specific complaints of discrimination were that Negro individuals and institutions are given very much less television exposure than others are given and that programs are generally disrespectful toward Negroes. The allegations were particularized and accompanied by a detailed presentation of the results of Appellants' monitoring of a typical week's programming.

<sup>5</sup>In promulgating the Fairness Doctrine in 1949 the Commission emphasized the "right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter . . ." The Commission characterized this as "the foundation stone of the American system of broadcasting." *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949). This policy received Congressional approval in the 1959 amendment of Section 315 which speaks in terms of "the obligation imposed upon [licensees] 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." 73 Stat. 557 (1959), 47 U.S.C. § 315(a) (1964).

Nevertheless, the Commission conducted no hearing but granted a license renewal, asserting a belief that renewal would be in the public interest since broadcast stations were in a position to make worthwhile contributions to the resolution of pressing racial problems, this contribution was "needed immediately" in the Jackson area, and WLBT, if operated properly,<sup>6</sup> could make such a contribution. Indeed the renewal period was explicitly made a test of WLBT's qualifications in this respect.

We are granting a renewal of license, so that the licensee can demonstrate and carry out its stated willingness to serve fully and fairly the needs and interests of its entire area—so that it can, in short, meet and resolve the questions raised.

The one-year renewal was on conditions which plainly put WLBT on notice that the renewal was in the nature of a probationary grant; the conditions were stated as follows:

- (a) "That the licensee comply strictly with the established requirements of the fairness doctrine."
- (b) "... [T]hat the licensee observe strictly its representations to the Commission in this [fairness] area . . ."
- (c) "That, in the light of the substantial questions raised by the United Church petition, the licensee immediately have discussions with community leaders, including those active in the civil rights movement (such as petitioners), as to whether its programming is fully meeting the needs and interests of its area."
- (d) "That the licensee immediately cease discriminatory programming patterns."
- (e) That "the licensee will be required to make a detailed report as to its efforts in the above four respects . . ."

Appellants contend that, against the background of complaints since 1955 and the Commission's conclusion that WLBT was in fact guilty of "discriminatory programming," the Commission could not properly renew the license even for one year without a hearing to resolve factual issues raised by their petition and vitally important to the public. The Commission argues, however, that it in effect accepted Petitioners' view of the facts, took all necessary steps to insure that the practices complained of would cease, and for this reason granted a short-term renewal as an exercise by the Commission of what it describes as a "political" decision, "in the higher sense of that abused term," which is peculiarly entrusted to the agency."<sup>7</sup> The Commission seems to have based its "political decision" on a

<sup>6</sup>"... we cannot stress too strongly that the licensee must operate in complete conformity with its representations and the conditions laid down."

<sup>7</sup>Intervenor and the Commission depart from the record to argue that WLBT has fully complied with the conditions and that the Commission's hope that WLBT would make a valuable contribution to the problems of race relations is being fulfilled. Appellants respond that

blend of what the Appellants alleged, what its own investigation revealed, its hope that WLBT would improve, and its view that the station was needed.

## STANDING OF APPELLANTS<sup>8</sup>

The Commission's denial of standing to Appellants was based on the theory that, absent a potential direct, substantial injury or adverse effect from the administrative action under consideration, a petitioner has no standing before the Commission and that the only types of effects sufficient to support standing are economic injury and electrical interference. It asserted its traditional position that members of the listening public do not suffer any injury peculiar to them and that allowing them standing would pose great administrative burdens.<sup>9</sup>

Up to this time, the courts have granted standing to intervene only to those alleging electrical interference, *NBC v. FCC (KOA)*, 76 U.S. App. D.C. 238, 132 F. 2d 545 (1942), *aff'd*, 319 U.S. 239, 63 S.Ct. 1035, 87 L. Ed. 1374 (1943), or alleging some economic injury, *e.g.*, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 60 S.Ct. 693, 84 L. Ed. 869 (1940). It is interesting to note, however, that the Commission's traditionally narrow view of standing initially led it to deny standing to the very categories it now asserts are the only ones entitled thereto. In *Sanders* the Commission argued that economic injury was not a basis for standing,<sup>10</sup> and in *KOA* that electrical interference was insufficient. This history indicates that neither administrative nor judicial concepts of standing have been static.

What the Commission apparently fails to see in the present case is that the courts have resolved questions of standing as they arose and have at no time manifested an intent to make economic interest and electrical interference the exclusive grounds for standing. *Sanders*, for instance, granted standing to those economically injured on the theory that such persons might well be the only ones sufficiently interested to contest a Commission action. 309 U.S. 470, 477, 60 S.Ct. 693. In *KOA* we noted the anomalous result that, if standing were restricted to those with an economic interest, educational and non-profit radio stations, a prime source of

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WLBT has not adequately corrected unbalanced programming. We do not consider these claims as to the alleged success of the Commission's effort to permit WLBT to purge itself of misconduct relevant either to the question of standing or to the correctness of the grant of a renewal without a hearing. We confine ourselves to the record as made before the Commission.

<sup>8</sup>All parties seem to consider that the same standards are applicable to determining standing before the Commission and standing to appeal a Commission order to this court. See *Philco Corp. v. FCC*, 103 U.S. App. D.C. 278, 257 F. 2d 656 (1958), cert. denied, 358 U.S. 946, 79 S.Ct. 350, 3 L.Ed. 2d 352 (1959); *Metropolitan Television Co. v. FCC*, 95 U.S. App. D.C. 326, 221 F. 2d 879 (1955). We have, therefore, used the cases dealing with standing in the two tribunals interchangeably.

<sup>9</sup>See *Northern Pacific Radio Corp.*, 23 P & F Rad. Reg. 186 (1962); *Gordon Broadcasting of San Francisco, Inc.*, 22 P & F Rad. Reg. 236 (1962).

<sup>10</sup>It argued that, since economic injury was not a ground for refusing a license, it could not be a basis of standing. See generally *Chicago Junction Case*, 264 U.S. 258, 44 S.Ct. 317, 68 L.Ed. 667 (1924).

public-interest broadcasting, would be defaulted. Because such a rule would hardly promote the statutory goal of public-interest broadcasting, we concluded that non-profit stations must be heard without a showing of economic injury and held that all broadcast licensees could have standing by showing injury other than financial (there, electrical interference). Our statement that *Sanders* did not limit standing to those suffering direct economic injury was not disturbed by the Supreme Court when it affirmed *KOA*. 319 U.S. 239, 63 S.Ct. 1035 (1943).

It is important to remember that the cases allowing standing to those falling within either of the two established categories have emphasized that standing is accorded to persons not for the protection of their private interest but only to vindicate the public interest.

“The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402(b)(2), Congress gave the right of appeal to persons ‘aggrieved or whose interests are adversely affected’ by Commission action. . . . But *these private litigants have standing only as representatives of the public interest*. Federal Communications Commission v. Sanders Radio Station, 309 U.S. 470, 477, 642, 60 S.Ct. 693, 698, 84 L. Ed. 869, 1037.” Associated Industries of New York State, Inc. v. Ickes, 134 F. 2d 694, 703 (2d Cir. 1943), vacated as moot, 320 U.S. 707, 64 S.Ct. 74, 88 L. Ed. 414 (1943), quoting Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14, 62 S.Ct. 875, 86 L. Ed. 1229 (1942).

On the other hand, some Congressional reports have expressed apprehensions, possibly representing the views of both administrative agencies and broadcasters, that standing should not be accorded lightly so as to make possible intervention into proceedings “by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made.”<sup>11</sup> But the recurring theme in the legislative reports is not so much fear of a plethora of parties in interest as apprehension that standing might be abused by persons with no *legitimate* interest in the proceedings but with a desire only to delay the granting of a license for some private selfish reason.<sup>12</sup> The Congressional Committee which voiced the apprehension of a “host of parties” seemingly was willing to allow standing to anyone who could show economic injury or electrical interference. Yet these criteria are no guarantee of the legitimacy of the claim sought to be advanced, for, as another Congressional Committee later lamented, “In many of these cases the protests are based on grounds which have little or no relationship to the public interest.”<sup>13</sup>

We see no reason to believe, therefore, that Congress through its committees had any thought that electrical interference and economic injury were to be the exclusive grounds for standing or that it intended to limit participation of the listen-

<sup>11</sup> S. Rep. No. 44, 82d Cong., 1st Sess. 8 (1951).

<sup>12</sup> See, e.g., *ibid.*; S. Rep. No. 1231, 84th Cong., 1st Sess. 1-3 (1955); H.R. Rep. No. 1051, 84th Cong., 1st Sess. 2-3 (1955); H.R. Rep. No. 1800, 86th Cong., 2d Sess. 9-10, U.S. Code Cong. & Admin. News 1960, p. 3516 (1960).

<sup>13</sup> H.R. Rep. No. 1051, 84th Cong., 1st Sess. 3 (1955).

ing public to writing letters to the Complaints Division of the Commission. Instead, the Congressional reports seem to recognize that the issue of standing was to be left to the courts.<sup>14</sup>

The Commission's rigid adherence to a requirement of direct economic injury in the commercial sense operates to give standing to an electronics manufacturer who competes with the owner of a radio-television station only in the sale of appliances,<sup>15</sup> while it denies standing to spokesmen for the listeners, who are most directly concerned with and intimately affected by the performance of a licensee. Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience. This much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist.

There is nothing unusual or novel in granting the consuming public standing to challenge administrative actions. In *Associated Industries of New York State, Inc. v. Ickes*, 134 F. 2d 694 (2d Cir. 1943), vacated as moot, 320 U.S. 707, 64 S.Ct. 74, 88 L. Ed. 414 (1943), coal consumers were found to have standing to review a minimum price order. In *United States v. Public Utilities Commission*, 80 U.S. App. D.C. 227, 151 F. 2d 609 (1945), we held that a consumer of electricity was affected by the rates charged and could appeal an order setting them. Similarly in *Bebchick v. Public Utilities Commission*, 109 U.S. App. D.C. 298, 287 F. 2d 337 (1961), we had no difficulty in concluding that a public transit rider had standing to appeal a rate increase. A direct economic injury, even if small as to each user, is involved in the rate cases, but standing has also been granted to a passenger to contest the legality of Interstate Commerce Commission rules allowing racial segregation in railroad dining cars. *Henderson v. United States*, 339 U.S. 816, 70 S.Ct. 843, 94 L. Ed. 1302 (1950). Moreover, in *Reade v. Ewing*, 205 F. 2d 630 (2d Cir. 1953), a consumer of oleomargarine was held to have standing to challenge orders affecting the ingredients thereof.<sup>16</sup>

These "consumer" cases were not decided under the Federal Communications Act, but all of them have in common with the case under review the interpretation of language granting standing to persons "affected" or "aggrieved." The Commission fails to suggest how we are to distinguish these cases from those involving standing of broadcast "consumers" to oppose license renewals in the Federal Communications Commission. The total number of potential individual suitors who are

<sup>14</sup>Perhaps the mention in these reports of economic and electrical injury arose out of preoccupation with problems surrounding initial licensing procedures, as distinguished from those involved in renewal proceedings. See . . . *infra*.

<sup>15</sup>*Philco Corp. v. FCC*, 103 U.S. App. D.C. 278, 257 F. 2d 656 (1958); cert. denied, 358 U.S. 946, 79 S.Ct. 350, 3 L.Ed. 2d 35 (1959).

<sup>16</sup>In the most recent case on the subject, the Second Circuit, relying on cases under the Federal Communications Act, held that non-profit conservation associations have standing to protect the aesthetic, conservational, and recreational aspects of power development. *Scenic Hudson Preservation Conference v. FPC*, 354 F. 2d 608 (2d Cir. 1965).

consumers of oleomargarine or public transit passengers would seem to be greater than the number of responsible representatives of the listening public who are potential intervenors in a proceeding affecting a single broadcast reception area. Furthermore, assuming we look only to the commercial economic aspects and ignore vital public interest, we cannot believe that the economic stake of the consumers of electricity or public transit riders is more significant than that of listeners who collectively have a huge aggregate investment in receiving equipment.<sup>17</sup>

The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency. A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.

Nor does the fact that the Commission itself is directed by Congress to protect the public interest constitute adequate reason to preclude the listening public from assisting in that task. *Cf. UAW v. Scofield*, 382 U.S. 205, 86 S.Ct. 335, 15 L. Ed. 2d 304 (1965). The Commission of course represents and indeed is the prime arbiter of the public interest, but its duties and jurisdiction are vast, and it acknowledges that it cannot begin to monitor or oversee the performance of every one of thousands of licensees. Moreover, the Commission has always viewed its regulatory duties as guided if not limited by our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life. The Commission view is that we have traditionally depended on this public reaction rather than on some form of governmental supervision or "censorship" mechanisms.

[I]t is the public in individual communities throughout the length and breadth of our country who must bear final responsibility for the quality and adequacy of television service—whether it be originated by local stations or by national networks. Under our system, the interests of the public are dominant. The commercial needs of licensed broadcasters and advertisers must be integrated into those of the public. *Hence, individual citizens and the communities they compose owe a duty to themselves and their peers to take an active interest in the scope and quality of the television service which stations and networks provide and which, undoubtedly, has a vast impact on their lives and the lives of their children.* Nor need the public feel that in taking a hand in broadcasting they are unduly interfering in the private business affairs of

<sup>17</sup>According to Robert Sarnoff of NBC the total investment in television, by American viewers is 40 billion dollars, a figure perhaps twenty times as large as the total investment of broadcasters. FCC, *Television Network Program Procurement*, H.R. Rep. No. 281, 88th Cong., 1st Sess. 57 (1963). Forty billion dollars would seem to afford at least one substantial brick in a foundation for standing.

others. On the contrary, *their interest in television programming is direct* and their responsibilities important. *They are the owners* of the channels of television—indeed, of all broadcasting.

FCC, *Television Network Program Procurement*, H.R. Rep. No. 281, 88th Cong., 1st Sess. 20 (1963). (Emphasis added.)

Taking advantage of this “active interest in the . . . quality” of broadcasting rather than depending on governmental initiative is also desirable in that it tends to cast governmental power, at least in the first instance, in the more detached role of arbiter rather than accuser.

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.

The Commission’s attitude in this case is ambivalent in the precise sense of that term. While attracted by the potential contribution of widespread public interest and participation in improving the quality of broadcasting, the Commission rejects effective public participation by invoking the oft-expressed fear that a “host of parties” will descend upon it and render its dockets “clogged” and “unworkable.” The Commission resolves this ambivalence for itself by contending that in this renewal proceeding the viewpoint of the public was adequately represented since it fully considered the claims presented by Appellants even though denying them standing. It also points to the general procedures for public participation that are already available, such as the filing of complaints with the Commission,<sup>18</sup> the practice of having local hearings,<sup>19</sup> and the ability of people who are not parties in interest to appear at hearings as witnesses.<sup>20</sup> In light of the Commission’s procedure in this case and its stated willingness to hear witnesses having complaints, it is difficult to see how a grant of formal standing would pose undue or insoluble problems for the Commission.

We cannot believe that the Congressional mandate of public participation which the Commission says it seeks to fulfill<sup>21</sup> was meant to be limited to writing letters to the Commission, to inspection of records, to the Commission’s grace in considering listener claims, or to mere non-participating appearance at hearings. We cannot fail to note that the long history of complaints against WLBT beginning in 1955 had left the Commission virtually unmoved in the subsequent renewal pro-

<sup>18</sup>47 C.F.R. § 1.587 (1965).

<sup>19</sup>74 Stat. 892 (1960), 47 U.S.C. § 311 (1964).

<sup>20</sup>47 C.F.R. § 1.225 (1965).

<sup>21</sup>See 30 Fed. Reg. 4543 (1965).



ceedings, and it seems not unlikely that the 1964 renewal application might well have been routinely granted except for the determined and sustained efforts of Appellants at no small expense to themselves.<sup>22</sup> Such beneficial contribution as these Appellants, or some of them, can make must not be left to the grace of the Commission.

Public participation is especially important in a renewal proceeding, since the public will have been exposed for at least three years to the licensee's performance, as cannot be the case when the Commission considers an initial grant, unless the applicant has a prior record as a licensee. In a renewal proceeding, furthermore, public spokesmen, such as Appellants here, may be the only objectors. In a community served by only one outlet, the public interest focus is perhaps sharper and the need for airing complaints often greater than where, for example, several channels exist. Yet if there is only one outlet, there are no rivals at hand to assert the public interest, and reliance on opposing applicants to challenge the existing licensee for the channel would be fortuitous at best. Even when there are multiple competing stations in a locality, various factors may operate to inhibit the other broadcasters from opposing a renewal application. An imperfect rival may be thought a desirable rival, or there may be a "gentleman's agreement" of deference to a fellow broadcaster in the hope he will reciprocate on a propitious occasion.

Thus we are brought around by analogy to the Supreme Court's reasoning in *Sanders*; unless the listeners—the broadcast consumers—can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the Commission in an effective manner. By process of elimination those "consumers" willing to shoulder the burdensome and costly processes of intervention in a Commission proceeding are likely to be the only ones "having a sufficient interest" to challenge a renewal application. The late Edmond Cahn addressed himself to this problem in its broadest aspects when he said, "Some consumers need bread; others need Shakespeare; others need their rightful place in the national society—what they all need is processors of law who will consider the people's needs more significant than administrative convenience." *Law in the Consumer Perspective*, 112 U.Pa.L.Rev. 1, 13 (1963).

Unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee, some mechanism must be developed so that the *legitimate* interests of listeners can be made a part of the record which the Commission evaluates. An initial applicant frequently floods the Commission with testimonials from a host of representative community groups as to the relative merit of their champion, and the Commission places considerable reliance on these vouchers; on a renewal application the "campaign pledges" of applicants must be open to comparison with "performance in office" aided by a limited number of

<sup>22</sup>We recognize, of course, the existence of strong tides of public opinion and other forces at work outside the listening area of the Licensee which may not have been without some effect on the Commission.

responsible representatives of the listening public when such representatives seek participation.

We recognize the risks alluded to by Judge Madden in his cogent dissent in *Philco*,<sup>23</sup> regulatory agencies, the Federal Communications Commission in particular, would ill serve the public interest if the courts imposed such heavy burdens on them as to overtax their capacities. The competing consideration is that experience demonstrates consumers are generally among the best vindicators of the public interest. In order to safeguard the public interest in broadcasting, therefore, we hold that some "audience participation" must be allowed in license renewal proceedings. We recognize this will create problems for the Commission but it does not necessarily follow that "hosts" of protestors must be granted standing to challenge a renewal application or that the Commission need allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests. The Commission can avoid such results by developing appropriate regulations by statutory rulemaking. Although it denied Appellants standing, it employed *ad hoc* criteria in determining that these Appellants were responsible spokesmen for representative groups having significant roots in the listening community. These criteria can afford a basis for developing formalized standards to regulate and limit public intervention to spokesmen who can be helpful. A petition for such intervention must "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 the public interest. 74 Stat. 891 (1960), 47 U.S.C. 309(d) (1) (1964).

The responsible and representative groups eligible to intervene cannot here be enumerated or categorized specifically; such community organizations as civic associations, professional societies, unions, churches, and educational institutions or associations might well be helpful to the Commission. These groups are found in every community; they usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests.

The Commission should be accorded broad discretion in establishing and applying rules for such public participation, including rules for determining which community representatives are to be allowed to participate and how many are reasonably required to give the Commission the assistance it needs in vindicating the public interest.<sup>24</sup> The usefulness of any particular petitioner for intervention

<sup>23</sup> 103 U.S. App. D.C. at 281, 257 F. 2d at 659 (1958), cert. denied, 358 U.S. 946, 79 S.Ct. 350, 3 L.Ed. 2d 352 (1959).

<sup>24</sup> Professor Jaffe concedes there are strong reasons to reject public or listener standing but he believes "it does have much to commend it" in certain areas if put in terms of "jurisdiction subject to judicial discretion to be exercised with due regard for the character of the interests and the issues involved in each case." Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 282 (1961). "There are many persons . . . who feel that neither the industry nor the FCC can be trusted to protect the listener interest. If this is so, the public action is appropriate. But a frank recognition that the action is a public action and not a private remedy would allow us to introduce the notion of discretion at both the administrative and judicial levels." *Id.* at 284.

must be judged in relation to other petitioners and the nature of the claims it asserts as basis for standing. Moreover it is no novelty in the administrative process to require consolidation of petitions and briefs to avoid multiplicity of parties and duplication of effort.

The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome. Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucrative contingent fees, as can be done, for example, in rate cases.

We are aware that there may be efforts to exploit the enlargement of intervention, including spurious petitions from private interests not concerned with the quality of broadcast programming, since such private interests may sometimes cloak themselves with a semblance of public interest advocates. But this problem, as we have noted, can be dealt with by the Commission under its inherent powers and by rulemaking.

In line with this analysis, we do not now hold that all of the Appellants have standing to challenge WLBT's renewal. We do not reach that question. As to these Appellants we limit ourselves to holding that the Commission must allow standing to one or more of them as responsible representatives to assert and prove the claims they have urged in their petition.

It is difficult to anticipate the range of claims which may be raised or sought to be raised by future petitioners asserting representation of the public interest. It is neither possible nor desirable for us to try to chart the precise scope or patterns for the future. The need sought to be met is to provide a means for reflection of listener appraisal of a licensee's performance as the performance meets or fails to meet the licensee's statutory obligation to operate the facility in the public interest. The matter now before us is one in which the alleged conduct adverse to the public interest rests primarily on claims of racial discrimination, some elements of religious discrimination, oppressive overcommercialization by advertising announcements, and violation of the Fairness Doctrine. Future cases may involve other areas of conduct and programming adverse to the public interest; at this point we can only emphasize that intervention on behalf of the public is not allowed to press private interests but only to vindicate the broad public interest relating to a licensee's performance of the public trust inherent in every license.

## HEARING

We hold further that in the circumstances shown by this record an evidentiary hearing was required in order to resolve the public interest issue. Under Section 309(e) the Commission must set a renewal application for hearing where "a substantial

and material question of fact is presented *or* the Commission for any reason is unable to make the finding" that the public interest, convenience, and necessity will be served by the license renewal. (Emphasis supplied.)

The Commission argues in this Court that it accepted all Appellants' allegations of WLBT's misconduct and that for this reason no hearing was necessary.<sup>25</sup> Yet the Commission recognized that WLBT's past behavior, as described by Appellants, would preclude the statutory finding of public interest necessary for license renewal;<sup>26</sup> hence its grant of the one-year license on the policy ground that there was an urgent need at the time for a properly run station in Jackson must have been predicated on a belief that the need was so great as to warrant the risk that WLBT might continue its improper conduct.

We agree that a history of programming misconduct of the kind alleged would preclude, as a matter of law, the required finding that renewal of the license would serve the public interest. It is important to bear in mind, moreover, that although in granting an initial license the Commission must of necessity engage in some degree of forecasting future performance, in a renewal proceeding past performance is its best criterion. When past performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest. Like public officials charged with a public trust, a renewal applicant, as we noted in our discussion of standing, must literally "run on his record."

The Commission in effect sought to justify its grant of the one-year license, in the face of accepted facts irreconcilable with a public interest finding, on the ground that as a matter of policy the immediate need warranted the risks involved, and that the "strict conditions" it imposed on the grant would improve *future* operations. However the conditions which the Commission made explicit in the one-year license are implicit in every grant. The Commission's opinion reveals how it labored to justify the result it thought was dictated by the urgency of the situation.<sup>27</sup> The majority considered the question of setting the application for hearing a "close" one; Chairman Henry and Commissioner Cox would have granted a hearing to Appellants as a matter of right.

<sup>25</sup>The Commission also argues that Appellants do not have standing in this Court as persons aggrieved or adversely affected under 66 Stat. 718 (1952), as amended, 47 U.S.C. § 402(b) (1964), because all their allegations were accepted as true. However, denial of the relief they sought rendered them persons aggrieved.

<sup>26</sup>In the 1959 renewal proceedings the Commission conceded that WLBT's misconduct then shown would preclude a grant except that there were only "isolated instances."

<sup>27</sup>"24. The discussion in B and C above, establishes that serious issues are presented whether the licensee's operations have fully met the public interest standard. Indeed, it is a close question whether to designate for hearing these applications for renewal of license. In making its judgment, the Commission has taken into account that this particular area is entering a critical period in race relations, and that the broadcast stations, such as here involved, can make a most worthwhile contribution to the resolution of problems arising in this respect. That contribution is needed now—and should not be put off for the future. We believe that the licensee, operating in strict accordance with the representations made and other conditions specified herein, can make that needed contribution, and thus that its renewal would be in the public interest.

The Commission's "policy" decision is not a reflection of some long standing or accepted proposition but represents an *ad hoc* determination in the context of Jackson's contemporary problem. Granted the basis for a Commission "policy" recognizing the value of properly run broadcast facilities to the resolution of community problems, if indeed this truism rises to the level of a policy, it is a determination valid in the abstract but calling for explanation in its application.

Assuming *arguendo* that the Commission's acceptance of Appellants' allegations would satisfy one ground for dispensing with a hearing, *i.e.*, absence of a question of fact, Section 309(e) also commands that in order to avoid a hearing the Commission must make an affirmative finding that renewal will serve the public interest. Yet the only finding on this crucial factor is a qualified statement that the public interest would be served, provided WLBT thereafter complied strictly with the specified conditions. Not surprisingly, having asserted that it accepted Petitioners' allegations, the Commission thus considered itself unable to make a categorical determination that on WLBT's record of performance it was an appropriate entity to receive the license. It found only that *if* WLBT changed its ways, something which the Commission did not and, of course, could not guarantee, the licensing would be proper. The statutory public interest finding cannot be inferred from a statement of the obvious truth that a properly operated station will serve the public interest.

We view as particularly significant the Commission's summary:

We are granting a renewal of license, so that the licensee can demonstrate and carry out its stated willingness to serve fully and fairly the needs and interests of its entire area—so that it can, in short, meet and resolve the questions raised.

The only "stated willingness to serve fully and fairly" which we can glean from the record is WLBT's protestation that it had always fully performed its public obligations. As we read it the Commission's statement is a strained and strange substitute for a public interest finding.

We recognize that the Commission was confronted with a difficult problem and difficult choices, but it would perhaps not go too far to say it elected to post the Wolf to guard the Sheep in the hope that the Wolf would mend his ways because some protection was needed at once and none but the Wolf was handy. This is not a case, however, where the Wolf had either promised or demonstrated any capacity

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25. But we cannot stress too strongly that the licensee must operate in complete conformity with its representations and the conditions laid down. In the last two renewal periods, questions have been raised whether the licensee has complied with the requirements of the fairness doctrine; in the last renewal period, substantial public interest questions have been raised by the petition filed by most responsible community leaders. We are granting a renewal of license, so that the licensee can demonstrate and carry out its stated willingness to serve fully and fairly the needs and interests of its entire area—so that it can, in short, meet and resolve the questions raised. Further, in line with the basic policy determination set out in par. 24, the licensee's efforts in this respect must be made now, and continue throughout the license period."

and willingness to change, for WLBT had stoutly denied Appellants' charges of programming misconduct and violations.<sup>28</sup> In these circumstances a pious hope on the Commission's part for better things from WLBT is not a substitute for evidence and findings. *Cf. Interstate Broadcasting Co. v. FCC*, 116 U.S. App. D.C. 327, 323 F. 2d 797 (1963).

Even if the embodiment of the Commission's hope be conceded *arguendo* to be a finding, there was not sufficient evidence in the record to justify a "policy determination" that the need for a properly run station in Jackson was so pressing as to justify the risk that WLBT might well continue with an inadequate performance. The issues which should have been considered could be resolved only in an evidentiary hearing in which all aspects of its qualifications and performance could be explored.

It is open to question whether the public interest would not be as well, if not better served with one TV outlet acutely conscious that adherence to the Fairness Doctrine is a *sine qua non* of every licensee. Even putting aside the salutary warning effect of a license denial, there are other reasons why one station in Jackson might be better than two for an interim period. For instance, in a letter to the Commission, Appellant Smith alleged that the other television station in Jackson had agreed to sell him time only if WLBT did so.<sup>29</sup> It is arguable that the pressures on the other station might be reduced if WLBT were in other hands—or off the air. The need which the Commission thought urgent might well be satisfied by refusing to renew the license of WLBT and opening the channel to new applicants under the special temporary authorization procedures available to the Commission on the theory that another, and better suited, operator could be found to broadcast on the channel with brief, if any, interruption of service. The Commission's opinion reflects no consideration of these or other alternatives.

We hold that the grant of a renewal of WLBT's license for one year was erroneous. The Commission is directed to conduct hearings on WLBT's renewal application, allowing public intervention pursuant to this holding. Since the Commission has already decided that Appellants are responsible representatives of the listening public of the Jackson area, we see no obstacle to a prompt determination granting standing to Appellants or some of them. Whether WLBT should be able to benefit from a showing of good performance, if such is the case, since June 1965 we do not undertake to decide. The Commission has had no occasion to pass on this issue and we therefore refrain from doing so.<sup>30</sup>

<sup>28</sup>The Commission should have discretion to experiment and even to take calculated risks on renewals where a licensee confesses the error of its ways; this is not such a case.

<sup>29</sup>Letter to Commission from Rev. Robert L. T. Smith, received Jan. 17, 1962, Record, p. 1.

<sup>30</sup>In light of our holding, the special form of license granted here is not unlike a special temporary authorization. Under the Commission's position in *Community Broadcasting Co., Inc. v. FCC*, 107 U.S. App. D.C. 95, 274 F. 2d 753 (1960), it may be that the Commission will conclude that good performance under this conditional or probationary license should not weigh in favor of WLBT.

The record is remanded to the Commission for further proceedings consistent with this opinion; jurisdiction is retained in this court.

Reversed and remanded.

### *MIND PROBES*

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1. Since, as this document states, the concept of standing is a flexible one that Congress intended to let the judiciary determine, can a future case rescind the right of public intervention established by this decision?

2. If a broadcaster is neither a "public utility" nor a "purely private enterprise," then what is a broadcaster?

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# President Johnson's Message to Congress

H.R. Doc. 68, 90th Congress, 1st Session

February 28, 1967

The progress of noncommercial broadcasting in America had been unimpressive. By 1965 only about one hundred educational noncommercial television (ETV) stations were on the air (and 250 educational FM stations, most of which were low powered and student operated). The main impediment to a larger, more effective noncommercial broadcasting establishment was the lack of money. True, many states and local communities had supported ETV generously, and since 1962 federal dollars were used to help construct ETV stations. But many areas of the country were left unserved by noncommercial broadcasting, and the medium had failed to achieve anything approaching national impact. For one thing, there was no interconnected network to facilitate program sharing among stations. And while dollars for hardware could often be found, funds to support program production on a fully professional scale were scarce, even though the Ford Foundation had pumped more than \$100 million into the medium by the mid-1960's.

A sweeping plan to finance and revitalize the service that had been established fifteen years earlier by the FCC was proposed by the Carnegie Commission on Educational Television in 1967. The Commission was headed by Dr. James R. Killian and supported by a \$500,000 grant from the Carnegie Corporation of New York. Its report recommended the creation of a federally financed "Corporation for Public Television." President Lyndon B. Johnson, himself a former school-teacher, requested legislation embodying the major aspects of the Carnegie Commission's proposal in the following excerpt from his "Message on Education and Health in America." The question of long-range funding was left for future determination, and both radio and TV were included in President Johnson's recommendations.



Congress responded with the Public Broadcasting Act of 1967 (Public Law 90-129, approved November 7, 1967), which is incorporated into Part IV of Title III of the Communications Act of 1934, as amended (see Document 42). Intermediate-range funding was initiated through a 1975 law authorizing federal funds for public broadcasting over a five-year period.

The Corporation for Public Broadcasting's first decade and a half of operation saw a vast increase in the number of educational TV and FM radio stations on the air accompanied by the creation of the Public Broadcasting Service (interconnecting TV stations), National Public Radio (linking the larger, professionally managed noncommercial radio stations), and the Children's Television Workshop (producing series such as "Sesame Street" and "Electric Company"). The cultural, children's, and minority interest programming provided by public television stations constitutes an increasingly effective alternative to the programs offered by commercial stations.

Public broadcasting in the mid-1980's is threatened with a financial crunch as federal financing contracts. It faces competition for access to upscale audiences and programming as providers of cultural fare on cable TV proliferate. Like all of broadcasting, it will be affected by emerging technologies. Whether it will be able to retain its "noncommercial" or "educational" identities very much longer remains to be seen.

## **BUILDING FOR TOMORROW**

### **Public Television**

In 1951, the Federal Communications Commission set aside the first 242 television channels for noncommercial broadcasting, declaring: "The public interest will be clearly served if these stations contribute significantly to the educational process of the Nation."

The first educational television station went on the air in May 1953. Today, there are 178 noncommercial television stations on the air or under construction. Since 1963 the Federal Government has provided \$32 million under the Educational Television Facilities Act to help build towers, transmitters and other facilities. These funds have helped stations with an estimated potential audience of close to 150 million citizens.

Yet we have only begun to grasp the great promise of this medium, which, in the words of one critic, has the power to "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 winds and the hills."

Noncommercial television can bring its audience the excitement of excellence

in every field. I am convinced that a vital and self-sufficient noncommercial television system will not only instruct, but inspire and uplift our people.

Practically all noncommercial stations have serious shortages of the facilities, equipment, money and staff which they need to present programs of high quality. There are not enough stations. Interconnections between stations are inadequate and seldom permit the timely scheduling of current programs.

Noncommercial television today is reaching only a fraction of its potential audience—and achieving only a fraction of its potential worth.

Clearly, the time has come to build on the experience of the past 14 years, the important studies that have been made, and the beginnings we have made.

*I recommend that Congress enact the Public Television Act of 1967 to:*

*Increase federal funds for television and radio facility construction to \$10.5 million in fiscal 1968, more than three times this year's appropriations.*

*Create a Corporation for Public Television authorized to provide support to noncommercial television and radio.*

*Provide \$9 million in fiscal 1968 as initial funding for the Corporation.*

Next year, after careful review, I will make further proposals for the Corporation's long-term financing.

Noncommercial television and radio in America, even though supported by Federal funds, must be absolutely free from any Federal Government interference over programming. As I said in the state of the Union message, "We should insist that the public interest be fully served through the public's airwaves."

The Board of Directors of the Corporation for Public Television should include American leaders in education, communications and the creative arts. I recommend that the Board be comprised of 15 members, appointed by the President and confirmed by the Senate.

The Corporation would provide support to establish production centers and to help local stations improve their proficiency. It would be authorized to accept funds from other sources, public and private.

The strength of public television should lie in its diversity. Every region and community should be challenged to contribute its best.

Other opportunities for the Corporation exist to support vocational training for young people who desire careers in public television, to foster research and development, and to explore new ways to serve the viewing public.

One of the Corporation's first tasks should be to study the practicality and the economic advantages of using communication satellites to establish an educational television and radio network. To assist the Corporation, I am directing the Administrator of the National Aeronautics and Space Administration and the Secretary of Health, Education, and Welfare to conduct experiments on the requirements for such a system, and for instructional television, in cooperation with other interested agencies of the Government and the private sector.

Formulation of long-range policies concerning the future of satellite communi-

cations requires the most detailed and comprehensive study by the executive branch and the Congress. I anticipate that the appropriate committees of Congress will hold hearings to consider these complex issues of public policy. The executive branch will carefully study these hearings as we shape our recommendations.

### *MIND PROBES*

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1. The document says, "Noncommercial television today is reaching only a fraction of its potential audience—and achieving only a fraction of its potential worth." How much change has occurred since 1967? What are the likelihoods for marked progress in the foreseeable future?

2. Public television programming for adults is geared primarily to the better educated and economically secure sectors of America. It bothers some that these sectors are the beneficiaries of governmental subsidies while less advantaged segments of society are left largely unserved by public TV. What, if anything, can be done to redress the inequity?

### *RELATED READING*

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- HERMAN W. LAND ASSOCIATES, INC., *The Hidden Medium: A Status Report on Educational Radio in the United States*. Washington, D.C.: National Association of Educational Broadcasters, 1967.
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# The Fairness Doctrine and Cigarette Advertising

Letter from Federal Communications Commission

to Television Station WCBS-TV

8 FCC 2d 381

June 2, 1967

During an era of growing consumer activism the FCC, in 1967, responded to a citizen's complaint by holding that health aspects of cigarette smoking constituted a controversial issue of public importance to which the Fairness Doctrine (Document 23) applied. Broadcasters were required to "provide a significant amount of time for the other viewpoint" if they carried cigarette commercials. The Commission pointed out that cigarettes were a "unique" product category and that the doctrine would not apply to commercial messages on behalf of other products.

A dizzying sequence of events followed this ruling. After the FCC elaborated its decision on reconsideration [9 FCC 2d 921 (1967)], the Court of Appeals upheld the ruling [405 F.2d 1082 (D.C. Cir. 1968)], and the Supreme Court refused to review the case [396 U.S. 842 (1969)]. The FCC proposed to ban cigarette commercials entirely [16 FCC 2d 284 (1969)] as the NAB "volunteered" to effect a gradual phase-out of the ads through industry self-regulation. Congress settled the matter by banning all cigarette commercials on radio and TV effective January 2, 1971 [Public Law 91-222 (1970)], whereupon the Commission ruled that in the absence of such ads, smoking was no longer a matter to which it would apply the Fairness Doctrine [27 FCC 2d 453 (1970)]. The result of all this was confusion about the scope of the Fairness Doctrine and the loss of more than \$200 million annually in tobacco advertising revenue.

The cigarette ruling turned out to be a precedent, despite Commission protestations to the contrary. The FCC's reluctance to apply

the Fairness Doctrine to other types of commercial advertising was upset in 1971 by the Court of Appeals which found the health hazards posed by air pollution stemming from the use of such advertised products as super-powered cars and high-test gasolines were sufficiently akin to those in the cigarette ruling to mandate similar Fairness Doctrine treatment [*Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971)].

The Commission finally extricated itself from its self-made dilemma when it issued its "Fairness Report" in 1974, following 3 years of re-examining selected aspects of the Fairness Doctrine [48 FCC 2d 1 (1974)]. The FCC rescinded the cigarette ruling, holding that ordinary product commercials do not "inform the public on any side of a controversial issue of public importance" or make "a meaningful contribution to public debate" (*id.* at 26). Hence the Fairness Doctrine is no longer applicable to ordinary commercial advertising [see *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976)], unless a controversial issue is explicitly raised in a sponsor's message. See, e.g., *Energy Action Committee, Inc., et al.*, 64 FCC 2d 787 (1977).

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D.C.

June 2, 1967

Television Station WCBS-TV  
51 West 52 Street  
New York, New York

Gentlemen:

This letter constitutes the Commission's ruling upon the complaint of Mr. John F. Banzhaf, III, against Station WCBS-TV, New York, N.Y. Mr. Banzhaf, by letter dated January 5, 1967, filed a fairness doctrine complaint, asserting that WCBS-TV, after having aired numerous commercial advertisements for cigarette manufacturers, has not afforded him or some other responsible spokesman an opportunity "to present contrasting views on the issue of the benefits and advisability of smoking."

Mr. Banzhaf's letter cites as examples three particular commercials over WCBS-TV which present the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life." Mr. Banzhaf, in his letter to you of December 1, 1966, requested free time be made available to "responsible groups" roughly approximate to that spent on the promotion of "the virtues and values of smoking."

Your responsive letter of December 30, 1966, cites programs which WCBS-TV has broadcast dealing with the effect of smoking on health, beginning in September 1962 and continuing to date. It cites six reports on this issue in its evening news programs since May 1966, five major reports by its Science Editor since September 1966 and five one minute messages, which advance the view that smoking is undesirable, broadcast without charge within the last few months for the American Cancer Society. The letter also refers to half hour and hour programs on smoking and health broadcast in 1962 and 1964. You take the position that the above programs have provided contrasting viewpoints on this issue by responsible authorities, and therefore, that it is unnecessary to consider whether the "fairness doctrine" may be applied to commercial announcements solely aimed at selling products. You state your view that it may not.

In Mr. Banzhaf's complaint to the Commission, he asserts that the programs cited by you as showing compliance with the "fairness doctrine" are insufficient to offset the effects of paid advertisements broadcast daily for a total of five to ten minutes each broadcast day. He also states that the very point of his letters is to establish the applicability of the doctrine to cigarette advertisements.

We hold that the fairness doctrine is applicable to such advertisements. 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.

We reject, however, Mr. Banzhaf's claim that the time to be afforded "roughly approximate" that devoted to the cigarette commercials. The fairness doctrine does not require "equal time" (see Ruling No. II C. 12, 29 F.R. 10416) and, equally important, a requirement of such "rough approximation" would, we think, be inconsistent with the Congressional direction in this field—the 1965 Cigarette Labeling and Advertising Act. The practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising. But in the 1965 Act Congress made clear that it did not favor such a "drastic" step, but rather wished to afford an opportunity to consider "the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package... [on the problem of] adequately alert[ing] the public to the potential hazard from smoking" (Sen. Rept. No. 195, 89th Cong., 1st Sess., p. 5). At the conclusion of a three year period (to end July 1, 1969), and upon the basis of reports from the Federal Trade Commission and the Department of Health, Education, and Welfare (HEW) and other pertinent sources,

the Congress would then decide what further remedial action, if any, is appropriate. In the meantime, Congress has promoted extensive smoking education campaigns by appropriating substantial sums for HEW in this area. See P.L. 89-156, Title II, Public Health Service, Chronic Diseases and Health of the Aged.

Our action here, therefore, must be tailored so as to carry out the above Congressional purpose. We believe that it does. It requires a station which carries cigarette commercials to provide a significant amount of time for the other viewpoint, thus implementing the "smoking education campaigns" referred to as a basis for Congressional action in the 1965 Act. See Cigarette Labeling and Advertising Act; remarks of Senator Warren Magnuson, floor manager in the Senate of the bill which became that Act, Cong. Rec. (Daily Edition) Jan. 16, 1967, p. S. 317, 319. But this requirement will not preclude or curtail presentation by stations of cigarette advertising which they choose to carry.

A station might, for example, reasonably determine that the above noted responsibility would be discharged by presenting each week, in addition to appropriate news reports or other programming dealing with the subject, a number of the public service announcements of the American Cancer Society or HEW in this field. We stress, however, that in this, as in other areas under the fairness doctrine, 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, upon the particular facts of his situation. See Cullman Broadcasting Co., F.C.C. 63-849 (Sept. 18, 1963).

In this case, we note that WCBS-TV is aware of its responsibilities in this area, in light of the programming described in the third paragraph. While we have rejected Mr. Banzhaf's claim of "rough approximation of time," the question remains whether in the circumstances a sufficient amount of time is being allocated each week to cover the viewpoint of the health hazard posed by smoking. We note in this respect that, particularly in light of the recent American Cancer Society announcements, you appear to have a continuing program in this respect. The guidelines in the foregoing discussion are brought to your attention so that in connection with the above continuing program you may make the judgment whether sufficient time is being allocated each week in this area.

By Direction of the Commission  
Ben F. Waple  
*Secretary*

### *MIND PROBES*

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1. Tobacco companies opposed the application of the Fairness Doctrine to cigarette advertising but accepted the later congressional ban of broadcast cigarette advertising. What explains these superficially inconsistent stances?

2. Are there products or services advertised today on radio or TV that explicitly raise controversial issues of public importance to which the Fairness Doctrine arguably applies? What techniques are used by advertisers that raise such issues implicitly rather than explicitly?

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- UNITED STATES CONGRESS, HOUSE, COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, *Regulation of Radio and Television Cigarette Advertisements*, hearing before the Committee, 91st Congress, 1st Session, on Self-Regulation by the Broadcasting Industry of Radio and Television Cigarette Advertisements, June 10, 1969. Washington, D.C.: Government Printing Office, 1969.
- WOODBY, KATHLEEN R., and F. LESLIE SMITH, "The Cigarette Commercial Ban: A Pattern for Change," *Quarterly Journal of Speech*, 60:4 (December 1974), 431-41.



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# The Southwestern Case

United States et al. v. Southwestern Cable Co. et al.

392 U.S. 157

June 10, 1968

Cable television, originally known as community antenna television (CATV), began operating in the U.S. in 1949 during the "freeze." The early systems served as small-town equivalents of urban apartment house master antenna systems, bringing clear TV station signals by wire to subscribers unable to obtain acceptable reception on their own because of their distance from the small number of operational transmitters or because of terrain features that blocked signal passage.

As CATV systems enlarged their offerings, sometimes importing distant TV station signals via microwave relay and originating programming themselves, and as many new TV stations came on the air following the freeze's termination in 1952, telecasters in small markets urged the FCC to assert jurisdiction over CATV. The Commission first did so in *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), *affirmed*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951, using the *Carroll* case's interpretation of *Sanders Brothers* (Document 19) as a means of opening the jurisdictional door to microwave licensees serving CATV systems.

*Carter Mountain* became a "dispositive" precedent when the FCC adopted its first set of regulations for microwave-served CATV systems [38 FCC 683, 687, n. 5 (1965)]. A year later the Commission applied modified rules to *all* cable systems [2 FCC 2d 725 (1966)] and prohibited distant TV signal importation into the top one hundred markets without a hearing that placed an insurmountable burden of proof on CATV entrepreneurs. These rules protected big city TV station operators from cable "encroachment" and hampered CATV development in the nation's population centers.

This unanimous Supreme Court decision in *Southwestern* (sometimes referred to as the "San Diego case") declared the FCC's cable jurisdiction legally valid under the broad authority over interstate com-

munication vested in the Commission by the Communications Act. (Justice White's concurring opinion has been omitted.) In 1972 the Court narrowly upheld the legality of a rule first adopted by the FCC in 1969 that required cable systems with more than 3,500 subscribers to engage in local program origination; the five-to-four decision pivoted on the "reasonably ancillary" standard, the precedent established in the *Southwestern* case [*United States v. Midwest Video Corp.*, 406 U.S. 649, 662 (1972)]. Despite judicial affirmation, the FCC rescinded the cable program origination rule a few years later [49 FCC 2d 1090 (1974)].

In the 4 years between *Southwestern and Midwest I* a torrent of CATV rules issued from the Commission. The most comprehensive set of cable regulations was promulgated in 1972 (36 FCC 2d 143), but within 5 years these rules had become decimated by waivers, amendments, suspensions, and new regulations. In the meantime, widespread criticism of the FCC's policy of regulating cable in order to protect over-the-air broadcasting mounted.

The question referred to in footnote 10 of the Court's decision was decided in the negative one week later [392 U.S. 390 (1968)]. After several years Congress enacted a comprehensive new copyright statute, the Copyright Act of 1976 (Public Law 553, 94th Congress). Section 111 of this Act established copyright liability when cable systems carry certain distant signals under a compulsory licensing system that precluded fee negotiations. See Document 38 for subsequent developments in the cable TV field.

*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<sup>1</sup> for relief under §§ 74.1107<sup>2</sup>

<sup>1</sup> Midwest's petition was premised upon its status as licensee of KFMB-TV, San Diego, California. It is evidently also the licensee of various other broadcasting stations. See Second Report and Order, 2 F.C.C. 2d 725, 739.

<sup>2</sup> 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. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year." San Diego is the Nation's 54th largest television market. *Midwest Television, Inc.*, 11 Pike & Fischer Radio Reg. 2d 273, 276.

and 74.1109<sup>3</sup> 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.<sup>5</sup> 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, 48 Stat. 1064, 47 U.S.C. § 151, to issue such an order.<sup>6</sup> 378 F. 2d 118. We granted certiorari to consider this important question of regulatory authority.<sup>7</sup> 389 U.S. 911. For reasons that follow, 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

<sup>3</sup>47 CFR § 74.1109 creates "procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes." It provides that petitions for special relief "may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted." 47 CFR § 74.1109(b). Provisions are made for comments or opposition to the petition, and for rejoinders by the petitioner. 47 CFR §§ 74.1109(d), (e). Finally, the Commission "may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate." 47 CFR § 74.1109(f).

<sup>4</sup>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. Respondents' CATV systems now carry the signals of San Diego stations, but Midwest alleged that the quality of the signals, as they are carried by respondents, is materially degraded, and that this serves only to accentuate the fragmentation of the local audience.

<sup>5</sup>February 15, 1966, is the date on which grandfather rights accrued under 47 CFR § 74.1107(d). The initial decision of the hearing examiner, issued October 3, 1967, concluded that permanent restrictions on the expansion of respondents' services were unwarranted. *Midwest Television, Inc.*, 11 Pike & Fischer Radio Reg. 2d 273. The Commission has declined to terminate its interim restrictions pending consideration by the Commission of the examiner's decision. *Midwest Television, Inc.*, *id.*, at 721.

<sup>6</sup>The opinion of the Court of Appeals could be understood to hold either that the Commission may not, under the Communications Act, regulate CATV, or, more narrowly, that it may not issue the prohibitory order involved here. We take the court's opinion, in fact, to have encompassed both positions.

<sup>7</sup>We note that the Court of Appeals for the District of Columbia Circuit has concluded that the Communications Act permits the regulation of CATV systems. See *Buckeye Cablevision, Inc. v. F.C.C.*, 128 U.S. App. D.C. 262, 387 F. 2d 220.

the receivers of their subscribers.<sup>8</sup> CATV systems characteristically do not produce their own programming,<sup>9</sup> and do not recompense producers or broadcasters for use of the programming which they receive and redistribute.<sup>10</sup> Unlike ordinary broadcasting stations, CATV systems commonly charge their subscribers installation and other fees.<sup>11</sup>

The CATV industry has grown rapidly since the establishment of the first commercial system in 1950.<sup>12</sup> In the late 1950's, some 50 new systems were established each year; by 1959, there were 550 "nationally known and identified" systems serving a total audience of 1,500,000 to 2,000,000 persons.<sup>13</sup> It has been more recently estimated that "new systems are being founded at the rate of more than one per day, and . . . subscribers . . . signed on at the rate of 15,000 per month."<sup>14</sup> By late 1965, it was 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> The statistical evidence is incomplete, but, as the Commission has observed, "whatever the estimate, CATV growth is clearly explosive in nature." Second Report and Order, 2 F.C.C. 2d 725, 738, n. 15.

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,

<sup>8</sup>CATV systems are defined by the Commission for purposes of its rules as "any facility which . . . receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television 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 which serves fewer than 50 subscribers, or (2) any such facility which 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." 47 CFR § 74.1101(a).

<sup>9</sup>There is, however, no technical reason why they may not. See Note, *The Wire Mire: The FCC and CATV*, 79 Harv. L. Rev. 366, 367. Indeed, the examiner was informed in this case that respondent Mission Cable TV "intends to commence program origination in the near future." *Midwest Television, Inc., supra*, at 283.

<sup>10</sup>The question whether a CATV system infringes the copyright of a broadcasting station by its reception and retransmission of the station's signals is presented in *Fortnightly Corp. v. United Artists TV, Inc.*, No. 618, now pending before the Court.

<sup>11</sup>The installation costs for CATV systems in 16 Connecticut communities were, for example, found to range from \$31 to \$147 per home. M. Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry* 24 (1965).

<sup>12</sup>CATV systems were evidently first established on a noncommercial basis in 1949. H. R. Rep. No. 1635, 89th Cong., 2d Sess., 5.

<sup>13</sup>CATV and TV Repeater Services, 26 F.C.C. 403, 408; Note, *The Wire Mire: The FCC and CATV, supra*, at 368.

<sup>14</sup>Note, *The Wire Mire: The FCC and CATV, supra*, at 368.

<sup>15</sup>Second Report and Order, 2 F.C.C. 2d 725, 738. The franchises are granted by state or local regulatory agencies. It was reported in 1965 that two States, Connecticut and Nevada, regulate CATV systems, and that some 86% of the systems are subject at least to some local regulation. Seiden, *supra*, at 44-47. See Conn. Gen. Stat. Rev., Tit. 16, c. 289 (1958); Nev. Stat. 1967, c. 458.

their principal function has more frequently become the importation of distant signals.<sup>16</sup> In 1959, only 50 systems employed microwave relays, and the maximum distance over which signals were transmitted was 300 miles; by 1964, 250 systems used microwave, and the transmission distances sometimes exceeded 665 miles. First Report and Order, 38 F.C.C. 683, 709. There are evidently now plans "to carry the programing of New York City independent stations by cable to . . . upstate New York, to Philadelphia, and even as far as Dayton."<sup>17</sup> And see *Channel 9 Syracuse, Inc. v. F.C.C.*, 128 U.S. App. D.C. 187, 385 F. 2d 969; *Hubbard Broadcasting, Inc. v. F.C.C.*, 128 U.S. App. D.C. 197, 385 F. 2d 979. Thus, "while the CATV industry originated in sparsely settled areas and areas of adverse terrain . . . it is now spreading to metropolitan centers . . ." First Report and Order, *supra*, at 709. 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.<sup>18</sup>

The Commission has on various occasions attempted to assess the relationship between community antenna television systems and its conceded regulatory functions. In 1959, it completed an extended investigation of several auxiliary broadcasting services, including CATV. CATV and TV Repeater Services, 26 F.C.C. 403. Although it found that CATV is "related to interstate transmission," the Commission reasoned that CATV systems are neither common carriers nor broadcasters, and therefore are within neither of the principal regulatory categories created by the Communications Act. *Id.*, at 427-428. The Commission declared that it had not been given plenary authority over "any and all enterprises which happen to be connected with one of the many aspects of communications." *Id.*, at 429. It refused to premise regulation of CATV upon assertedly adverse consequences for broadcasting, because it could not "determine where the impact takes effect, although we recognize that it may well exist." *Id.*, at 431.

The Commission instead declared that it would forthwith seek appropriate legislation "to clarify the situation." *Id.*, at 438. Such legislation was introduced in the Senate in 1959,<sup>19</sup> favorably reported,<sup>20</sup> and debated on the Senate floor.<sup>21</sup> The bill was, however, ultimately returned to committee.<sup>22</sup>

<sup>16</sup>The term "distant signal" has been given a specialized definition by the Commission, as a signal "which is extended 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).

<sup>17</sup>Note, *The Wire Mire: The FCC and CATV*, *supra*, at 368 (notes omitted).

<sup>18</sup>It has thus been suggested that "a nationwide grid of wired CATV systems, interconnected by microwave frequencies and financed by subscriber fees, may one day offer a viable economic alternative to the advertiser-supported broadcast service." Levin, *New Technology and the Old Regulation in Radio Spectrum Management*, 56 *Am. Econ. Rev.* 339, 341 (Proceedings, May 1966).

<sup>19</sup>See S. 2653, 86th Cong., 1st Sess.

<sup>20</sup>S. Rep. No. 923, 86th Cong., 1st Sess.

<sup>21</sup>See 106 Cong. Rec. 10416-10436, 10520-10548.

<sup>22</sup>*Id.*, at 10547. The Commission in 1966 made additional efforts to obtain suitable modifications in the Communications Act. See n. 30, *infra*.

Despite its inability to obtain amendatory legislation, the Commission has, since 1960, gradually asserted jurisdiction over CATV. It first placed restrictions upon the activities of common carrier microwave facilities that serve CATV systems. See *Carter Mountain Transmission Corp.*, 32 F.C.C. 459, aff'd, 321 F. 2d 359. Finally, the Commission in 1962 conducted a rule-making proceeding in which it re-evaluated the significance of CATV for its regulatory responsibilities. First Report and Order, *supra*. The proceeding was explicitly restricted to those systems that are served by microwave, but the Commission's conclusions plainly were more widely relevant. The Commission found that "the likelihood or probability of [CATV's] adverse impact upon potential and existing service has become too substantial to be dismissed." *Id.*, at 713-714. It reasoned that the importation of distant signals into the service areas of local stations necessarily creates "substantial competition" for local broadcasting. *Id.*, at 707. 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 . . ." *Id.*, at 710-711.

The Commission attempted to "accommodat[e]" the interests of CATV and of local broadcasting by the imposition of two rules. *Id.*, at 713. First, CATV systems were required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals.<sup>23</sup> Second, CATV systems were forbidden to duplicate the programming of such local stations for periods of 15 days before and after a local broadcast. See generally First Report and Order, *supra*, at 719-730. 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 . . ." *Id.*, at 715.

The Commission in 1965 issued additional notices of inquiry and proposed rule-making, by which it sought to determine whether all forms of CATV, including those served only by cable, could properly be regulated under the Communications Act. 1 F.C.C. 2d 453. After further hearings, the Commission held that the Act confers adequate regulatory authority over all CATV systems. Second Report and Order, *supra*, at 728-734. It promulgated revised rules, applicable both to cable and to microwave CATV systems, to govern the carriage of local signals and the nonduplication of local programming. Further, the Commission 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 consistent with the public interest," *id.*, at 782; see generally *id.*, at 781-785, "particularly the establishment and healthy maintenance of television broadcast service in the area," 47 CFR § 74.1107(c).

<sup>23</sup> See generally First Report and Order, *supra*, at 716-719. The Commission held that a CATV system must, within the limits of its channel capacity, carry the signals of stations that place signals over the community served by the system. The stations are to be given priority according to the strength of the signal available in the community, with the strongest signals given first priority. Exceptions are made for situations in which there would be substantial duplication or in which an independent or noncommercial station would be excluded. *Id.*, at 717.

Finally, the Commission created "summary, nonhearing procedures" for the disposition of applications for separate or additional relief. 2 F.C.C. 2d, at 764; 47 CFR § 74.1109. Thirteen days after the Commission's adoption of the Second Report, Midwest initiated these proceedings by the submission of its petition for special relief.

## 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.<sup>24</sup>

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. The Commission was expected to serve as the "single Government agency"<sup>25</sup> with "unified jurisdiction"<sup>26</sup> and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio."<sup>27</sup> It was for this purpose given "broad authority."<sup>28</sup> As this Court emphasized in an earlier case, the Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the [broadcasting] industry." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137.

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

<sup>24</sup>It must also be noted that the CATV systems involved in these cases evidently do not employ microwave. We intimate no views on what differences, if any, there might be in the scope of the Commission's authority over microwave and nonmicrowave systems.

<sup>25</sup>The phrase is taken from the message to Congress from President Roosevelt, dated February 26, 1934, in which he recommended the Commission's creation. See H. R. Rep. No. 1850, 73d Cong., 2d Sess., 1.

<sup>26</sup>S. Rep. No. 781, 73d Cong., 2d Sess., 1.

<sup>27</sup>*Ibid.* The Committee also indicated that there was a "vital need" for such a commission with jurisdiction "over all of these methods of communication." *Ibid.*

<sup>28</sup>The phrase is taken from President Roosevelt's message to Congress. H. R. Rep. No. 1850, *supra*, at 1. The House Committee added that "the primary purpose of this bill [is] to create such a commission armed with adequate statutory powers to regulate all forms of communication . . ." *Id.*, at 3.

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.<sup>29</sup> 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<sup>30</sup> 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.<sup>31</sup> We have recognized that administrative agencies should in such situations, be encouraged to seek from Congress clarification of the pertinent statutory provisions. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47.

Nor can we obtain significant assistance from the various expressions of congressional opinion that followed the Commission's requests. In the first place, the

<sup>29</sup> Respondents assert only that this "is subject to considerable question" Brief for Respondent Southwestern Cable Co. 24, n. 25. They rely chiefly upon the language of § 152(b), which provides that nothing in the Act shall give the Commission jurisdiction over "carriers" that are engaged in interstate communication solely through physical connection, or connection by wire or radio, with the facilities of another carrier, if they are not directly or indirectly controlled by such other carrier. The terms and history of this provision, however, indicate that it was "merely a perfecting amendment" intended to "obviate any possible technical argument that the Commission may attempt to assert common-carrier jurisdiction over point-to-point communication by radio between two points within a single State . . ." S. Rep. No. 1090, 83d Cong., 2d Sess., 1. See also H. R. Rep. No. 910, 83d Cong., 1st Sess. The Commission and the respondents are agreed, we think properly, that these CATV systems are not common carriers within the meaning of the Act. See 47 U.S.C. § 153(h); *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251; *Philadelphia Television Broadcasting Co. v. F.C.C.*, 123 U.S. App. D.C. 298, 359 F. 2d 282; CATV and TV Repeater Services, *supra*, at 427-428.

<sup>30</sup> See H. R. 13286, 89th Cong., 2d Sess. The bill was favorably reported by the House Committee on Interstate and Foreign Commerce, H. R. Rep. No. 1635, 89th Cong., 2d Sess., but failed to reach the floor for debate.

<sup>31</sup> See, for the legislation proposed in 1959, CATV and TV Repeater Services, *supra*, at 427-431, 438-439. The Commission in 1966 explicitly stated in its explanation of its proposed amendments to the Act that "we believe it highly desirable that Congress . . . confirm [the Commission's] jurisdiction and . . . establish such basic national policy as it deems appropriate." H. R. Rep. No. 1635, *supra*, at 16.



views of one Congress as to the construction of a statute adopted many years before by another Congress have "very little, if any, significance." *Rainwater v. United States*, 356 U.S. 590, 593; *United States v. Price*, 361 U.S. 304, 313; *Haynes v. United States*, 390 U.S. 85, 87, n. 4. Further, it is far from clear that Congress believed, as it considered these requests for legislation, that the Commission did not already possess regulatory authority over CATV. In 1959, the proposed legislation was preceded by the Commission's declarations that it "did not intend to regulate CATV," and that it preferred to recommend the adoption of legislation that would impose specified requirements upon CATV systems.<sup>32</sup> Congress may well have been more troubled by the Commission's unwillingness to regulate than by any fears that it was unable to regulate.<sup>33</sup> In 1966, the Commission informed Congress that it desired legislation in order to "conform [its] jurisdiction and to establish such basic national policy as [Congress] deems appropriate." H. R. Rep. No. 1635, 89th Cong., 2d Sess., 16. In response, the House Committee on Interstate and Foreign Commerce said merely that it did not "either agree or disagree" with the jurisdictional conclusions of the Second Report, and that "the question of whether or not . . . the Commission has authority under present law to regulate CATV systems is for the courts to decide . . ." *Id.*, at 9. In these circumstances, we cannot derive from the Commission's requests for legislation anything of significant bearing on the construction question now before us.

Second, respondents urge that § 152(a)<sup>34</sup> 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

<sup>32</sup> See S. Rep. No. 923, 86th Cong., 1st Sess., 5-6.

<sup>33</sup> Thus, the Senate Committee on Interstate and Foreign Commerce observed in its 1959 Report that although the Commission's staff had recommended that authority be asserted over CATV, the Commission had "long hesitated," and had only recently made clear "that it did not intend to regulate CATV systems in any way whatsoever." S. Rep. No. 923, *supra*, at 5. Nonetheless, it must be acknowledged that the debate on the Senate floor centered on the broad question whether the Commission should have authority to regulate CATV. See, e.g., 106 Cong. Rec. 10426.

<sup>34</sup> 47 U.S.C. § 152(a) provides that "[t]he provisions of this chapter 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; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone."

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 it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *F.C.C. v. Pottsville Broadcasting Co.*, *supra*, at 138, that it conferred upon the Commission a "unified jurisdiction"<sup>35</sup> and "broad authority."<sup>36</sup> Thus, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *F.C.C. v. Pottsville Broadcasting Co.*, *supra*, at 138. Congress in 1934 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers." *National Broadcasting Co. v. United States*, 319 U.S. 190, 219. We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over "all interstate . . . communication by wire or radio."<sup>37</sup>

Moreover, the Commission has reasonably concluded that regulatory authority over CATV 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,"<sup>38</sup> with a "fair, efficient, and equitable distribution" of service among the "several States and communities." 47 U.S.C. § 307(b). The Commission has, for this and other purposes, been granted authority to allocate broadcasting zones or areas, and to provide regulations "as it may deem necessary" to prevent interference among the various stations. 47 U.S.C. §§ 303(f), (h). The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system

<sup>35</sup>S. Rep. No. 781, *supra*, at 1.

<sup>36</sup>H. R. Rep. No. 1850, *supra*, at 1.

<sup>37</sup> Respondents argue, and the Court of Appeals evidently concluded, that the opinion of the Court in *Regents v. Carroll*, 338 U.S. 586, supports the inference that the Commission's authority is limited to licensees, carriers, and others specifically reached by the Act's other provisions. We find this unpersuasive. The Court in *Carroll* considered the very general contention that the Commission had been given authority "to determine the validity of contracts between licensees and others." *Id.*, at 602. It was concerned, not with the limits of the Commission's authority over a form of communication by wire or radio, but with efforts to enforce a contract that had been repudiated upon the demand of the Commission. The Court's discussion of the Commission's authority under § 303(r), *see id.*, at 600, must be read in that context, and as thus read it cannot be controlling here.

<sup>38</sup>S. Rep. No. 923, *supra*, at 7. The Committee added that "Congress and the people" have no particular interest in the success of any given broadcaster, but if the failure of a station "leaves a community with inferior service," this becomes "a matter of real and immediate public concern." *Ibid.*

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 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.<sup>40</sup> Second, communities must be encouraged "to launch sound and adequate programs to utilize the television channels now reserved for educational purposes."<sup>41</sup> These subsidiary goals have received the endorsement of Congress.<sup>42</sup>

The Commission has reasonably found that the achievement of each of these purposes is "placed in jeopardy by the unregulated explosive growth of CATV." H. R. Rep. No. 1635, 89th Cong., 2d Sess., 7. Although CATV may in some circumstances make possible "the realization of some of the [Commission's] most important goals," First Report and Order, *supra*, at 699, its importation of distant signals into the service areas of local stations may also "destroy or seriously degrade the service offered by a television broadcaster," *id.*, at 700, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations.<sup>43</sup> In particular, the Commission feared that CATV might, by dividing the

<sup>39</sup>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 Foreign Commerce, 85th Cong., 2d Sess., *The Television Inquiry: The Problem of Television Service for Smaller Communities* 3-4 (Comm. Print 1959). 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.

<sup>40</sup>The Commission has allocated 82 channels for television broadcasting, of which 70 are in the UHF portion of the radio spectrum. This permits a total of 681 VHF stations and 1,544 UHF stations. H. R. Rep. No. 1559, *supra*, at 2. In December 1964, 454 VHF stations were on the air, 25 permittees were not operating, and 11 applications were awaiting Commission action, leaving 63 unreserved VHF allocations available. Seiden, *supra*, . . . n. 11, at 10. At the same time, 90 UHF stations were operating, 66 were assigned but not operating, 52 applications were pending before the Commission, and 1,108 allocations were still available. *Ibid.* The Commission has concluded that, in these circumstances, "an adequate national television system can be achieved" only if more of the available UHF channels are utilized. H. R. Rep. No. 1559, *supra*, at 4.

<sup>41</sup>S. Rep. No. 67, 87th Cong., 1st Sess., 8-9. The Committee indicated that it was "of utmost importance to the Nation that a reasonable opportunity be afforded educational institutions to use television as a noncommercial educational medium." *Id.*, at 3. Similarly, the House Committee on Interstate and Foreign Commerce has concluded that educational television will "provide a much needed source of cultural and informational programming for all audiences . . ." H. R. Rep. No. 1559, *supra*, at 3. It is thus an essential element of "an adequate national television system." *Id.*, at 4. See also H. R. Rep. No. 572, 90th Cong., 1st Sess.; S. Rep. No. 222, 90th Cong., 1st Sess.

<sup>42</sup>Legislation was adopted in 1962 to amend the Communications Act in order to require that all television receivers thereafter shipped in interstate commerce for sale or resale to the public be capable of receiving both UHF and VHF frequencies. 76 Stat. 150. The legislation was plainly intended to assist the growth of UHF broadcasting. See H. R. Rep. No. 1559, *supra*. Moreover, legislation has been adopted to provide construction grants and other assistance to educational television systems. 76 Stat. 68, 81 Stat. 365.

<sup>43</sup>See generally Second Report and Order, *supra*, at 736-745. 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 serv-

available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters.<sup>44</sup> The Commission acknowledged that it could not predict with certainty the consequences of unregulated CATV, but reasoned that its statutory responsibilities demand that it "plan in advance of foreseeable events, instead of waiting to react to them." *Id.*, at 701. We are aware that these consequences have been variously estimated,<sup>45</sup> 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).

The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems. We have elsewhere held that we may not, "in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative

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ice 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 community 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.

<sup>44</sup>The Commission has found that "we are in a critical period with respect to UHF development. Most of the new UHF stations will face considerable financial obstacles." First Report and Order, *supra*, at 712. It concluded that "one general factor giving cause for serious concern," *ibid.*, was that there is "likely" to be a "severe" impact between new local stations, particularly UHF stations, and CATV systems. *Id.*, at 713. Further, the Commission believed that there was danger that CATV systems would "siphon off sufficient local financial support" for educational television, with the result that such stations would fail or not be established at all. It feared that "the loss would be keenly felt by the public." Second Report and Order, *supra*, at 761. The Commission concluded that the hazards to educational television were "sufficiently strong to warrant some special protection . . ." *Id.*, at 762. Similarly, a recent study has found that CATV systems may have a substantial impact upon station revenues, that many stations, particularly in small markets, cannot readily afford such competition, and that in consequence a "substantial percentage of potential new station entrants, particularly UHF, are likely to be discouraged . . ." Fisher & Ferrall, *Community Antenna Television Systems and Local Television Station Audience*, 80 Q. J. Econ. 227, 250.

<sup>45</sup>Compare the following. Seiden, *supra*, at 69-90; Note, the Federal Communications Commission and Regulation of CATV, 43 N.Y.U. L. Rev. 117, 133-139; Note, *The Wire Mire: The FCC and CATV*, *supra* at 376-383; Fisher & Ferrall, *supra*. We note, in addition, that the dispute here is in part whether local, advertiser-supported stations are an appropriate foundation for a national system of television broadcasting. See generally Coase, *The Economics of Broadcasting and Government Policy*, 56 Am. Econ. Rev. 440 (May 1966); Greenberg, *Wire Television and the FCC's Second Report and Order on CATV Systems*, 10 J. Law & Econ. 181.

action imperative for the achievement of an agency's ultimate purposes." *Permian Basin Area Rate Cases*, 390 U.S. 747, 780. Compare *National Broadcasting Co. v. United States*, *supra*, at 219-220; *American Trucking Assns. v. United States*, 344 U.S. 298, 311. There is no such evidence here, and we therefore hold that the Commission's authority over "all interstate . . . communication by wire or radio" permits the regulation of CATV systems.

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.

### III.

We must next determine whether the Commission has authority under the Communications Act to issue the particular prohibitory order in question in these proceedings. In its Second Report and Order, *supra*, the Commission concluded that it should provide summary procedures for the disposition both of requests for special relief and of "complaints or disputes." *Id.*, at 764. It feared that if evidentiary hearings were in every situation mandatory they would prove "time consuming and burdensome" to the CATV systems and broadcasting stations involved. *Ibid.* The Commission considered that appropriate notice and opportunities for comment or objection must be given, and it declared that "additional procedures, such as oral argument, evidentiary hearing, or further written submissions" would be permitted "if they appear necessary or appropriate . . ." *Ibid.* See 47 CFR § 74.1109(f). It was under the authority of these provisions that Midwest sought, and the Commission granted, temporary relief.

The Commission, after examination of various responsive pleadings but without prior hearings, ordered that respondents generally restrict their carriage of Los Angeles signals to areas served by them on February 15, 1966, pending hearings to determine whether the carriage of such signals into San Diego contravenes the public interest. The order does not prohibit the addition of new subscribers within areas served by respondents on February 15, 1966; it does not prevent service to other subscribers who began receiving service or who submitted an "accepted subscription request" between February 15, 1966, and the date of the Commission's order; and it does not preclude the carriage of San Diego and Tijuana, Mexico, signals to subscribers in new areas of service. 4 F.C.C. 2d 612, 624-625. The order is thus designed simply to preserve the situation as it existed at the moment of its issuance.

Respondents urge that the Commission may issue prohibitory orders only under the authority of § 312(b), by which the Commission is empowered to issue

cease-and-desist orders. We shall assume that, consistent with the requirements of § 312(c), cease-and-desist orders are proper only after hearing or waiver of the right to hearing. Nonetheless, the requirement does not invalidate the order issued in this case, for we have concluded that the provisions of §§ 312(b), (c) are inapplicable here. Section 312(b) provides that a cease-and-desist order may issue only if the respondent "has violated or failed to observe" a provision of the Communications Act or a rule or regulation promulgated by the Commission under the Act's authority. Respondents here were not found to have violated or to have failed to observe any such restriction; the question before the Commission was instead only whether an existing situation should be preserved pending a determination "whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission." 4 F.C.C. 2d, at 626. The Commission's order was thus not, in form or function, a cease-and-desist order that must issue under §§ 312(b), (c).<sup>46</sup>

The Commission has acknowledged that, in this area of rapid and significant change, there may be situations in which its generalized regulations are inadequate, and special or additional forms of relief are imperative. It has found that the present case may prove to be such a situation, and that the public interest demands "interim relief . . . limiting further expansion," pending hearings to determine appropriate Commission action. Such orders do not exceed the Commission's authority. This Court has recognized that "the administrative process [must] possess sufficient flexibility to adjust itself" to the "dynamic aspects of radio transmission," *F.C.C. v. Pottsville Broadcasting Co.*, *supra*, at 138, and that it was precisely for that reason that Congress declined to "stereotyp[e] the powers of the Commission to specific details . . ." *National Broadcasting Co. v. United States*, *supra*, at 219. And compare *American Trucking Assns. v. United States*, 344 U.S. 298, 311; *R. A. Holman & Co. v. S.E.C.*, 112 U.S. App. D.C. 43, 47-48, 299 F. 2d 127, 131-132. Thus, the Commission has been explicitly authorized to issue "such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). See also 47 U.S.C. § 303(r). In these circumstances, we hold that the Commission's order limiting further expansion of respondents' service pending appropriate hearings did not exceed or abuse its authority under the Communications Act. And there is no claim that its procedure in this respect is in any way constitutionally infirm.

The judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

<sup>46</sup> Respondents urge that the legislative history of § 312(b) indicates that the Commission may issue prohibitory orders only under, and in conformity with, that section. We find this unpersuasive. Nothing in that history suggests that the Commission was deprived of its authority, granted elsewhere in the Act, to issue orders "necessary in the execution of its functions." 47 U.S.C. § 154(i). See also 47 U.S.C. § 303(r).

Mr. Justice Douglas and Mr. Justice Marshall took no part in the consideration or decision of these cases.

### *MIND PROBES*

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1. Is the FCC's authority upheld by the Supreme Court in this case broad enough to permit the Commission to favor cable TV's development by placing regulatory restrictions on broadcasting?

2. If an intrastate cable system that carried no broadcast station programming operated with such success that local broadcasters were forced out of business for lack of a mass audience, would the FCC be able to regulate the system on the jurisdictional foundation affirmed in *Southwestern*? On some other basis?

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# The Red Lion Case

Red Lion Broadcasting Co., Inc., et al. v. Federal  
Communications Commission et al.

395 U.S. 367

June 9, 1969

In this landmark decision the Supreme Court unanimously upheld the constitutional and statutory soundness of the FCC's Fairness Doctrine (Document 23) and related right-of-reply rules issued by the Commission in 1967. Justice White's opinion is premised on the technological scarcity of frequencies that places broadcasting in a different posture with respect to the First Amendment than other modes of communication. Thus, although government *abridgment* of free expression is prohibited by the Constitution, *enhancement* of that freedom, reasonably related to the public interest in broadcasting, is permissible—even if the freedom of licensees is lessened thereby.

The *Red Lion* decision raised as many questions as it settled. The biggest riddle had to do with the notion that the First Amendment, a pre-mass media "relic" of the eighteenth century, required substantial judicial re-interpretation if it was to serve the informational needs of the public in the media-dominated twentieth century. Those urging a limited right of access to broadcasting for editorial advertising were disappointed by a 1973 Supreme Court decision that established limits on how far *Red Lion* could be stretched (see Document 35). Then, a year later, the nine Justices dashed the hopes of media access advocates by declaring unconstitutional a 1913 Florida right-of-reply law that required newspapers to provide free and equal space for replies to published attacks on political candidates [*Miami Herald v. Tornillo*, 418 U.S. 241 (1974)]. The Court held that the First Amendment prohibits government intrusion into the editorial prerogatives of control and judgment.

While the language of *Red Lion* appears to carve the Fairness Doctrine out of constitutional stone, subsequent developments have



weakened prospects for the metamorphosis of "fairness" into legally enforceable "access" to broadcasting and the print media. The foundation of the Fairness Doctrine itself has suffered some erosion, for the view persists that there is little practical difference between the technological scarcity that permits approximately 10,000 broadcasting stations and the economic scarcity that limits daily newspapers to fewer than 2,000. Why, then, should different First Amendment standards apply to the treatment of public controversy in different mass media? Is it conceivable that the public interest standard of the Communications Act supersedes the Constitution? Can the river run higher than its source?

*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<sup>1</sup> that equal time be allotted all qualified candidates for

<sup>1</sup>Communications Act of 1934, Tit. III, 48 Stat. 1081, as amended, 47 U.S.C. § 301 *et seq.* Section 315 now reads:

"315. Candidates for public office; facilities; rules.

"(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 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 chapter 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 for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

"(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

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."<sup>2</sup> 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

\*RTNDA denotes Radio Television News Directors Association. [Ed.]

<sup>2</sup> According to the record, Hargis asserted that his broadcast included the following statement:

"Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER—EXTREMIST ON THE RIGHT.' Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U.S. or by other government agencies. . . . Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called 'Barry Goldwater—Extremist of the Right!'"

the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia Circuit,<sup>3</sup> the FCC's position was upheld as constitutional and otherwise proper. 127 U.S. App. D.C. 129, 381 F. 2d 908 (1967).

## 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. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed, 32 Fed. Reg. 10303. Twice amended, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362, the rules were held unconstitutional 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. 400 F. 2d 1002 (1968).

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,

<sup>3</sup>The Court of Appeals initially dismissed the petition for want of a reviewable order, later reversing itself en banc upon argument by the Government that the FCC rule used here, which permits it to issue "a declaratory ruling terminating a controversy or removing uncertainty," 47 CFR § 1.2, was in fact justified by the Administrative Procedure Act. That Act permits an adjudicating agency, "in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." § 5, 60 Stat. 239, 5 U.S.C. § 1004(d). In this case, the FCC could have determined the question of Red Lion's liability to a cease-and-desist order or license revocation, 47 U.S.C. § 312, for failure to comply with the licensee's condition that the station be operated "in the public interest," or for failure to obey a requirement of operation in the public interest implicit in the ability of the FCC to revoke licenses for conditions justifying the denial of an initial license, 47 U.S.C. § 312(a)(2), and the statutory requirement that the public interest be served in granting and renewing licenses, 47 U.S.C. §§ 307(a), (d). Since the FCC could have adjudicated these questions it could, under the Administrative Procedure Act, have issued a declaratory order in the course of its adjudication which would have been subject to judicial review. Although the FCC did not comply with all of the formalities for an adjudicative proceeding in this case, the petitioner itself adopted as its own the Government's position that this was a reviewable order, waiving any objection it might have had to the procedure of the adjudication.

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. See, section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*. 29 F.R. 10415. 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.

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos.<sup>4</sup> It quickly became apparent that broadcast fre-

<sup>4</sup>Because of this chaos, a series of National Radio Conferences was held between 1922 and 1925, at which it was resolved that regulation of the radio spectrum by the Federal Government was essential and that regulatory power should be utilized to ensure that allocation of this

quencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.<sup>5</sup> Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."<sup>6</sup>

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.

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limited resource would be made only to those who would serve the public interest. The 1923 Conference expressed the opinion that the Radio Communications Act of 1912, 37 Stat. 302, conferred upon the Secretary of Commerce the power to regulate frequencies and hours of operation, but when Secretary Hoover sought to implement this claimed power by penalizing the Zenith Radio Corporation for operating on an unauthorized frequency, the 1912 Act was held not to permit enforcement. *United States v. Zenith Radio Corporation*, 12 F. 2d 614 (D.C.N.D. Ill. 1926). Cf. *Hoover v. Intercity Radio Co.*, 52 App. D.C. 339, 286 F. 1003 (1923) (Secretary had no power to deny licenses, but was empowered to assign frequencies). An opinion issued by the Attorney General at Hoover's request confirmed the impotence of the Secretary under the 1912 Act. 35 Op. Atty. Gen. 126 (1926). Hoover thereafter appealed to the radio industry to regulate itself, but his appeal went largely unheeded. See generally L. Schmeckebier, *The Federal Radio Commission* 1-14 (1932).

<sup>5</sup>Congressman White, a sponsor of the bill enacted as the Radio Act of 1927, commented upon the need for new legislation:

"We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual. . . . The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479.

<sup>6</sup>Radio Act of 1927, § 4, 44 Stat. 1163. See generally Davis, *The Radio Act of 1927*, 13 Va. L. Rev. 611 (1927).

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). Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); see *Metropolitan Broadcasting Corp.*, 19 P & F Radio Reg. 602 (1960); *The Evening News Assn.*, 6 P & F Radio Reg. 283 (1950). The Federal Radio Commission had imposed these two basic duties on broadcasters since the outset, *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929), rev'd on other grounds, 59 App. D.C. 197, 37 F. 2d 993, cert. dismissed, 281 U.S. 706 (1930); *Chicago Federation of Labor v. FRC*, 3 F.R.C. Ann. Rep. 36 (1929), aff'd, 59 App. D.C. 333, 41 F. 2d 422 (1930); *KFKB Broadcasting Assn. v. FRC*, 60 App. D.C. 79, 47 F. 2d 670 (1931), and in particular respects the personal attack rules and regulations at issue here have spelled them out in greater detail.

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 statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the

provisions of this chapter . . ." 47 U.S.C. § 303 and § 303 (r).<sup>7</sup> The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U.S.C. §§ 307(a), 309(a); renewing them, 47 U.S.C. § 307; and modifying them. *Ibid.* Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest, 47 U.S.C. § 309(h). This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943), whose validity we have long upheld. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953); *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933). It is broad enough to encompass these regulations.

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." Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U.S.C. § 315(a) (emphasis added). 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. Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.<sup>8</sup> And here this principle is given special force by the equally

<sup>7</sup>As early as 1930, Senator Dill expressed the view that the Federal Radio Commission had the power to make regulations requiring a licensee to afford an opportunity for presentation of the other side on "public questions." Hearings before the Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess., 1616 (1930):

"Senator Dill. Then you are suggesting that the provision of the statute that now requires a station to give equal opportunity to candidates for office shall be applied to all public questions?"

"Commissioner Robinson. Of course, I think in the legal concept the law requires it now. I do not see that there is any need to legislate about it. It will evolve one of these days. Somebody will go into court and say, 'I am entitled to this opportunity,' and he will get it.

"Senator Dill. Has the Commission considered the question of making regulations requiring the stations to do that?"

"Commissioner Robinson. Oh, no.

"Senator Dill. It would be within the power of the commission, I think, to make regulations on that subject."

<sup>8</sup>*Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962) (opinion of Mr. Justice Harlan, joined by Mr. Justice Brennan and Mr. Justice Stewart). This principle is a venerable one. *Alexander v. Alexandria*, 5 Cranch 1 (1809); *United States v. Freeman*, 3 How. 556 (1845); *Stockdale v. The Insurance Companies*, 20 Wall. 323 (1874).

venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,<sup>9</sup> especially when Congress has refused to alter the administrative construction.<sup>10</sup> Here, the Congress has not just kept its silence by refusing to overturn the administrative construction,<sup>11</sup> but has ratified it with positive legislation. Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act.<sup>12</sup>

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<sup>13</sup> and proceed to

<sup>9</sup>*Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965); *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965); *Commissioner v. Sternberger's Estate*, 348 U.S. 187, 199 (1955); *Hastings & D.R. Co. v. Whitney*, 132 U.S. 357, 366 (1889); *United States v. Burlington & Missouri River R. Co.*, 98 U.S. 334, 341 (1879); *United States v. Alexander*, 12 Wall. 177, 179-181 (1871); *Surgett v. Lapice*, 8 How. 48, 68 (1850).

<sup>10</sup>*Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965); *United States v. Bergh*, 352 U.S. 40, 46-47 (1956); *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 16-17 (1953); *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932).

<sup>11</sup>An attempt to limit sharply the FCC's power to interfere with programming practices failed to emerge from Committee in 1943. S. 814, 78th Cong., 1st Sess. (1943). See Hearings on S. 814 before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. (1943). Also, attempts specifically to enact the doctrine failed in the Radio Act of 1927, 67 Cong. Rec. 12505 (1926) (agreeing to amendment proposed by Senator Dill eliminating coverage of "question affecting the public"), and a similar proposal in the Communications Act of 1934 was accepted by the Senate, 78 Cong. Rec. 8854 (1934); see S. Rep. No. 781, 73d Cong., 2d Sess., 8 (1934), but was not included in the bill reported by the House Committee, see H. R. Rep. No. 1850, 73d Cong., 2d Sess. (1934). The attempt which came nearest success was a bill, H. R. 7716, 72d Cong., 1st Sess. (1932), passed by Congress but pocket-vetoes by the President in 1933, which would have extended "equal opportunities" whenever a public question was to be voted on at an election or by a government agency. H. R. Rep. No. 2106, 72d Cong., 2d Sess., 6 (1933). In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent. *Fogarty v. United States*, 340 U.S. 8, 13-14 (1950); *United States v. United Mine Workers*, 330 U.S. 258, 281-282 (1947). A review of some of the legislative history over the years, drawing a somewhat different conclusion, is found in Staff Study of the House Committee on Interstate and Foreign Commerce, *Legislative History of the Fairness Doctrine*, 90th Cong., 2d Sess. (Comm. Print. 1968). This inconclusive history was, of course, superseded by the specific statutory language added in 1959.

<sup>12</sup>§ 326. Censorship.

"Nothing in this chapter 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."

<sup>13</sup>*John P. Crommelin*, 19 P & F Radio Reg. 1392 (1960).



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.

The legislative history reinforces this view of the effect of the 1959 amendment. Even before the language relevant here was added, the Senate report on amending § 315 noted that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias." S. Rep. No. 562, 86th Cong., 1st Sess., 8-9 (1959). See also, specifically advertent to Federal Communications Commission doctrine, *id.*, at 13.

Rather than leave this approval solely in the legislative history, Senator Proxmire suggested an amendment to make it part of the Act. 105 Cong. Rec. 14457. This amendment, which Senator Pastore, a manager of the bill and a ranking member of the Senate Committee, considered "rather surplusage," 105 Cong. Rec. 14462, constituted a positive statement of doctrine<sup>14</sup> and was altered to the present merely approving language in the conference committee. In explaining the language to the Senate after the committee changes, Senator Pastore said: "We insisted that that provision remain in the bill, to be a continuing reminder and admonition to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." 105 Cong. Rec. 17830. Senator Scott, another Senate manager, added that: "It is intended to encompass all legitimate areas of public importance which are controversial," not just politics. 105 Cong. Rec. 17831.

It is true that the personal attack aspect of the fairness doctrine was not actually adjudicated until after 1959, so that Congress then did not have those rules specifically before it. However, the obligation to offer time to reply to a personal attack was presaged by the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary of its *ratio decidendi* in cases in this area:

"In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as . . . whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the re-

<sup>14</sup>The Proxmire amendment read: "[B]ut nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible." 105 Cong. Rec. 14457.

quest. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." 13 F.C.C., at 1251-1252.

When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future. The statutory authority does not go so far. But we 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 candidates 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. The Communications Act is not notable for the precision of its substantive standards and in this respect the explicit provisions of § 315, and the doctrine and rules at issue here which are closely modeled upon that section, are far more explicit than the generalized "public interest" standard in which the Commission ordinarily finds its sole guidance, and which we have held a broad but adequate standard before. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-217 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933). We cannot say that the FCC's declaratory ruling in *Red Lion*, or the regulations at issue in *RTNDA*, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

### 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 whom-ever 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, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948), 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 track, 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.

<sup>15</sup>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).

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934,<sup>16</sup> as the Court has noted at length before. *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-214 (1943). It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable 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.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations. *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933). No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943).

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

<sup>16</sup>The range of controls which have in fact been imposed over the last 40 years, without giving rise to successful constitutional challenge in this Court, is discussed in W. Emery, *Broadcasting and Government: Responsibilities and Regulations* (1961); Note, *Regulation of Program Content by the FCC*, 77 Harv. L. Rev. 701 (1964).

§ 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.

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, § 18, 44 Stat. 1170, has been held valid by this Court as an obligation of the licensee relieving him

of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned.<sup>17</sup> *Farmers Educ. & Coop. Union v. WDAY*, 360 U.S. 525 (1959).

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.<sup>18</sup> 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. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

### 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

<sup>17</sup>This has not prevented vigorous argument from developing on the constitutionality of the ancillary FCC doctrines. Compare Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. Cin. L. Rev. 447 (1968), with Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. (1967), and Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 Geo. Wash. L. Rev. 719 (1964).

<sup>18</sup>The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." J. Mill, *On Liberty* 32 (R. McCallum ed. 1947).

this regard.<sup>19</sup> 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.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U.S.C. § 301. Unless renewed, they expire within three years. 47 U.S.C. § 307(d). The statute mandates the issuance of licenses if the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a). In applying this standard the Commission for 40 years has been choosing licensees based in part on their program proposals. In *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933), the Court noted that in "view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses." In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet those needs; moreover, if needs or programs shifted, the Commission could alter its allocations to reflect those shifts. *Id.*, at 285. In the same vein, in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138 (1940), the Court noted that the statutory standard was a supple instrument to effect congressional desires "to maintain . . . a grip on the dynamic aspects of radio transmission" and to allay fears that "in the absence of governmental control the public interest might be subordinated to monopolistic domination in

<sup>19</sup>The President of the Columbia Broadcasting System has recently declared that despite the Government, "we are determined to continue covering controversial issues as a public service, and exercising our own independent news judgment and enterprise. I, for one, refuse to allow that judgment and enterprise to be affected by official intimidation." F. Stanton, Keynote Address, Sigma Delta Chi National Convention, Atlanta, Georgia, November 21, 1968. Problems of news coverage from the broadcaster's viewpoint are surveyed in W. Wood, *Electronic Journalism* (1967).

the broadcasting field." Three years later the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

#### 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, *United States v. Sullivan*, 332 U.S. 689, 694 (1948), but will deal with those problems if and when they arise.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.

#### 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. To this there are several answers.

Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace.<sup>20</sup> Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices.<sup>21</sup> "Land mobile services" such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum<sup>22</sup> and there are, apart from licensed amateur radio operators' equipment, 5,000,000 transmitters operated on the "citizens' band" which is also increasingly congested.<sup>23</sup> Among the various uses for radio frequency space, including marine, aviation, amateur, military, and common carrier users, there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists.

Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has been necessary to suspend new applications.<sup>24</sup> The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.<sup>25</sup>

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

<sup>20</sup>Current discussions of the frequency allocation problem appear in Telecommunication Science Panel, Commerce Technical Advisory Board, U.S. Dept. of Commerce, *Electromagnetic Spectrum Utilization—The Silent Crisis* (1966); Joint Technical Advisory Committee, Institute of Electrical and Electronics Engineers and Electronic Industries Assn., *Report on Radio Spectrum Utilization* (1964); Note, *The Crisis in Electromagnetic Frequency Spectrum Allocation*, 53 Iowa L. Rev. 437 (1967). A recently released study is the Final Report of the President's Task Force on Communications Policy (1968).

<sup>21</sup>*Bendix Aviation Corp. v. FCC*, 106 U.S. App. D.C. 304, 272 F.2d 533 (1959), cert. denied, 361 U.S. 965 (1960).

<sup>22</sup>1968 FCC Annual Report 65-69.

<sup>23</sup>New limitations on these users, who can also lay claim to First Amendment protection, were sustained against First Amendment attack with the comment, "Here is truly a situation where if everybody could say anything, many could say nothing." *Lafayette Radio Electronics Corp. v. United States*, 345 F. 2d 278, 281 (1965). Accord, *California Citizens Band Assn. v. United States*, 375 F. 2d 43 (C.A. 9th Cir.), cert. denied, 389 U.S. 844 (1967).

<sup>24</sup>*Kessler v. FCC*, 117 U.S. App. D.C. 130, 326 F. 2d 673 (1963).

<sup>25</sup>In a table prepared by the FCC on the basis of statistics current as of August 31, 1968, VHF and UHF channels allocated to and those available in the top 100 market areas for television are set forth:

speculate on the future allocation 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.<sup>26</sup> This does not mean, of course, that every possible wave length must be occupied at every hour by some vital use in order to sustain the congressional judgment. The substantial capital investment required by many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasi-

## COMMERCIAL

Market Areas	Channels Allocated		Channels on the Air, Authorized, or Applied for		Available Channels	
	VHF	UHF	VHF	UHF	VHF	UHF
	Top 10 . . . . .	40	45	40	44	0
Top 50 . . . . .	157	163	157	136	0	27
Top 100 . . . . .	264	297	264	213	0	84

## NONCOMMERCIAL

Market Areas	Channels Reserved		Channels on the Air, Authorized, or Applied for		Available Channels	
	VHF	UHF	VHF	UHF	VHF	UHF
	Top 10 . . . . .	7	17	7	16	0
Top 50 . . . . .	21	79	20	47	1	32
Top 100 . . . . .	35	138	34	69	1	69

1968 FCC Annual Report 132-135.

<sup>26</sup> RTNDA argues that these regulations should be held invalid for failure of the FCC to make specific findings in the rule-making proceeding relating to these factual questions. Presumably the fairness doctrine and the personal attack decisions themselves, such as *Red Lion*, should fall for the same reason. But this argument ignores the fact that these regulations are no more than the detailed specification of certain consequences of long-standing rules, the need for which was recognized by the Congress on the factual predicate of scarcity made plain in 1927, recognized by this Court in the 1943 *National Broadcasting Co.* case, and reaffirmed by the Congress as recently as 1959. "If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision regarding equal time and urge the right of each broadcaster to follow his own conscience . . . However, broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." S. Rep. No. 562, 86th Cong., 1st Sess., 8-9 (1959). In light of this history; the opportunity which the broadcasters have had to address the FCC and show that somehow the situation had radically changed, undercutting the validity of the congressional judgment; and their failure to adduce any convincing evidence of that in the record here, we cannot consider the absence of more detailed findings below to be determinative.

ble. The allocation need not be made at such a breakneck pace that the objectives of the allocation are themselves imperiled.<sup>27</sup>

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. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

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>28</sup> The judgment of the Court of Appeals in *Red Lion* is affirmed and that in *RTNDA* reversed and the causes remanded for proceedings consistent with this opinion.

*It is so ordered.*

Not having heard oral argument in these cases, Mr. Justice Douglas took no part in the Court's decision.\*

<sup>27</sup>The "airwaves [need not] be filled at the earliest possible moment in all circumstances without due regard for these important factors." *Community Broadcasting Co. v. FCC*, 107 U.S. App. D.C. 95, 105, 274 F. 2d 753, 763 (1960). Accord, enforcing the fairness doctrine, *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 343, 359 F. 2d 994, 1009 (1966).

<sup>28</sup>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. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. Cf. *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

\*Justice Douglas declared in a concurring opinion 4 years later, "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." [*Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 154 (1973).] [Ed.]

*MIND PROBES*

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1. On p. 287 Justice White deals with the "ends and purposes of the First Amendment" and appears to transform the right to speak and publish into the right to hear and read. Is this a justified corollary or is it judicial overreach?
2. If broadcast frequencies were not regarded as particularly "scarce," would there be some other compelling reason for upholding the Fairness Doctrine and related rules in the face of constitutional challenge?

*RELATED READING*

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- BARRON, JEROME A., "Access to the Press—A New First Amendment Right," *Harvard Law Review*, 80:8 (June 1967), 1641-78.
- \_\_\_\_\_, *Freedom of the Press for Whom? The Right of Access to Mass Media*. Bloomington: University of Indiana Press, 1973.
- BAZELON, DAVID L., "FCC Regulation of the Telecommunications Press," *Duke Law Journal*, 1975:2 (May 1975), 213-51.
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- LABUNSKI, RICHARD E., *The First Amendment Under Siege: The Politics of Broadcast Regulation*. Westport, Conn.: Greenwood Press, 1981.
- Miami Herald v. Tornillo: The Trial of the First Amendment*. Columbia, Missouri: Freedom of Information Center, 1975.

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# CBS v. DNC

Columbia Broadcasting System, Inc. v.

Democratic National Committee

412 U.S. 94

May 29, 1973

In the wake of the *Red Lion* decision (Document 34) many groups sought access to broadcast facilities to express their opinions. Some were willing to pay for the privilege, but when station policy precluded the sale of time for editorial advertising they tried to turn privilege into legal right.

In *CBS v. DNC* the Supreme Court upset an appellate court's reversal of the FCC's refusal to mandate a limited right of access for paid messages advocating viewpoints on controversial public issues. This seven-to-two decision vindicated the Commission's view that the Fairness Doctrine was sufficient to protect the public interest by providing for the broadcast access of *issues* (rather than *persons*) selected by responsible licensees serving as gatekeepers. The six separate opinions issued by nine Justices indicate the complexity of the procedural and substantive matters at stake. Parts I and II of the opinion below were supported by six Justices and Part IV attracted only the barest majority of the Court. All concurring and dissenting opinions have been omitted.

The FCC concluded the Fairness Doctrine inquiry referred to in this decision with the adoption of the "Fairness Report" on June 27, 1974—two days after the High Court decided the *Miami Herald* case (see p. 274). The "Fairness Report" reaffirmed the Commission's commitment to the Fairness Doctrine and specifically rejected the notion of government-dictated access, whether paid or free [48 FCC 2d 1, 28-31 (1974)].

Two years later the FCC set a precedent when it required a broadcasting station to provide coverage of the previously untreated local issue of strip mining [*Patsy Mink and O. D. Hagedorn v. Station WHAR*, 59 FCC 2d 987 (1976)]. This aberrational enforcement of the "affirma-

tive responsibility" aspect of the Fairness Doctrine (see paragraph 7 of the doctrine on pp. 169-170) has not been repeated. In 1981 the Commission sought repeal of § 315's codification of the Doctrine, in line with its deregulatory leanings.

*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, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.*, or the First Amendment.

In two orders announced the same day, the Federal Communications Commission ruled that a broadcaster who meets his public obligation to provide full and fair coverage of public issues is not required to accept editorial advertisements. *Democratic National Committee*, 25 F.C.C. 2d 216; *Business Executives' Move for Vietnam Peace*, 25 F.C.C. 2d 242. A divided Court of Appeals reversed the Commission, holding that a broadcaster's fixed policy of refusing editorial advertisements violates the First Amendment; the court remanded the cases to the Commission to develop procedures and guidelines for administering a First Amendment right of access. *Business Executives' Move for Vietnam Peace v. FCC*, 146 U.S. App. D.C. 181, 450 F.2d 642 (1971).

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, broadcasters, 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. BEM challenged the fairness of WTOP's coverage of criticism of that policy, but it presented no evidence in support of that claim.

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 viewed the issue as one of major significance in administering the regulatory scheme relating to the electronic media, one going "to the heart of the system of broadcasting which has developed in this country. . . ." 25 F.C.C. 2d, at 221. After reviewing the legislative history of the Communications Act, the provisions of the Act itself, the Commission's decisions under the Act, and the difficult problems inherent in administering a right of access, the Commission rejected the demands of BEM and DNC.

The Commission also rejected BEM's claim that WTOP had violated the Fairness Doctrine by failing to air views such as those held by members of BEM; the Commission pointed out that BEM had made only a "general allegation" of unfairness in WTOP's coverage of the Vietnam conflict and that the station had adequately rebutted the charge by affidavit. 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 inherently 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." *Ibid.*

<sup>1</sup>The Commission's rulings against BEM's Fairness Doctrine complaint and in favor of DNC's claim that political parties should be permitted to purchase air time for solicitation of funds were not appealed to the Court of Appeals and are not before us here.

Judge McGowan dissented; in his view, The First Amendment did not compel the Commission to undertake the task assigned to it by the majority:

"It is presently the obligation of a licensee to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance, striking a balance which is always subject to redress by reference to the fairness doctrine. Failure to do so puts continuation of the license at risk—a sanction of tremendous potency, and one which the Commission is under increasing pressure to employ.

"This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice." 146 U.S. App. D.C., at 205, 450 F.2d, at 666.

Judge McGowan concluded that the court's decision to overrule the Commission and to remand for development and implementation of a constitutional right of access put the Commission in a "constitutional straitjacket" on a highly complex and far-reaching issue.

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. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in *Red Lion*, we said "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.*, at 388.

Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values. *Red Lion* discussed at length the application of the First Amendment to the broadcast media. In analyzing the broadcasters' claim that the Fairness Doctrine and two of its component rules violated their freedom of expression, we held that "[n]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" *Id.*, at 389. Although the broadcaster is not without protection under the First Amendment, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948), "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . 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." *Red Lion, supra*, at 390.



Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time, 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; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.

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. Professor Chafee aptly observed:

"Once we get away from the bare words of the [First] Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as not to cripple the regular work of the government. A part of this work is the regulation of interstate and foreign commerce, and this has come in our modern age to include the job of parceling out the air among broadcasters, which Congress has entrusted to the FCC. Therefore, every free-speech problem in the radio has to be considered with reference to the satisfactory performance of this job as well as to the value of open discussion. Although free speech should weigh heavily in the scale in the event of conflict, still the Commission should be given ample scope to do its job." 2 Z. Chafee, *Government and Mass Communications* 640-641 (1947).

The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment. 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. Thus, before confronting the specific legal issues in these cases, we turn to an examination of the legislative and administrative development of our broadcast system over the last half century.

## II

This Court has on numerous occasions recounted the origins of our modern system of broadcast regulation. See, e.g., *Red Lion, supra*, at 375-386; *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-217 (1943); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940); *FCC v. Pottsville Broadcasting Co.*, 309

U.S. 134, 137-138 (1940). We have noted that prior to the passage of the Radio Act of 1927, 44 Stat. 1162, broadcasting was marked by chaos. The unregulated and burgeoning private use of the new media in the 1920's had resulted in an intolerable situation demanding congressional action:

"It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." *Red Lion, supra*, at 376.

But, once 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. Cf. *Farmers Union v. WDAY*, 360 U.S. 525, 528 (1959).

One of the earliest and most frequently quoted statements of this dilemma is that of Herbert Hoover, when he was Secretary of Commerce. While his Department was making exploratory attempts to deal with the infant broadcasting industry in the early 1920's, he testified before a House Committee:

"We can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material." Hearings on H.R. 7357 before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess., 8 (1924).

That statement foreshadowed the "tightrope" aspects of Government regulation of the broadcast media, a problem the Congress, the Commission, and the courts have struggled with ever since. Congress appears to have concluded, however, that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided.

The legislative history of the Radio Act of 1927, the model for our present statutory scheme, see *FCC v. Pottsville Broadcasting Co.*, *supra*, at 137, 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. Some members of Congress—those whose views were ultimately rejected—strenuously objected to the unregulated power of broadcasters to reject applications for service. See, e.g., H.R. Rep. No. 404, 69th Cong., 1st Sess., 18 (minority report). They regarded the exercise of such power to be "private censorship," which should be controlled by treating broadcasters as public utilities.<sup>2</sup> The provision that came closest to imposing an unlimited

<sup>2</sup>Congressman Davis, for example, stated on the floor of the House the view that Congress found unacceptable:

"I do not think any member of the committee will deny that it is absolutely inevitable that we are going to have to regulate the radio public utilities just as we regulate other public utilities. We are going to have to regulate the rates and the service, and to force them to give equal service and equal treatment to all." 67 Cong. Rec. 5483 (1926). See also *id.*, at 5484.

right of access to broadcast time was part of the bill reported to the Senate by the Committee on Interstate Commerce. The bill that emerged from the Committee contained the following provision:

"[I]f any licensee shall permit a broadcasting station to be used . . . by a candidate or candidates for any public office, *or for the discussion of any question affecting the public*, he shall make no discrimination as to the use of such broadcasting station, *and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce*: Provided, that such licensee shall have no power to censor the material broadcast." 67 Cong. Rec. 12503 (1926) (emphasis added).

When the bill came to the Senate floor, the principal architect of the Radio Act of 1927, Senator Dill, offered an amendment to the provision to eliminate the common carrier obligation and to restrict the right of access to candidates for public office. Senator Dill explained the need for the amendment:

"When we recall that broadcasting today is purely voluntary, and the listener-in pays nothing for it, that the broadcaster gives it for the purpose of building up his reputation, it seemed unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid." 67 Cong. Rec. 12502.

The Senators were also sensitive to the problems involved in legislating "equal opportunities" with respect to the discussion of public issues. Senator Dill stated:

"['Public questions'] is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time; and thus a radio station would be placed in the position that the Senator from Iowa mentions about candidates, namely, that they would have to give all their time to that kind of discussion, or no public question could be discussed." *Id.*, at 12504.

The Senate adopted Senator Dill's amendment. The provision finally enacted, § 18 of the Radio Act of 1927, 44 Stat. 1170, was later re-enacted as § 315 (a) of the Communications Act of 1934,<sup>3</sup> but only after Congress rejected another pro-

<sup>3</sup> Section 315(a) now reads:

"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),

posal that would have imposed a limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain public issues.<sup>4</sup> Instead, 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.”<sup>5</sup>

Other provisions of the 1934 Act also evince a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations. Although the Commission was given the

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“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 chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.” 47 U.S.C. § 315(a).

<sup>4</sup>The Senate passed a provision stating that:

“[I]f any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, or for the presentation of opposite views on such public questions.”

See Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., 19 (1934) (emphasis added). The provision for discussion of public issues was deleted by the House-Senate Conference. See H.R. Conf. Rep. No. 1918 on S. 3285, 73d Cong., 2d Sess., 49.

Also noteworthy are two bills offered in 1934 that would have restricted the control of broadcasters over the discussion of certain issues. Congressman McFadden proposed a bill that would have forbidden broadcasters to discriminate against programs sponsored by religious, charitable, or educational associations. H.R. 7986, 73d Cong., 2d Sess. The bill was not reported out of committee. And, during the debates on the 1934 Act, Senators Wagner and Hatfield offered an amendment that would have ordered the Commission to “reserve and allocate only to educational, religious, agricultural, labor, cooperative, and similar non-profit-making associations one-fourth of all the radio broadcasting facilities within its jurisdiction.” 78 Cong. Rec. 8828. Senator Dill explained why the Committee had rejected the proposed amendment, indicating that the practical difficulties and the dangers of censorship were crucial:

“MR. DILL. . . . If we should provide that 25 percent of time shall be allocated to non-profit organizations, someone would have to determine—Congress or somebody else—how much of the 25 percent should go to education, how much of it to religion, and how much of it to agriculture, how much of it to labor, how much of it to fraternal organizations, and so forth. When we enter this field we must determine how much to give to the Catholics probably and how much to the Protestants and how much to the Jews.” 78 Cong. Rec. 8843.

Senator Dill went on to say that the problem of determining the proper allocation of time for discussion of these subjects should be worked out by the Commission. *Id.*, at 8844. The Senate rejected the amendment. *Id.*, at 8846.

<sup>5</sup>Section 3 (h) provides as follows:

“‘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 chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.” 48 Stat. 1066, as amended, 47 U.S.C. § 153 (h).

authority to issue renewable three-year licenses to broadcasters<sup>6</sup> and to promulgate rules and regulations governing the use of those licenses,<sup>7</sup> both consistent with the “public convenience, interest, or necessity,” § 326 of the Act specifically provides that:

“Nothing in this chapter 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.” 47 U.S.C. § 326.

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. See *Office of Communication of United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966), and 138 U.S. App. D.C. 112, 425 F.2d 543 (1969).

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.<sup>8</sup> Formulated under the Commission’s power to issue regulations consistent with the “public interest,” the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints. See *Red Lion*, 395 U.S., at 377. In fulfilling the Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable, *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963), and must initiate programming on public

<sup>6</sup>48 Stat. 1083, as amended, 47 U.S.C. § 307.

<sup>7</sup>Section 303, 48 Stat. 1082, as amended, 47 U.S.C. § 303, provides in relevant part:

“Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

“(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

“(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 chapter. . . .”

<sup>8</sup>In 1959, Congress amended § 315 of the Act to give statutory approval to the Fairness Doctrine. Act of Sept. 14, 1959, § 1, 73 Stat. 557, 47 U.S.C. § 315 (a).

For a summary of the development and nature of the Fairness Doctrine, see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375–386 (1969).

issues if no one else seeks to do so. See *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); *Red Lion*, *supra*, at 378.

Since it is physically impossible to provide time for all viewpoints, however, the right to exercise editorial judgment was granted to the broadcaster. The broadcaster, therefore, is allowed significant journalistic discretion in deciding how best to fulfill the Fairness Doctrine obligations,<sup>9</sup> although that discretion is bounded by rules designed to assure that the public interest in fairness is furthered. In its decision in the instant cases, the Commission described the boundaries as follows:

"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.<sup>10</sup> The basic principle underlying that responsibility is "the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter. . . ." Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949). Consistent with that

<sup>9</sup> See *Madalyn Murray*, 5 P & F Radio Reg. 2d 263 (1965). Factors that the broadcaster must take into account in exercising his discretion include the following:

"In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person [or group] making the request." Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1251-1252 (1949).

<sup>10</sup> The Commission has also adopted various component regulations under the Fairness Doctrine, the most notable of which are the "personal attack" and "political editorializing" rules which we upheld in *Red Lion*. The "personal attack" rule provides that "[w]hen, 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," the licensee must notify the person attacked and give him an opportunity to respond. *E.g.*, 47 CFR § 73.123. Similarly, the "political editorializing" rule provides that, when a licensee endorses a political candidate in an editorial, he must give other candidates or their spokesmen an opportunity to respond. *E.g., id.*, § 73.123.

The Commission, of course, has taken other steps beyond the Fairness Doctrine to expand the diversity of expression on radio and television. The chain broadcasting and multiple ownership rules are established examples. *E.g., id.*, §§ 73.131, 73.240. More recently, the Commission promulgated rules limiting television network syndication practices and reserving 25% of prime time for non-network programs. *Id.*, §§ 73.658 (j), (k).

philosophy, the Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities.<sup>11</sup> See, e.g., *Dowie A. Crittenden*, 18 F.C.C. 2d 499 (1969); *Margaret Z. Scherbina*, 21 F.C.C. 2d 141 (1969); *Boalt Hall Student Assn.*, 20 F.C.C. 2d 612 (1969); *Madalyn Murray*, 40 F.C.C. 647 (1965); *Democratic State Central Committee of California*, 19 F.C.C. 2d 833 (1968); *U.S. Broadcasting Corp.*, 2 F.C.C. 208 (1935). Congress has not yet seen fit to alter that policy, although since 1934 it has amended the Act on several occasions<sup>12</sup> and considered various proposals that would have vested private individuals with a right of access.<sup>13</sup>

[Part III of Chief Justice Burger's opinion drew the support of only two other Justices. Because it does not constitute part of the Court's opinion, it is omitted here.—Ed.]

#### 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

<sup>11</sup>The Court of Appeals, respondents, and the dissent in this case have relied on dictum in *United Broadcasting Co.*, 10 F.C.C. 515 (1945), as illustrating Commission approval of a private right to purchase air time for the discussion of controversial issues. In that case the complaint alleged not only that the station had a policy of refusing to sell time for the discussion of public issues, but also that the station had applied its policy in a discriminatory manner, a factor not shown in the cases presently before us. Furthermore, the decision was handed down four years before the Commission had fully developed and articulated the Fairness Doctrine. See Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). Thus, even if the decision is read without reference to the allegation of discrimination, it stands as merely an isolated statement, made during the period in which the Commission was still working out the problems associated with the discussion of public issues; the dictum has not been followed since and has been modified by the Fairness Doctrine.

<sup>12</sup>In 1959, as noted earlier, Congress amended § 315 (a) of the Act to give statutory approval to the Commission's Fairness Doctrine. Act of Sept. 14, 1959, § 1, 73 Stat. 557, 47 U.S.C. § 315 (a). Very recently, Congress amended § 312 (a) of the 1934 Act to authorize the Commission to revoke a station license "for willful or repeated failure to allow reasonable access to or to permit purchase of 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." Campaign Communications Reform Act of 1972, Pub. L. 92-225, 86 Stat. 4. This amendment essentially codified the Commission's prior interpretation of § 315 (a) as requiring broadcasters to make time available to political candidates. *Farmers Union v. WDAY*, 360 U.S. 525, 534 (1959). See FCC Memorandum on Second Sentence of Section 315 (a), in *Political Broadcasts—Equal Time*, Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90.

<sup>13</sup>See, e.g., H.R. 3595, 80th Cong., 1st Sess. (1947). A more recent proposal was offered by Senator Fulbright. His bill would have amended § 315 of the Act to provide:

"(d) Licensees shall provide a reasonable amount of public service time to authorized representatives of the Senate of the United States, and the House of Representatives of the United States, to present the views of the Senate and the House of Representatives on issues of public importance. The public service time required to be provided under this subsection shall be made available to each such authorized representative at least, but not limited to, four times during each calendar year." S.J. Res. 209, 91st Cong., 2d Sess. (1970).

so by reason of the First Amendment. In resolving those issues, we are guided by the “venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . .” *Red Lion*, 395 U.S., at 381. Whether there are “compelling indications” of error in these cases must be answered by a careful evaluation of the Commission’s reasoning in light of the policies embodied by Congress in the “public interest” standard of the Act. Many of those policies, as the legislative history makes clear, were drawn from the First Amendment itself; the “public interest” standard necessarily invites reference to First Amendment principles. Thus, the question before us is whether the various interests in free expression of the public, the broadcaster, and the individuals require broadcasters to sell commercial time to persons wishing to discuss controversial issues. In resolving that issue it must constantly be kept in mind that the interest of the public is our foremost concern. With broadcasting, where the available means of communication are limited in both space and time, the admonition of Professor Alexander Meiklejohn that “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said” is peculiarly appropriate. *Political Freedom* 26 (1948).

At the outset we reiterate what was made clear earlier that nothing in the language of the Communications Act or its legislative history compels a conclusion different from that reached by the Commission. As we have seen, Congress has time and again rejected various legislative attempts that would have mandated a variety of forms of individual access. That is not to say that Congress’ rejection of such proposals must be taken to mean that Congress is opposed to private rights of access under all circumstances. Rather, the point is that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require. In this case, the Commission has decided that on balance the undesirable effects of the right of access urged by respondents would outweigh the asserted benefits. The Court of Appeals failed to give due weight to the Commission’s judgment on these matters.

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,<sup>16</sup> 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, as the Court of Appeals acknowledged, 146 U.S. App. D.C., at 203, 450 F. 2d, at 664, 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 vari-

<sup>16</sup> See 25 F.C.C. 2d 216, 230, 234-235 (Johnson, dissenting).



ous 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.<sup>17</sup>

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 especially since, under the Court of Appeals' decision, a broadcaster would be largely precluded from rejecting editorial advertisements that dealt with matters trivial or insignificant or already fairly covered by the broadcaster. 146 U.S. App. D.C., at 196 n. 36, 197, 450 F.2d, at 657 n. 36, 658. If the Fairness Doctrine and the *Cullman* doctrine were suspended to alleviate these problems, as respondents suggest might be appropriate, the question arises whether we would have abandoned more than we have gained. Under such a regime the congressional objective of balanced coverage of public issues would be seriously threatened.

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.

It was reasonable for Congress to conclude that the public interest in being informed requires periodic accountability on the part of those who are entrusted with the use of broadcast frequencies, scarce as they are. In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commis-

<sup>17</sup>To overcome this inconsistency it has been suggested that a "submarket rate system" be established for those unable to afford the normal cost for air time. See Note, 85 Harv. L. Rev. 689, 695-696 (1972). That proposal has been criticized, we think justifiably, as raising "incredible administrative problems." Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768, 789 (1972).

sion 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. To agree that debate on public issues should be "robust, and wide-open" does not mean that we should exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators.

The Court of Appeals discounted those difficulties by stressing that it was merely mandating a "modest reform," requiring only that broadcasters be required to accept some editorial advertising. 146 U.S. App. D.C., at 202, 450 F.2d, at 663. The court 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." *Id.*, at 202, 203, 450 F.2d, at 663, 664. If the Commission decided to apply the Fairness Doctrine to editorial advertisements and as a result broadcasters suffered financial harm, the court thought the "Commission could make necessary adjustments." *Id.*, at 203, 450 F.2d, at 664. Thus, without providing any specific answers to the substantial objections raised by the Commission and the broadcasters, other than to express repeatedly its "confidence" in the Commission's ability to overcome any difficulties, the court remanded the cases to the Commission for the development of regulations to implement a constitutional right of access.

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. See, e.g., *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951). 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. Although the use of a public resource by the broadcast media permits a limited degree of Government surveillance, as is not true with respect to private media, see *National Broadcasting Co. v. United States*, 319 U.S., at 216–219, the Government's power over licensees, as we have noted, is by no means absolute and is carefully circumscribed by the Act itself.<sup>18</sup>

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 particu-

<sup>18</sup>See n. 8, *supra*.

lar viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.

Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good-faith effort to meet the public interest in being fully and fairly informed.<sup>19</sup> The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements.<sup>20</sup> To sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result.<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 [sic] 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."<sup>22</sup> As the broadcast media became more pervasive in our society, the problem has become more acute. In a recent decision upholding the Commission's power to promulgate rules regarding cigarette advertising, Judge Bazelon, writing for a unanimous Court of Appeals, noted some of the effects of the ubiquitous commercial:

"Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air.' In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or by 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*, 132 U.S. App. D.C. 14, 32-33, 405 F.2d 1082, 1100-1101 (1968), cert. denied, 396 U.S. 842 (1969).

<sup>19</sup> See Report on Editorializing by Broadcast Licensees, 13 F.C.C., at 1251-1252.

<sup>20</sup> See Note, 85 Harv. L. Rev. 689, 697 (1973).

<sup>21</sup> 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.

<sup>22</sup> Reprinted in Hearings before the Senate Committee on Interstate Commerce on Radio Control, 69th Cong., 1st Sess., 54 (1926).

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.<sup>23</sup> 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). This theme of "invidious discrimination" against protected speech is echoed in the briefs of BEM and DNC to this Court. 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 unconstitutional 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 these 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.

The opinion of the Court of Appeals asserted that the Fairness Doctrine, insofar as it allows broadcasters to exercise certain journalistic judgments over the discussion of public issues, is inadequate to meet the public's interest in being informed. The present system, the court held, "conforms . . . to a paternalistic structure in which licensees and bureaucrats decide what issues are 'important,' and how 'fully' to cover them, and the format, time and style of the coverage." 146 U.S. App. D.C., at 195, 450 F.2d, at 656. The forced sale of advertising time for editorial spot announcements would, according to the Court of Appeals majority, remedy this deficiency. That conclusion was premised on the notion that advertising time, as opposed to programming time, involves a "special and separate mode of expression" because advertising content, unlike programming content, is generally pre-

<sup>23</sup> *Lee v. Board of Regents of State Colleges*, 306 F.Supp. 1097 (WD Wis. 1969), *aff'd*, 441 F.2d 1257 (CA7 1971); *Zucker v. Panitz*, 299 F. Supp. 102 (SDNY 1969); *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (SDNY 1967); *Hillside Community Church, Inc. v. City of Tacoma*, 76 Wash. 2d 63, 455 P.2d 350 (1969); *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 434 P.2d 982 (1967).

pared and edited by the advertiser. Thus, that court concluded, a broadcaster's policy against using advertising time for editorial messages "may well ignore opportunities to enliven and enrich the public's overall information." *Id.*, at 197, 450 F.2d, at 658. The Court of Appeals' holding would serve to transfer a large share of responsibility for balanced broadcasting from an identifiable, regulated entity—the licensee—to unregulated speakers who could afford the cost.

We reject the suggestion that the Fairness Doctrine permits broadcasters to preside over a "paternalistic" regime. See *Red Lion*, 395 U.S., at 390. That doctrine admittedly has not always brought to the public perfect or, indeed, even consistently high-quality treatment of all public events and issues; but the remedy does not lie in diluting licensee responsibility. The Commission stressed that, while the licensee has discretion in fulfilling its obligations under the Fairness Doctrine, it is required to "present representative community views and voices on controversial issues which are of importance to [its] listeners," and it is prohibited from "excluding partisan voices and always itself presenting views in a bland, inoffensive manner. . . ." 25 F.C.C. 2d, at 222. A broadcaster neglects that obligation only at the risk of losing his license.

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. In its proposed rules on cable television the Commission has provided that cable systems in major television markets

"shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel." 37 Fed. Reg. 3289, § 76.251(a)(4).

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. Among other things, the study will attempt to determine whether "there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine." 30 F.C.C. 2d, at 33. The Commission made it clear, however, that it does not intend to discard the Fairness Doctrine or to require broadcasters to accept all private demands for air time.<sup>24</sup> The Commission's inquiry on this score was an-

<sup>24</sup> Subsequent to the announcement of the Court of Appeals' decision, the Commission expanded the scope of the inquiry to comply with the Court of Appeals' mandate. Further Notice of Inquiry in Docket 19260, 33 F.C.C. 2d 554, 37 Fed. Reg. 3383. After we granted certiorari and stayed the mandate of the Court of Appeals, the Commission withdrew that notice of an expanded inquiry and continued its study as originally planned. Order and Further Notice of Inquiry in Docket 19260, 33 F.C.C. 2d 798, 37 Fed. Reg. 4980.

nounced prior to the decision of the Court of Appeals in this case and hearings are under way.

The problems perceived by the Court of Appeals majority are by no means new; as we have seen, the 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. The Commission's pending hearings are but one step in this continuing process. At the very least, courts should not freeze this necessarily dynamic process into a constitutional holding. See *American Commercial Lines, Inc. v. Louisville & N.R. Co.*, 392 U.S. 571, 590-593 (1968).

The judgment of the Court of Appeals is

*Reversed.*

### *MIND PROBES*

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1. Many newspapers publish "letters to the editor" and some have an "op ed" section to accommodate the views of a wide variety of members of the public on a broad range of issues. Would widespread adoption of such practices by broadcasters serve the public interest without threatening the editorial rights and responsibilities of licensees?

2. If the FCC had prohibited station policies refusing editorial advertising (instead of permitting them), and if CBS had appealed the Court of Appeals' affirmation of the FCC decision, what do you think the judgment of the Supreme Court would have been? Why?

3. Perhaps the Fairness Doctrine is a proper middle ground since it presumably provides the public with full and fair coverage of issues while it protects licensees from the burden of accepting editorial advertising. Are any of the following proposals more capable of preserving broadcasters' editorial independence and assuring that the public airways are used to serve the informational needs of society:

- a) adopt limited access for editorial advertising as a complement to the Fairness Doctrine;
- b) adopt limited access as a substitute for the Fairness Doctrine;
- c) adopt libertarianism as a substitute for governmentally imposed social responsibility by abolishing the Fairness Doctrine and granting broadcasters the same freedom exercised by newspaper publishers.

### *RELATED READING*

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CHAMBERLIN, BILL F., "The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion," *Federal Communications Law Journal*, 31:3 (Fall 1979), 361-411.

SCHMIDT, BENNO C., JR., *Freedom of the Press vs. Public Access*. New York: Praeger, 1976.

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# Cross-Media Ownership

**Federal Communications Commission v. National**

**Citizens Committee for Broadcasting**

**436 U.S. 775**

**June 12, 1978**

How many AM, FM, and TV stations should be licensed to a single entity? Should two stations in any class be licensed to a particular party if they will serve the same or overlapping audiences? Many decades ago the FCC's multiple ownership and duopoly rules addressed these situations. Concentrations of control in broadcasting that threaten the public interest may be prohibited by the Commission under its broad power to enact rules even if the concentrations fall short of violating antitrust law.

Newspapers were among the earliest broadcast licensees, having founded or acquired many pioneering radio and television stations. Relationships between co-located publishers and broadcasters were not uniformly cozy as Document 16 points out, but rivalry could become symbiosis when the print and broadcast media were commonly owned. Were such cross-channel affiliations in the public interest? The Commission attempted to address this question beginning in the 1940's, but found it impossible to answer conclusively enough to issue regulations at that time.

The matter continued to hound the FCC. In 1975 the rules at issue in this case were promulgated. They generally foreclosed any future co-located newspaper cross-ownership in the broadcast field. Pre-existing cross-ownerships, however, were permitted to remain in existence, except for a handful of situations (some of which were subsequently allowed to continue through rule waiver). The Commission decision was a compromise between the competing public interest goals of maintaining industry stability and enforcing the policy of diversification of ownership of mass media the FCC had articulated in Document 29 and elsewhere.

The compromise left nobody completely satisfied with the Com-

mission's resolution of the issues. Publishers and broadcasters were unhappy with the prospective ban on cross-ownership, while citizens groups and the Department of Justice disliked the retention of the status quo in cross-channel affiliation. A unanimous Court of Appeals overturned the retroactive portion of the FCC's rules and remanded the matter to the Commission for revision that would have required divestiture unless cross-media owners could produce evidence that their continuation was in the public interest.

The expected appeal from the lower court's decision resulted in the similarly unanimous (8-0) Supreme Court opinion that upheld the FCC rules in all respects. The High Court's decision is methodical, thorough, and thoughtful. It sheds light on the history of Commission concern with cross-ownership as it develops the statutory and constitutional issues involved. The judgment represents a victory for the FCC's exercise of legislative-type discretion when the facts underlying a decision are contradictory and unclear.

In 1982 the Commission repealed its 20-year old "trafficking" rule that required a hearing if a broadcaster attempted to sell a station before holding its license for a three-year period. At about the same time, the FCC began seriously to consider the public interest benefits of modifying its multiple ownership regulations. These rules limit to seven the number of stations in each class (AM, FM, and TV) that may be licensed to a single entity. Given the prevailing regulatory climate, how long will the rules upheld in this decision remain in place?

*Mr. Justice Marshall delivered the opinion of the Court.*

At issue in these cases are Federal Communications Commission regulations governing the permissibility of common ownership of a radio or television broadcast station and a daily newspaper located in the same community. *Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, 50 F.C.C. 2d 1046 (1975) (hereinafter cited as Order), as amended upon reconsideration, 53 F.C.C. 2d 589 (1975), codified in 47 CFR §§ 73.35, 73.240, 73.636 (1976). The regulations, adopted after a lengthy rulemaking proceeding, prospectively bar formation or transfer of co-located newspaper-broadcast combinations. Existing combinations are generally permitted to continue in operation. However, in communities in which there is common ownership of the only daily newspaper and the only broadcast station, or (where there is more than one broadcast station) of the only daily newspaper and the only television station, divestiture of either the newspaper or the broadcast station is required within five years, unless grounds for waiver are demonstrated.

The questions for decision are whether these regulations either exceed the Commission's authority under the Communications Act of 1934, 48 Stat. 1064, as



amended, 47 U.S.C. § 151 *et seq.* (1970 ed. and Supp. V), or violate the First or Fifth Amendment rights of newspaper owners; and whether the lines drawn by the Commission between new and existing newspaper-broadcast combinations, and between existing combinations subject to divestiture and those allowed to continue in operation, are arbitrary or capricious within the meaning of § 10 (e) of the Administrative Procedure Act, 5 U.S.C. § 706 (2)(A) (1976 ed.). For the reasons set forth below, we sustain the regulations in their entirety.

## A

Under the regulatory scheme established by the Radio Act of 1927, 44 Stat. 1162, and continued in the Communications Act of 1934, no television or radio broadcast station may operate without a license granted by the Federal Communications Commission. 47 U.S.C. § 301. Licensees who wish to continue broadcasting must apply for renewal of their licenses every three years, and the Commission may grant an initial license or a renewal only if it finds that the public interest, convenience, and necessity will be served thereby. §§ 307 (a), (d), 308 (a), 309 (a), (d).

In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power. See, e.g., *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476, 1476-1477 (1964). This perception of the public interest has been implemented over the years by a series of regulations imposing increasingly stringent restrictions on multiple ownership of broadcast stations. In the early 1940's, the Commission promulgated rules prohibiting ownership or control of more than one station in the same broadcast service (AM radio, FM radio, or television) in the same community.<sup>1</sup> In 1953, limitations were placed on the total number of stations in each service a person or entity may own or control.<sup>2</sup> And in 1970, the Commission adopted regulations prohibiting, on

<sup>1</sup> See *Multiple Ownership of Standard Broadcast Stations (AM radio)*, 8 Fed. Reg. 16065 (1943); *Rules and Regulations Governing Commercial Television Broadcast Stations*, § 4.226, 6 Fed. Reg. 2284, 2284-2285 (1941); *Rules Governing Standard and High Frequency Broadcast Stations (FM radio)*, § 3.228 (a), 5 Fed. Reg. 2382, 2384 (1940). In 1941 the Commission issued "chain broadcasting" regulations that, among other things, prohibited any organization from operating more than one broadcast network and barred any network from owning more than one standard broadcast station in the same community. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 193, 206-208 (1943). In 1964 the Commission tightened its multiple-ownership regulations so as to prohibit common ownership of any stations in the same broadcast service that have overlaps in certain service contours. See *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476 (1964).

<sup>2</sup> See *Multiple Ownership of AM, FM and Television Broadcast Stations*, 18 F.C.C. 288 (1953). The regulations limited each person to a total of seven AM radio stations, seven FM radio stations, and five VHF television stations. In *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), the regulations were upheld by this Court.

a prospective basis, common ownership of a VHF television station and any radio station serving the same market.<sup>3</sup>

More generally, “[d]iversification of control of the media of mass communications” has been viewed by the Commission as “a factor of primary significance” in determining who, among competing applicants in a comparative proceeding, should receive the initial license for a particular broadcast facility. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394-395 (1965) (italics omitted). Thus, prior to adoption of the regulations at issue here, the fact that an applicant for an initial license published a newspaper in the community to be served by the broadcast station was taken into account on a case-by-case basis, and resulted in some instances in awards of licenses to competing applicants.<sup>4</sup>

Diversification of ownership has not been the sole consideration thought relevant to the public interest, however, The Commission’s other, and sometimes conflicting, goal has been to ensure “the best practicable service to the public.” *Id.*, at 394. To achieve this goal, the Commission has weighed factors such as the anticipated contribution of the owner to station operations, the proposed program service, and the past broadcast record of the applicant—in addition to diversification of ownership—in making initial comparative licensing decisions. See *id.*, at 395-400. Moreover, the Commission has given considerable weight to a policy of avoiding undue disruption of existing service.<sup>5</sup> As a result, newspaper owners in many instances have been able to acquire broadcast licenses for stations serving the same communities as their newspapers, and the Commission has repeatedly renewed such

<sup>3</sup> *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 22 F.C.C. 2d 306 (1970), as modified, 28 F.C.C. 2d 662 (1971). No divestiture of existing television-radio combinations was required. The regulations also provided that license applications involving common ownership of a UHF television station and a radio station serving the same market would be considered on a case-by-case basis and that common ownership of AM and FM radio stations serving the same market would be permitted.

<sup>4</sup> See, e.g., *McClatchy Broadcasting Co. v. FCC*, 99 U.S. App. D.C. 195, 239 F. 2d 15 (1956), cert. denied, 353 U.S. 918 (1957); *Scripps-Howard Radio, Inc. v. FCC*, 89 U.S. App. D.C. 13, 189 F. 2d 677, cert. denied, 342 U.S. 830 (1951).

In the early 1940’s the Commission considered adopting rules barring common ownership of newspapers and radio stations, see Order Nos. 79 and 79-A, 6 Fed. Reg. 1580, 3302 (1941), but, after an exclusive rulemaking proceeding, decided to deal with the problem on an ad hoc basis, *Newspaper Ownership of Radio Stations*, Notice of Dismissal of Proceeding, 9 Fed. Reg. 702 (1944).

<sup>5</sup> The Commission’s policy with respect to license renewals has undergone some evolution, but the general practice has been to place considerable weight on the incumbent’s past performance and to grant renewal—even where the incumbent is challenged by a competing applicant—if the incumbent has rendered meritorious service. In 1970 the Commission adopted a policy statement purporting to codify its previous practice as to comparative license renewal hearings. *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C. 2d 424. Citing considerations of predictability and stability, the statement adopted the policy that, where an incumbent’s program service “has been substantially attuned to meeting the needs and interests of its area,” the incumbent would be granted an automatic preference over any new applicant without consideration of other factors—including diversification of ownership—that are taken into account in initial licensing decisions. *Id.*, at 425. This policy statement was overturned on appeal, *Citizens Communications Center v. FCC*, 145 U.S.

licenses on findings that continuation of the service offered by the common owner would serve the public interest. See Order, at 1066-1067, 1074-1075.

## B

Against this background, the Commission began the instant rulemaking proceeding in 1970 to consider the need for a more restrictive policy toward newspaper ownership of radio and television broadcast stations. Further Notice of Proposed Rulemaking (Docket No. 18110), 22 F.C.C. 2d 339 (1970).<sup>6</sup> Citing studies showing the dominant role of television stations and daily newspapers as sources of local news and other information, *id.*, at 346; see *id.*, at 344-346,<sup>7</sup> the notice of rulemaking proposed adoption of regulations that would eliminate all newspaper-broadcast combinations serving the same market, by prospectively banning formation or transfer of such combinations and requiring dissolution of all existing combinations within five years, *id.*, at 346. The Commission suggested that the proposed regulations would serve "the purpose of promoting competition among the mass media involved, and maximizing diversification of service sources and viewpoints." *Ibid.* At the same time, however, the Commission expressed "substantial concern" about the disruption of service that might result from divestiture of existing combinations. *Id.*, at 348. Comments were invited on all aspects of the proposed rules.

The notice of rulemaking generated a considerable response. Nearly 200 parties, including the Antitrust Division of the Justice Department, various broadcast and newspaper interests, public interest groups, and academic and research

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App. D.C. 32, 447 F. 2d 1201 (1971), on the ground that the Commission was required to hold full hearings at which all relevant public-interest factors would be considered. The court agreed with the Commission, however, that "incumbent licensees should be judged primarily on their records of past performance." *Id.*, at 44, 447 F. 2d, at 1213. The court stated further that "superior performance [by an incumbent] should be a plus of major significance in renewal proceedings." *Ibid.* (emphasis in original). After the instant regulations were promulgated, the Commission adopted a new policy statement in response to the *Citizens Communications* decision, returning to a case-by-case approach in which all factors would be considered, but in which the central factor would still be the past performance of the incumbent. *In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 66 F.C.C. 2d 419 (1977), pet. for review pending *sub. nom. National Black Media Coalition v. FCC*, No. 77-1500 (CADC).

<sup>6</sup>This proceeding was a continuation of the earlier proceeding that had resulted in adoption of regulations barring new licensing of radio-VHF television combinations in the same market, while permitting AM-FM combinations and consigning radio-UHF television combinations to case-by-case treatment. See *supra* . . . and n. 3. In addition to the proposal with respect to common ownership of newspapers and broadcast stations, the Further Notice of Proposed Rulemaking suggested the possibility of prohibiting AM-FM combinations and requiring divestiture of existing television-radio combinations serving the same market, but these latter proposals were not adopted and they are not at issue here. See Order, at 1052-1055.

<sup>7</sup>The studies generally showed that radio was the third most important source of news, ranking ahead of magazines and other periodicals. See 22 F.C.C. 2d, at 345.

entities, filed comments on the proposed rules. In addition, a number of studies were submitted, dealing with the effects of newspaper-broadcast cross-ownership on competition and station performance, the economic consequences of divestiture, and the degree of diversity present in the mass media. In March 1974, the Commission requested further comments directed primarily to the core problem of newspaper-television station cross-ownership, Memorandum Opinion and Order (Docket No. 18110), 47 F.C.C. 2d 97 (1974), and close to 50 sets of additional comments were filed. In July 1974, the Commission held three days of oral argument, at which all parties who requested time were allowed to speak.

The regulations at issue here were promulgated and explained in a lengthy report and order released by the Commission on January 31, 1975. The Commission concluded, first, that it had statutory authority to issue the regulations under the Communications Act, Order, at 1048, citing 47 U.S.C. § § 2 (a), 4 (i), 4 (j), 301, 303, 309 (a), and that the regulations were valid under the First and Fifth Amendments to the Constitution, Order, at 1050-1051. It observed that "[t]he term public interest encompasses many factors including 'the widest possible dissemination of information from diverse and antagonistic sources.'" Order, at 1048, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and that "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation," Order, at 1050. The Order further explained that the prospective ban on creation of co-located newspaper-broadcast combinations was grounded primarily in First Amendment concerns, while the divestiture regulations were based on both First Amendment and antitrust policies. *Id.*, at 1049. In addition, the Commission rejected the suggestion that it lacked the power to order divestiture, reasoning that the statutory requirement of license renewal every three years necessarily implied authority to order divestiture over a five-year period. *Id.*, at 1052.

After reviewing the comments and studies submitted by the various parties during the course of the proceeding, the Commission then turned to an explanation of the regulations and the justifications for their adoption. The prospective rules, barring formation of new broadcast-newspaper combinations in the same market, as well as transfers of existing combinations to new owners, were adopted without change from the proposal set forth in the notice of rulemaking.<sup>8</sup> While recognizing the pioneering contributions of newspaper owners to the broadcast industry, the

<sup>8</sup>The rules prohibit a newspaper owner from acquiring a license for a co-located broadcast station, either by transfer or by original licensing; if a broadcast licensee acquires a daily newspaper in the same market, it must dispose of its license within a year or by the time of its next renewal date, whichever comes later. See Order, at 1074-1076, 1099-1107. Non-commercial educational television stations and college newspapers are not included within the scope of the rules. 47 CFR § 73.636, and n. 10 (1976). For purposes of the rules, ownership is defined to include operation or control, § 73.636 n. 1; a "daily newspaper" is defined as "one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication," § 73.636 n. 10; and a broadcast station is considered to serve the same community as a newspaper if a specified service contour of the station—"Grade A" for television, 2 mV/m for AM, and 1 mV/m for FM—encompasses the city in which the newspaper is published, Order, at 1075.

Commission concluded that changed circumstances made it possible, and necessary, for all new licensing of broadcast stations to "be expected to add to local diversity." *Id.*, at 1075.<sup>9</sup> In reaching this conclusion, the Commission did not find that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily "spea[k] with one voice" or are harmful to competition. *Id.*, at 1085, 1089. In the Commission's view, the conflicting studies submitted by the parties concerning the effects of newspaper ownership on competition and station performance were inconclusive, and no pattern of specific abuses by existing cross-owners was demonstrated. See *id.*, at 1072-1073, 1085, 1089. The prospective rules were justified, instead, by reference to the Commission's policy of promoting diversification of ownership: Increases in diversification of ownership would possibly result in enhanced diversity of viewpoints, and, given the absence of persuasive countervailing considerations, "even a small gain in diversity" was "worth pursuing." *Id.*, at 1076, 1080 n. 30.

With respect to the proposed across-the-board divestiture requirement, however, the Commission concluded that "a mere hoped-for gain in diversity" was not a sufficient justification. *Id.*, at 1078. Characterizing the divestiture issues as "the most difficult" presented in the proceeding, the Order explained that the proposed rules, while correctly recognizing the central importance of diversity considerations, "may have given too little weight to the consequences which could be expected to attend a focus on the abstract goal alone." *Ibid.* Forced dissolution would promote diversity, but it would also cause "disruption for the industry and hardship for individual owners," "resulting in losses or diminution of service to the public." *Id.*, at 1078, 1080.

The Commission concluded that in light of these countervailing considerations divestiture was warranted only in "the most egregious cases," which it identified as those in which a newspaper-broadcast combination has an "effective monopoly" in the local "marketplace of ideas as well as economically." *Id.*, at 1080-1081. The Commission recognized that any standards for defining which combinations fell within that category would necessarily be arbitrary to some degree, but "[a] choice had to be made." *Id.*, at 1080. It thus decided to require divestiture only where there was common ownership of the sole daily newspaper published in a community and either (1) the sole broadcast station providing that entire community with a clear signal, or (2) the sole television station encompassing the entire community with a clear signal. *Id.*, at 1080-1084.<sup>10</sup>

<sup>9</sup>The Commission did provide however, for waiver of the prospective ban in exceptional circumstances. See Order, at 1076 n. 24, 1077; Memorandum Opinion and Order (Docket No. 18110), 53 F.C.C. 2d 589, 591, 592 (1975).

<sup>10</sup>Radio and television stations are treated the same under the regulations to the extent that, if there is only one broadcast station serving a community—regardless of whether it is a radio or television station—common ownership of it and a co-located daily newspaper is barred. On the other hand, radio and television stations are given different weight to the extent that the presence of a radio station does not exempt a newspaper-television combination from divestiture, whereas the presence of a television station does exempt a newspaper-radio combination. The latter difference in treatment was explained on the ground that "[r]ealistically, a radio sta-

The Order identified 8 television-newspaper and 10 radio-newspaper combinations meeting the divestiture criteria. *Id.*, at 1085, 1098. Waivers of the divestiture requirement were granted *sua sponte* to 1 television and 1 radio combination, leaving a total of 16 stations subject to divestiture. The Commission explained that waiver requests would be entertained in the latter cases,<sup>11</sup> but, absent waiver, either the newspaper or the broadcast station would have to be divested by January 1, 1980. *Id.*, at 1084-1086.<sup>12</sup>

On petitions for reconsideration, the Commission reaffirmed the rules in all material respects. Memorandum Opinion and Order (Docket No. 18110), 53 F.C.C. 2d 589 (1975).

### C

Various parties—including the National Citizens Committee for Broadcasting (NCCB), the National Association of Broadcasters (NAB), the American Newspaper Publishers Association (ANPA), and several broadcast licensees subject to the divestiture requirement—petitioned for review of the regulations in the United States Court of Appeals for the District of Columbia Circuit, pursuant to 47 U.S.C.

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tion 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.” Order, at 1083. The Commission also explained that the regulations did not take into account the presence of magazines and other periodicals, or out-of-town radio or television stations not encompassing the entire community with a clear signal, since—aside from their often small market share—these sources could not be depended upon for coverage of local issues. See *id.*, at 1081-1082.

<sup>11</sup> While noting that the Commission “would not be favorably inclined to grant any request premised on views rejected when the rule was adopted,” the Order stated that temporary or permanent waivers might be granted if the common owner were unable to sell his station or could sell it only at an artificially depressed price; if it could be shown that separate ownership of the newspaper and the broadcast station “cannot be supported in the locality”; or, more generally, if the underlying purposes of the divestiture rule “would be better served by continuation of the current ownership pattern.” *Id.*, at 1085.

<sup>12</sup> As to existing newspaper-broadcast combinations not subject to the divestiture requirement, the Commission indicated that, within certain limitations, issues relating to concentration of ownership would continue to be considered on a case-by-case basis in the context of license renewal proceedings. Thus, while making clear the Commission’s view that renewal proceedings were not a proper occasion for any “overall restructuring” of the broadcast industry, the Order stated that diversification of ownership would remain a relevant consideration in renewal proceedings in which common owners were challenged by competing applicants. *Id.*, at 1088 (emphasis in original); see *id.*, at 1087-1089; n. 5, *supra*. The Order suggested, moreover, that where a petition to deny renewal is filed, but no competing applicant steps forward, the renewal application would be set for hearing if a sufficient showing were made of specific abuses by a common owner, or of economic monopolization of the sort that would violate the Sherman Act. Order, at 1080 n. 29, 1088.

The Order does not make clear the extent to which hearings will be available on petitions to deny renewal that do not allege specific abuses or economic monopolization. Counsel for the Commission informs us, however, that the Order was intended to “limi[t] such challengers only to the extent that [the Commission] will not permit them to re-argue in an adjudicatory setting the question already decided in this rulemaking, *i.e.*, in what circumstances is the continued existence of co-located newspaper-broadcast combinations *per se* undesirable.” Reply Brief for Petitioner in No. 76-1471, p. 8; see n. 13, *infra*.

§ 402 (a) and 28 U.S.C. §§ 2342 (1), 2343 (1970 ed. and Supp. V). Numerous other parties intervened, and the United States—represented by the Justice Department—was made a respondent pursuant to 28 U.S.C. §§ 2344, 2348. NAB, ANPA, and the broadcast licensees subject to divestiture argued that the regulations went too far in restricting cross-ownership of newspapers and broadcast stations; NCCB and the Justice Department contended that the regulations did not go far enough and that the Commission inadequately justified its decision not to order divestiture on a more widespread basis.

Agreeing substantially with NCCB and the Justice Department, the Court of Appeals affirmed the prospective ban on new licensing of co-located newspaper-broadcast combinations, but vacated the limited divestiture rules, and ordered the Commission to adopt regulations requiring dissolution of all existing combinations that did not qualify for a waiver under the procedure outlined in the Order. 181 U.S. App. D.C. 1, 555 F. 2d 938 (1977); see n. 11, *supra*. The court held, first, that the prospective ban was a reasonable means of furthering “the highly valued goal of diversity” in the mass media, 181 U.S. App. D.C., at 17, 555 F. 2d, at 954, and was therefore not without a rational basis. The court concluded further that, since the Commission “explained why it considers diversity to be a factor of exceptional importance,” and since the Commission’s goal of promoting diversification of mass media ownership was strongly supported by First Amendment and antitrust policies, it was not arbitrary for the prospective rules to be “based on [the diversity] factor to the exclusion of others customarily relied on by the Commission.” *Id.*, at 13 n. 33, 555 F. 2d, at 950 n. 33; see *id.*, at 11–12, 555 F. 2d, at 948–949.

The court also held that the prospective rules did not exceed the Commission’s authority under the Communications Act. The court reasoned that the public interest standard of the Act permitted, and indeed required, the Commission to consider diversification of mass media ownership in making its licensing decisions, and that the Commission’s general rulemaking authority under 47 U.S.C. §§ 303 (r) and 154 (i) allowed the Commission to adopt reasonable license qualifications implementing the public-interest standard. 181 U.S. App. D.C., at 14–15, 555 F. 2d, at 951–952. The court concluded, moreover, that since the prospective ban was designed to “increas[e] the number of media voices in the community,” and not to restrict or control the content of free speech, the ban would not violate the First Amendment rights of newspaper owners. *Id.*, at 16–17, 555 F. 2d, at 953–954.

After affirming the prospective rules, the Court of Appeals invalidated the limited divestiture requirement as arbitrary and capricious within the meaning of § 10 (e) of the Administrative Procedure Act (APA), 5 U.S.C. § 706 (2) (A) (1976 ed.). The court’s primary holding was that the Commission lacked a rational basis for “grandfathering” most existing combinations while banning all new combinations. The court reasoned that the Commission’s own diversification policy, as reinforced by First Amendment policies and the Commission’s statutory obligation to “encourage the larger and more effective use of radio in the public interest,” 47 U.S.C. § 303 (g), required the Commission to adopt a “presumption” that stations

owned by co-located newspapers “do not serve the public interest,” 181 U.S. App. D.C., at 25-26, 555 F. 2d, at 962-963. The court observed that, in the absence of countervailing policies, this “presumption” would have dictated adoption of an across-the-board divestiture requirement, subject only to waiver “in those cases where the evidence clearly discloses that cross-ownership is in the public interest.” *Id.*, at 29, 555 F. 2d, at 966. The countervailing policies relied on by the Commission in its decision were, in the court’s view, “lesser policies” which had not been given as much weight in the past as its diversification policy. *Id.*, at 28, 555 F. 2d, at 965. And “the record [did] not disclose the extent to which divestiture would actually threaten these [other policies].” *Ibid.* The court concluded, therefore, that it was irrational for the Commission not to give controlling weight to its diversification policy and thus to extend the divestiture requirement to all existing combinations.<sup>13</sup>

The Court of Appeals held further that, even assuming a difference in treatment between new and existing combinations was justifiable, the Commission lacked a rational basis for requiring divestiture in the 16 “egregious” cases while allowing the remainder of the existing combinations to continue in operation. The court suggested that “limiting divestiture to small markets of ‘absolute monopoly’ squanders the opportunity where divestiture might do the most good,” since “[d]ivestiture . . . may be more useful in the larger markets.” *Id.*, at 29, 555 F. 2d, at 966. The court further observed that the record “[did] not support the conclusion that divestiture would be more harmful in the grandfathered markets than in the 16 affected markets,” nor did it demonstrate that the need for divestiture was stronger in those 16 markets. *Ibid.* On the latter point, the court noted that, “[a]lthough the affected markets contain fewer voices, the amount of diversity in communities with additional independent voices may be in fact be no greater.” *Ibid.*

The Commission, NAB, ANPA, and several cross-owners who had been intervenors below, and whose licenses had been grandfathered under the Commission’s rules but were subject to divestiture under the Court of Appeals’ decision, petitioned this Court for review.<sup>14</sup> We granted certiorari, 434 U.S. 815 (1977), and we

<sup>13</sup>The Court of Appeals apparently believed that, under the terms of the Order, future petitions to deny license renewal to existing cross-owners could be set for hearing only if they alleged economic monopolization, and not if they alleged specific programming abuses. See 181 U.S. App. D.C., at 29 n. 108, 555 F. 2d, at 966 n. 108. On the basis of this assumption, the court held that the standards for petitions to deny were unreasonable. Since we do not read the Order as foreclosing the possibility of a hearing upon a claim of specific abuses, and since the Commission itself is apparently of the view that the only issue foreclosed in petitions to deny is the question of whether newspaper-broadcast ownership is *per se* undesirable, see n. 12, *supra*, we cannot say that the Order itself unreasonably limits the availability of petitions to deny renewal. The reasonableness of the Commission’s actions on particular petitions to deny filed subsequent to the Order is, of course, not before us at this time.

<sup>14</sup>Upon motion of the Commission the Court of Appeals temporarily stayed its mandate—insofar as it overturned the Commission’s limited divestiture requirement—pending the filing of a petition for certiorari by the Commission. 181 U.S. App. D.C. 30, 555 F. 2d 967 (1977). The Commission filed its petition for certiorari within the time allotted by the Court of Appeals, and thus the stay has remained in effect. See 28 U.S.C. § 2101 (f); Fed. Rule App. Proc. 41 (b).



now affirm the judgment of the Court of Appeals insofar as it upholds the prospective ban and reverse the judgment insofar as it vacates the limited divestiture requirement.<sup>15</sup>

## II

Petitioners NAB and ANPA contend that the regulations promulgated by the Commission exceed its statutory rulemaking authority and violate the constitutional rights of newspaper owners. We turn first to the statutory, and then to the constitutional, issues.

## A

## (1)

Section 303 (r) of the Communications Act, 47 U.S.C. § 303 (r), provides that "the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act]." See also 47 U.S.C. § 154 (i). As the Court of Appeals recognized, 181 U.S. App. D.C., at 14, 555 F. 2d, at 951, it is now well established that this general rulemaking authority supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable. If a license applicant does not qualify under standards set forth in such regulations, and does not proffer sufficient grounds for waiver or change of those standards, the Commission may deny the application without further inquiry. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

This Court has specifically upheld this rulemaking authority in the context of regulations based on the Commission's policy of promoting diversification of ownership. In *United States v. Storer Broadcasting Co.*, *supra*, we sustained the portion of the Commission's multiple-ownership rules placing limitations on the total number of stations in each broadcast service a person may own or control. See n. 2, *supra*. And in *National Broadcasting Co. v. United States*, *supra*, we affirmed regulations

<sup>15</sup>Several of the petitioners contend that the Court of Appeals exceeded the proper role of a reviewing court by directing the Commission to adopt a rule requiring divestiture of all existing combinations, rather than allowing the Commission to reconsider its decision and formulate its own approach in light of the legal principles set forth by the court. Petitioners cite well-established authority to the effect that, absent extraordinary circumstances, "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); accord, *NLRB v. Food Store Employees*, 417 U.S. 1, 9-10 (1974); *South Prairie Constr. Co. v. Operating Engineers*, 425 U.S. 800, 805-806 (1976). In light of our disposition of these cases, we need not decide whether the Court of Appeals was justified in departing from the latter course of action.

that, *inter alia*, prohibited broadcast networks from owning more than one AM radio station in the same community, and from owning “any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability . . . that competition would be substantially restrained by such licensing.” See 319 U.S., at 206–208; n. 1, *supra*.

Petitioner NAB attempts to distinguish these cases on the ground that they involved efforts to increase diversification within the boundaries of the broadcasting industry itself, whereas the instant regulations are concerned with diversification of ownership in the mass communications media as a whole. NAB contends that, since the Act confers jurisdiction on the Commission only to regulate “communication by wire or radio,” 47 U.S.C. § 152 (a), it is impermissible for the Commission to use its licensing authority with respect to broadcasting to promote diversity in an overall communications market which includes, but is not limited to, the broadcasting industry.

This argument undersells the Commission’s power to regulate broadcasting in the “public interest.” In making initial licensing decisions between competing applicants, the Commission has long given “primary significance” to “diversification of control of the media of mass communications,” and has denied licenses to newspaper owners on the basis of this policy in appropriate cases. See *supra* . . . and n. 4. As we have discussed on several occasions, see, e.g., *National Broadcasting Co. v. United States*, *supra*, at 210–218; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375–377, 387–388 (1969), the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the “public interest.” And “[t]he 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*, *supra*, at 217. It was not inconsistent with the statutory scheme, therefore, for the Commission to conclude that the maximum benefit to the “public interest” would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole.

Our past decisions have recognized, moreover, that the First Amendment and antitrust values underlying the Commission’s diversification policy may properly be considered by the Commission in determining where the public interest lies. “[T]he ‘public interest’ standard necessarily invites reference to First Amendment principles,” *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving “the widest possible dissemination of information from diverse and antagonistic sources,” *Associated Press v. United States*, 326 U.S., at 20. See *Red Lion Broadcasting Co. v. FCC*, *supra*, at 385, 390. See also *United States v. Midwest Video Corp.*, 406 U.S. 649, 667–669, and n. 27 (1972) (plurality opinion). And, while the Commission does not have power to enforce the antitrust laws as such, it is permitted to take antitrust policies into account in making licensing decisions pursuant to the public-interest standard. See, e.g., *United States v. Radio Corp. of*

*America*, 358 U.S. 334, 351 (1959); *National Broadcasting Co. v. United States*, *supra*, at 222-224. Indeed we have noted, albeit in dictum:

"[I]n a given case the Commission might find that antitrust considerations alone would keep the statutory standard 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." *United States v. Radio Corp. of America*, *supra*, at 351-352.

(2)

It is thus clear that the regulations at issue are based on permissible public-interest goals and, so long as the regulations are not an unreasonable means for seeking to achieve these goals, they fall within the general rulemaking authority recognized in the *Storer Broadcasting* and *National Broadcasting* cases. Petitioner ANPA contends that the prospective rules are unreasonable in two respects:<sup>16</sup> first, the rulemaking record did not conclusively establish that prohibiting common ownership of co-located newspapers and broadcast stations would in fact lead to increases in the diversity of viewpoints among local communications media; and second, the regulations were based on the diversification factor to the exclusion of other service factors considered in the past by the Commission in making initial licensing decisions regarding newspaper owners, see *supra* . . . With respect to the first point, we agree with the Court of Appeals that, notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints. As the Court of Appeals observed, "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." 181 U.S. App. D.C., at 24, 555 F. 2d, at 961. Moreover, evidence of specific abuses by common owners is difficult to compile; "the possible benefits of competition do not lend themselves to detailed forecast." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96 (1953). In these circumstances, the Commission was entitled to rely on its judgment, based on experience, that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run." Order, at 1079-1080; see 181 U.S. App. D.C., at 25, 555 F. 2d, at 962.

As to the Commission's decision to give controlling weight to its diversification goal in shaping the prospective rules, the Order makes clear that this change in policy was a reasonable administrative response to changed circumstances in the broadcasting industry. Order, at 1074-1075; see *FCC v. Pottsville Broadcasting Co.*,

<sup>16</sup>The rationality of the limited divestiture requirement is discussed in Part III, *infra*.

309 U.S. 134, 137-138 (1940). The Order explained that, although newspaper owners had previously been allowed, and even encouraged, to acquire licenses for co-located broadcast stations because of the shortage of qualified license applicants, a sufficient number of qualified and experienced applicants other than newspaper owners was now available. In addition, the number of channels open for new licensing had diminished substantially. It had thus become both feasible and more urgent for the Commission to take steps to increase diversification of ownership, and a change in the Commission's policy toward new licensing offered the possibility of increasing diversity without causing any disruption of existing service. In light of these considerations, the Commission clearly did not take an irrational view of the public interest when it decided to impose a prospective ban on new licensing of co-located newspaper-broadcast combinations. [Footnote deleted.—Ed.]

## B

Petitioners NAB and ANPA also argue that the regulations, though designed to further the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S., at 20, nevertheless violate the First Amendment rights of newspaper owners. We cannot agree, for this argument ignores the fundamental proposition that there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co. v. FCC*, 395 U.S., at 388.

The physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential, as we have often recognized. *Id.*, at 375-377, 387-388; *National Broadcasting Co. v. United States*, 319 U.S., at 210-218; *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 282 (1933); see *supra* . . . No one here questions the need for such allocation and regulation, and, given that need, we see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the "public interest" in diversification of the mass communications media.

NAB and ANPA contend, however, that it is inconsistent with the First Amendment to promote diversification by barring a newspaper owner from owning certain broadcasting stations. In support, they point to our statement in *Buckley v. Valeo*, 424 U.S. 1 (1976), to the effect that "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others," *id.*, at 48-49. As *Buckley* also recognized, however, "'the broadcast media pose unique and special problems not present in the traditional free speech case.'" *Id.*, at 50 n. 55, quoting *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S., at 101. Thus efforts to "'enhanc[e] the volume and quality of coverage' of public issues" through regulation of broadcasting may be permissible

where similar efforts to regulate the print media would not be. 424 U.S., at 50-51, and n. 55, quoting *Red Lion Broadcasting Co. v. FCC*, *supra*, at 393; cf. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Requiring those who wish to obtain a broadcast license to demonstrate that such would serve the "public interest" does not restrict the speech of those who are denied licenses; rather, it preserves the interests of the "people as a whole . . . in free speech." *Red Lion Broadcasting Co.*, *supra*, at 390. As we stated in *Red Lion*, "to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" 395 U.S., at 389, quoting *National Broadcasting Co. v. United States*, *supra*, at 227. See also *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, *supra*.

Relying on cases such as *Speiser v. Randall*, 357 U.S. 513 (1958), and *Elrod v. Burns*, 427 U.S. 347 (1976), NAB and ANPA also argue that the regulations unconstitutionally condition receipt of a broadcast license upon forfeiture of the right to publish a newspaper. Under the regulations, however, a newspaper owner need not forfeit anything in order to acquire a license for a station located in another community.<sup>18</sup> More importantly, in the cases relied on by those petitioners, unlike the instant case, denial of a benefit had the effect of abridging freedom of expression, since the denial was based solely on the content of constitutionally protected speech; in *Speiser* veterans were deprived of a special property-tax exemption if they declined to subscribe to a loyalty oath, while in *Elrod* certain public employees were discharged or threatened with discharge because of their political affiliation. As we wrote in *National Broadcasting*, *supra*, "the issue before us would be wholly different" if "the Commission [were] to choose among applicants upon the basis of their political, economic or social views." 319 U.S., at 226. Here the regulations are not content related; moreover, their purpose and effect is to promote free speech, not to restrict it.

Finally, NAB and ANPA argue that the Commission has unfairly "singled out" newspaper owners for more stringent treatment than other license applicants.<sup>19</sup> But the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple-ownership rules, see *supra* . . . and nn. 1-3; owners of radio stations, television stations, and newspapers alike are now restricted in their ability to acquire licenses for co-located broadcast stations. *Grosjean v. American Press*

<sup>18</sup>We note also that the regulations are in form quite similar to the prohibitions imposed by the antitrust laws. This court has held that application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment. See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139-140 (1969). See also *United States v. Radio Corp. of America*, 358 U.S. 334, 351-352 (1959). Since the Commission relied primarily on First Amendment rather than antitrust considerations, however, the fact that the antitrust laws are fully applicable to newspapers is not a complete answer to the issues in this case.

<sup>19</sup>NAB frames this argument in terms of the First Amendment; ANPA advances it as an equal protection claim under the Fifth Amendment.

*Co.*, 297 U.S. 233 (1936), in which this Court struck down a state tax imposed only on newspapers, is thus distinguishable in the degree to which newspapers were singled out for special treatment. In addition, the effect of the tax in *Grosjean* was "to limit the circulation of information to which the public is entitled," *id.*, at 250, an effect inconsistent with the protection conferred on the press by the First Amendment.

In the instant case, far from seeking to limit the flow of information, the Commission has acted, in the Court of Appeals' words, "to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech." 181 U.S. App. D.C., at 17, 555 F. 2d, at 954. The regulations are a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them.<sup>20</sup> Being forced to "choose among applicants for the same facilities," the Commission has chosen on a "sensible basis," one designed to further, rather than contravene, "the system of freedom of expression." T. Emerson, *The System of Freedom of Expression* 663 (1970).

### III

After upholding the prospective aspect of the Commission's regulations, the Court of Appeals concluded that the Commission's decision to limit divestiture to 16 "egregious cases" of "effective monopoly" was arbitrary and capricious within the meaning of § 10 (e) of the APA, 5 U.S.C. § 706 (2) (A) (1976 ed.).<sup>21</sup> We agree with

<sup>20</sup>The reasonableness of the regulations as a means of achieving diversification is underscored by the fact that waivers are potentially available from both the prospective and the divestiture rules in cases in which a broadcast station and a co-located daily newspaper cannot survive without common ownership. See nn. 9, 11, *supra*.

<sup>21</sup>The APA provides in relevant part:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

law;  
 "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law;  
 "(B) contrary to constitutional right, power, privilege, or immunity;

right;  
 "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory

right;  
 "(D) without observance of procedure required by law;

of  
 "(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of  
 this title or otherwise reviewed on the record of an agency hearing provided by statute; or

of  
 "(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by  
 the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706 (2) (1976 ed.).

the Court of Appeals that regulations promulgated after informal rulemaking, while not subject to review under the "substantial evidence" test of the APA, 5 U.S.C. § 706 (2) (E) (1976 ed.) quoted in n. 21, *supra*, may be invalidated by a reviewing court under the "arbitrary or capricious" standard if they are not rational and based on consideration of the relevant factors. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-416 (1971). Although this review "is to be searching and careful," "[t]he court is not empowered to substitute its judgment for that of the agency." *Id.*, at 416.

In the view of the Court of Appeals, the Commission lacked a rational basis, first, for treating existing newspaper-broadcast combinations more leniently than combinations that might seek licenses in the future; and, second, even assuming a distinction between existing and new combinations had been justified, for requiring divestiture in the "egregious cases" while allowing all other existing combinations to continue in operation. We believe that the limited divestiture requirement reflects a rational weighing of competing policies, and we therefore reinstate the portion of the Commission's order that was invalidated by the Court of Appeals.

## A

### (1)

The Commission was well aware that separating existing newspaper-broadcast combinations would promote diversification of ownership. It concluded, however, that ordering widespread divestiture would not result in "the best practicable service to the American public," Order, at 1074, a goal that the Commission has always taken into account and that has been specifically approved by this Court, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); see *supra* . . . In particular, the Commission expressed concern that divestiture would cause "disruption for the industry" and "hardship for individual owners," both of which would result in harm to the public interest. Order, at 1078. Especially in light of the fact that the number of co-located newspaper-broadcast combinations was already on the decline as a result of natural market forces, and would decline further as a result of the prospective rules, the Commission decided that across-the-board divestiture was not warranted. See *id.*, at 1080 n. 29.

The Order identified several specific respects in which the public interest would or might be harmed if a sweeping divestiture requirement were imposed: the stability and continuity of meritorious service provided by the newspaper owners as a group would be lost; owners who had provided meritorious service would unfairly be denied the opportunity to continue in operation; "economic dislocations" might prevent new owners from obtaining sufficient working capital to maintain the quality of local programming;<sup>22</sup> and local ownership of broadcast stations

<sup>22</sup> Although the Order is less than entirely clear in this regard, the Commission's theory with respect to "economic dislocations" and programming apparently was that, because of high interest rates, new owners would have to devote a substantial portion of revenues to debt service, and insufficient working capital would remain to finance local programming. See Order, at 1068 (describing comments to this effect).

would probably decrease.<sup>23</sup> *Id.*, at 1078. We cannot say that the Commission acted irrationally in concluding that these public-interest harms outweighed the potential gains that would follow from increasing diversification of ownership.

In the past, the Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proved broadcast service to the public, and in its indirect consequence of rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance.<sup>24</sup> Thus, although a broadcast license must be renewed every three years, and the licensee must satisfy the Commission that renewal will serve the public interest, both the Commission and the courts have recognized that a licensee who has given meritorious service has a “legitimate renewal expectanc[y]” that is “implicit in the structure of the Act” and should not be destroyed absent good cause. *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 396, 444 F. 2d 841, 854 (1970), cert. denied, 403 U.S. 923 (1971); see *Citizens Communications Center v. FCC*, 145 U.S. App. D.C. 32, 44, and n. 35, 447 F. 2d 1201, 1213, and n. 35 (1971); *In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process*, 66 F.C.C. 2d 419, 420 (1977); n. 5, *supra*.<sup>25</sup> Accordingly, while diversification of ownership is a relevant factor in the context of license renewal as well as initial licensing, the Commission has long considered the past performance of the incumbent as the most important factor in deciding whether to grant license renewal and thereby to allow the existing owner to continue in operation. Even where an incumbent is challenged by a competing applicant who offers greater potential in terms of diversification, the Commission’s general practice has been to go with the “proved product” and grant renewal if the incumbent has rendered meritorious service. See generally *In re Formulation of*

<sup>23</sup> In the Order the Commission expressed concern that a sweeping divestiture requirement “could reduce local ownership as well as the involvement of owners in management.” *Id.*, at 1078 (emphasis added). The Court of Appeals questioned the validity of any reliance on owner involvement in management, because “no evidence was presented that the local owners . . . are actively involved in daily management” and the Order itself had observed that “[m]ost of the parties state that their broadcast stations and newspapers have separate management, facilities, and staff . . . .” 181 U.S. App. D.C., at 27, 555 F. 2d, at 964, quoting Order, at 1059. Of course, the fact that newspapers and broadcast stations are separately managed does not foreclose the possibility that the common owner participates in management of the broadcast station and not the newspaper. But in any event, the Commission clearly did not place any significant weight on this factor, and we therefore need not consider it. See 5 U.S.C. § 706 (1976 ed.), quoted in part in n. 21, *supra* (rule of prejudicial error).

<sup>24</sup> We agree with the Court of Appeals that “[p]rivate losses are a relevant concern under the Communications Act only when shown to have an adverse effect on the provision of broadcasting service to the public.” 181 U.S. App. D.C., at 27–28, 555 F. 2d, at 964–965, citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474–476 (1940), and *Carroll Broadcasting v. FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 440 (1958). Private losses that result in discouragement of investment in quality service have such an effect.

<sup>25</sup> Section 301 of the Act provides that “no [broadcast] license shall be construed to create any right, beyond the terms, conditions, and periods of the license.” 47 U.S.C. § 301. The fact that a licensee does not have any legal or proprietary right to a renewal does not mean, however, that the Commission cannot take into account the incumbent’s past performance in deciding whether renewal would serve the public interest. See *infra* . . . and n. 31.



*Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, supra; n. 5, supra.*

In the instant proceeding, the Commission specifically noted that the existing newspaper-broadcast cross-owners as a group had a "long record of service" in the public interest; many were pioneers in the broadcasting industry and had established and continued "[t]raditions of service" from the outset. Order, at 1078.<sup>26</sup> Notwithstanding the Commission's diversification policy, all were granted initial licenses upon findings that the public interest would be served thereby, and those that had been in existence for more than three years had also had their licenses renewed on the ground that the public interest would be furthered. The Commission noted, moreover, that its own study of existing co-located newspaper-television combinations showed that in terms of percentage of time devoted to several categories of local programming, these stations had displayed "an undramatic but nonetheless statistically significant superiority" over other television stations. *Id.* at 1078 n. 26.<sup>27</sup> An across-the-board divestiture requirement would result in loss of the services of these superior licensees, and—whether divestiture caused actual losses to existing owners, or just denial of reasonably anticipated gains—the result would be that future licensees would be discouraged from investing the resources necessary to produce quality service.

At the same time, there was no guarantee that the licensees who replaced the existing cross-owners would be able to provide the same level of service or demonstrate the same long-term commitment to broadcasting. And even if the new owners were able in the long run to provide similar or better service, the Commission found that divestiture would cause serious disruption in the transition period. Thus, the Commission observed that new owners "would lack the long knowledge of the community and would have to begin raw," and—because of high interest rates—might not be able to obtain sufficient working capital to maintain the quality of local programming. *Id.*, at 1078; see n. 22, *supra*.<sup>28</sup>

<sup>26</sup>See B. Robbins, *A Study of Pioneer AM Radio Stations and Pioneer Television Stations* (1971), reprinted in App. 694–712.

<sup>27</sup>Earlier in the Order, the Commission had noted that this study was the first to be based on the 1973 annual programming reports for television stations, which were not yet available at the time the programming studies submitted by the parties were conducted. Order, at 1073; see *id.*, at 1094.

The United States suggests that the Commission could not properly have relied on this study since it was not made available to the parties for comment in advance of the Commission's decision. Brief for United States 46 n. 39. No party petitioned the Commission for reconsideration on this ground, nor was the issue raised in the Court of Appeals or in any of the petitions for certiorari, and it is therefore not before us.

<sup>28</sup>Commissioner Hooks effectively summarized this complex of factors in his separate opinion, concurring in the Commission's decision not to order across-the-board divestiture, while dissenting on other grounds:

"[A]s I contemplate the superior performance of many newspaper-owned stations . . . and speculate on the performance of some unknown successor, my conditioned response yields 'a bird in the hand is worth two in the bush' philosophy. Opponents [of divestiture] ask: Why require divestiture for its own sake of a superior broadcaster, with experience, background and resources, for an unknown licensee whose operation may be inferior? Can we afford, through wide-scale divestiture, to experiment with a dogmatic diversity formula; and, after the churning has ceased, who will profit—the new owners or the public?" Order, at 1109.

The Commission's fear that local ownership would decline was grounded in a rational prediction, based on its knowledge of the broadcasting industry and supported by comments in the record, see Order, at 1068-1069, that many of the existing newspaper-broadcast combinations owned by local interests would respond to the divestiture requirement by trading stations with out-of-town owners. It is undisputed that roughly 75% of the existing co-located newspaper-television combinations are locally owned, see 181 U.S. App. D.C., at 26-27, 555 F. 2d, at 963-964, and these owners' knowledge of their local communities and concern for local affairs, built over a period of years, would be lost if they were replaced with outside interests. Local ownership in and of itself has been recognized to be a factor of some—if relatively slight—significance even in the context of initial licensing decisions. See *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d, at 396. It was not unreasonable, therefore, for the Commission to consider it as one of several factors militating against divestiture of combinations that have been in existence for many years.<sup>29</sup>

In light of these countervailing considerations, we cannot agree with the Court of Appeals that it was arbitrary and capricious for the Commission to “grandfather” most existing combinations, and to leave opponents of these combinations to their remedies in individual renewal proceedings. In the latter connection we note that, while individual renewal proceedings are unlikely to accomplish any “overall restructuring” of the existing ownership patterns, the Order does make clear that existing combinations will be subject to challenge by competing applicants in renewal proceedings, to the same extent as they were prior to the instant rulemaking proceedings. Order, at 1087-1088 (emphasis omitted); see n. 12, *supra*. That is, diversification of ownership will be a relevant but somewhat secondary factor. And, even in the absence of a competing applicant, license renewal may be denied if, *inter alia*, a challenger can show that a common owner has engaged in specific economic or programming abuses. See nn. 12 and 13, *supra*.

(2)

In concluding that the Commission acted unreasonably in not extending its divestiture requirement across the board, the Court of Appeals apparently placed heavy reliance on a “presumption” that existing newspaper-broadcast combinations “do not serve the public interest.” See *supra* . . . The court derived this presumption primarily from the Commission's own diversification policy, as “reaffirmed” by adoption of the prospective rules in this proceeding, and secondarily from “[t]he policies of the First Amendment,” 181 U.S. App. D.C., at 26, 555 F. 2d, at 963, and the Commission's statutory duty to “encourage the larger and more

<sup>29</sup> The fact that 75%, but not all, of the existing television-newspaper combinations are locally owned does not mean that it was irrational for the Commission to take into account local ownership as one of several factors justifying a decision to “grandfather” most existing combinations, including those that are not locally owned. The Commission has substantial discretion as to whether to proceed by rulemaking or adjudication, see *SEC v. Chenery Corp.*, 332 U.S. 194, 201-202 (1947), and—in the context of a rule based on a multifactor weighing process—every consideration need not be equally applicable to each individual case.

effective use of radio in the public interest," 47 U.S.C. § 303 (g). As explained in Part II above, we agree that diversification of ownership furthers statutory and constitutional policies, and, as the Commission recognized, separating existing newspaper-broadcast combinations would promote diversification. But the weighing of policies under the "public interest" standard is a task that Congress has delegated to the Commission in the first instance, and we are unable to find anything in the Communications Act, the First Amendment, or the Commission's past or present practices that would require the Commission to "presume" that its diversification policy should be given controlling weight in all circumstances.<sup>30</sup>

Such a "presumption" would seem to be inconsistent with the Commission's longstanding and judicially approved practice of giving controlling weight in some circumstances to its more general goal of achieving "the best practicable service to the public." Certainly, as discussed in Part III-A (1) above, the Commission through its license renewal policy has made clear that it considers diversification of ownership to be a factor of less significance when deciding whether to allow an existing licensee to continue in operation than when evaluating applicants seeking initial licensing. Nothing in the language or the legislative history of § 303 (g) indicates that Congress intended to foreclose all differences in treatment between new and existing licensees, and indeed, in amending § 307 (d) of the Act in 1952, Congress appears to have lent its approval to the Commission's policy of evaluating existing licensees on a somewhat different basis from new applicants.<sup>31</sup> Moreover, if enactment of the prospective rules in this proceeding itself were deemed to create a "presumption" in favor of divestiture, the Commission's ability to experiment with new policies would be severely hampered. One of the most significant advantages of the administrative process is its ability to adapt to new circumstances in a flexible manner, see *FCC v. Pottsville Broadcasting Co.*, 309 U.S., at 137-138, and we are unwilling to presume that the Commission acts unreasonably when it decides to try out a change in licensing policy primarily on a prospective basis.

The Court of Appeals also relied on its perception that the policies militating against divestiture were "lesser policies" to which the Commission had not given as

<sup>30</sup>The Order at one point states: "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." Order, at 1079 (emphasis added). The Court of Appeals recognized, however, that "the Commission probably did not intend for this . . . statemen[t] to be read literally," 181 U.S. App. D.C., at 26, 555 F. 2d, at 963, and, indeed, it appears from the context that the statement was intended only as an explanation of why the Commission was adopting a First Amendment rather than an antitrust focus.

<sup>31</sup>Prior to 1952, § 307 (d) provided that decisions on renewal applications "shall be limited to and governed by the same considerations and practice which affect the granting of original applications." See Communications Act of 1934, § 307 (d), 48 Stat. 1084. In 1952 the section was amended to provide simply that renewal "may be granted . . . if the Commission finds that public interest, convenience, and necessity would be served thereby." Communications Act Amendments, 1952, § 5, 66 Stat. 714. The House Report explained that the previous language "is neither realistic nor does it reflect the way in which the Commission actually has handled renewal cases," H. R. Rep. No. 1750, 82d Cong., 2d Sess., 8 (1952), and the Senate Report specifically stated that the Commission has the "right and duty to consider, in the case of a station which has been in operation and is applying for renewal, the overall performance of that station against the broad standard of public interest, convenience, and necessity," S. Rep. No. 44, 82d Cong., 1st Sess., 7 (1951).

much weight in the past as its diversification policy. See *supra* . . . This perception is subject to much the same criticism as the "presumption" that existing co-located newspaper-broadcasting combinations do not serve the public interest. The Commission's past concern with avoiding disruption of existing service is amply illustrated by its license renewal policies. In addition, it is worth noting that in the past when the Commission has changed its multiple-ownership rules it has almost invariably tailored the changes so as to operate wholly or primarily on a prospective basis. For example, the regulations adopted in 1970 prohibiting common ownership of a VHF television station and a radio station serving the same market were made to apply only to new licensing decisions; no divestiture of existing combinations was required. See n. 3, *supra*. The limits set in 1953 on the total numbers of stations a person could own, upheld by this Court in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), were intentionally set at levels that would not require extensive divestiture of existing combinations. See *Multiple Ownership of AM, FM and Television Broadcast Stations*, 18 F.C.C., at 292. And, while the rules adopted in the early 1940's prohibiting ownership or control of more than one station in the same broadcast service in the same community required divestiture of approximately 20 AM radio combinations, FCC Eleventh Annual Report 12 (1946), the Commission afforded an opportunity for case-by-case review, see *Multiple Ownership of Standard Broadcast Stations*, 8 Fed. Reg. 16065 (1943). Moreover, television and FM radio had not yet developed, so that application of the rules to these media was wholly prospective. See *Rules and Regulations Governing Commercial Television Broadcast Stations*, *supra*, n. 1; *Rules Governing Standard and High Frequency Broadcast Stations*, *supra*, n. 1.

The Court of Appeals apparently reasoned that the Commission's concerns with respect to disruption of existing service, economic dislocations, and decreases in local ownership necessarily could not be very weighty since the Commission has a practice of routinely approving voluntary transfers and assignments of licenses. See 181 U.S. App. D.C., at 26-28, 555 F. 2d, at 963-965. But the question of whether the Commission should compel proved licensees to divest their stations is a different question from whether the public interest is served by allowing transfers by licensees who no longer wish to continue in the business. As the Commission's brief explains:

"[I]f the Commission were to force broadcasters to stay in business against their will, the service provided under such circumstances, albeit continuous, might well not be worth preserving. Thus, the fact that the Commission approves assignments and transfers in no way undermines its decision to place a premium on the continuation of proven past service by those licensees who wish to remain in business." Brief for Petitioner in No. 76-1471, p. 38 (footnote omitted).<sup>32</sup>

<sup>32</sup>The Commission also points out, Brief for Petitioner in No. 76-1471, p. 24, that it has a rule against "trafficking"—*i.e.*, the acquisition and sale of licenses to realize a quick profit—that applies to license transfers or assignments within three years after a licensee commences operations. See 47 CFR § 1.597 (1976); *Crowder v. FCC*, 130 U.S. App. D.C. 198, 201-202, and nn. 22-23, 399 F. 2d 569, 572-573, and nn. 22-23, cert. denied, 393 U.S. 962 (1968).

The Court of Appeals' final basis for concluding that the Commission acted arbitrarily in not giving controlling weight to its divestiture policy was the Court's finding that the rulemaking record did not adequately "disclose the extent to which divestiture would actually threaten" the competing policies relied upon by the Commission. 181 U.S. App. D.C., at 28, 555 F. 2d, at 965. However, to the extent that factual determinations were involved in the Commission's decision to "grandfather" most existing combinations, they were primarily of a judgmental or predictive nature—e.g., whether a divestiture requirement would result in trading of stations with out-of-town owners; whether new owners would perform as well as existing crossowners, either in the short run or in the long run; whether losses to existing owners would result from forced sales; whether such losses would discourage future investment in quality programming; and whether new owners would have sufficient working capital to finance local programming. In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency," *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961); see *Industrial Union Dept., AFL-CIO v. Hodgson*, 162 U.S. App. D.C. 331, 338-339, 499 F. 2d 467, 474-475 (1974).

## B

We also must conclude that the Court of Appeals erred in holding that it was arbitrary to order divestiture in the 16 "egregious cases" while allowing other existing combinations to continue in operation. The Commission's decision was based not—as the Court of Appeals may have believed, see *supra* . . . —on a conclusion that divestiture would be more harmful in the "grandfathered" markets than in the 16 affected markets, but rather on a judgment that the need for diversification was especially great in cases of local monopoly. This policy judgment was certainly not irrational, see *United States v. Radio Corp. of America*, 358 U.S., at 351-352, and indeed was founded on the very same assumption that underpinned the diversification policy itself and the prospective rules upheld by the Court of Appeals and now by this Court—that the greater the number of owners in a market, the greater the possibility of achieving diversity of program and service viewpoints.

As to the Commission's criteria for determining which existing newspaper-broadcast combinations have an "effective monopoly" in the "local marketplace of ideas as well as economically," we think the standards settled upon by the Commission reflect a rational legislative-type judgment. Some line had to be drawn, and it was hardly unreasonable for the Commission to confine divestiture to communities in which there is common ownership of the only daily newspaper and either the only television station or the only broadcast station of any kind encompassing the entire community with a clear signal. Cf. *United States v. Radio Corp. of America*, *supra*, at 351-352, quoted, *supra* . . . It was not irrational, moreover, for the Commission to disregard media sources other than newspapers and broadcast stations in setting its divestiture standards. The studies cited by the Commission in its notice

of rulemaking unanimously concluded that newspapers and television are the two most widely utilized media sources for local news and discussion of public affairs; and, as the Commission noted in its Order, at 1081, "aside from the fact that [magazines and other periodicals] 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." Moreover, the differences in treatment between radio and television stations, see n. 10, *supra*, were certainly justified in light of the far greater influence of television than radio as a source for local news. See Order, at 1083.

The judgment of the Court of Appeals is affirmed in part and reversed in part.

*It is so ordered.*

Mr. Justice Brennan took no part in the consideration or decision of these cases.

### *MIND PROBES*

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1. By not requiring divestiture of non-egregious cross-ownerships, the FCC "grandfathered" them. In what other regulatory actions has the Commission "grandfathered" pre-existing practices that it prospectively prohibited? To what extent is the world "grandfathered"?

2. Since the prospective rule became effective, newspapers seeking to enter or expand holdings in broadcasting have had to do so outside their home markets (barring waiver). What does this say about the Commission's loyalty to the concept of integration of ownership and management?

3. The FCC's own staff study in the cross-ownership proceeding (referred to in the text of this document at n. 27) had indicated that TV stations owned by newspapers displayed "statistically significant superiority" in non-entertainment and local news programming in comparison with stations lacking newspaper affiliation. Would a ban on future cross-ownerships cause a decline in localism and an increase in entertainment fare? Does such a trend serve the public interest in programming as spelled out in Documents 22 and 25?

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# Indecency in Broadcasting

**Federal Communications Commission v.**

**Pacifica Foundation**

**438 U.S. 726**

**July 3, 1978**

Section 1464 of the U.S. Criminal Code (Document 43) makes the broadcasting of "obscene, indecent, or profane language" a crime. The FCC is authorized by the Communications Act to invoke civil sanctions against stations for violation of § 1464.

Changing sexual and linguistic standards posed problems involving candid broadcast programming in the 1970's. "Obscenity" as defined by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), is not protected speech under current First Amendment interpretations. See *Trustees of the University of Pennsylvania (WXPN(FM))*, 57 FCC 2d 782 (1975); 57 FCC 2d 793 (1976). "Profanity" is an area of speech that has not been tested in recent years. Where does this leave "indecent"?

The FCC first applied the concept in 1970 to a Philadelphia non-commercial radio station that broadcast a taped interview at 10:00 p.m. in which recording artist Jerry Garcia peppered his remarks with common words denoting excrement and sexual intercourse in *WUHY-FM, Eastern Educational Radio*, 24 FCC 2d 408 (1970). The Commission found the program to be indecent rather than obscene and invited the licensee to test this finding in court. The broadcaster paid the token \$100 forfeiture instead.

A few years later the FCC fined a suburban Chicago radio station, WGLD-FM, \$2,000 for airing material characterized as "obscene or indecent" [*Sonderling Broadcasting Corp.*, 41 FCC 2d 919 (1973)]. From 10 a.m. to 3 p.m., 5 days a week, the station broadcast a popular call-in show, "Femme Forum," on which a number of topics related to women's interests, including various aspects of sex, were discussed. Per-



haps 200 stations throughout America carried similar programs that were available from syndication sources or produced locally. Because of the candor with which sexual matters were treated, the programs were casually referred to as "topless radio." A WGLD-FM program on the topic of oral sex included this exchange:

Female Listener: . . . of course I had a few hangups at first about—in regard to this, but you know what we did—I have a craving for peanut butter all that [*sic*] time so I used to spread this on my husband's privates and after a while, I mean, I didn't even need the peanut butter any more.

Announcer: (Laughs) Peanut butter, huh?

Listener: Right. Oh, we can try anything—you know—any, any of these women that have called and they have, you know, hangups about this, I mean they should try their favorite—you know like—uh. . . .

Announcer: Whipped cream, marshmallow . . .

Such programming was either softened or whisked off the air following the FCC's announcement of the institution of a "nonpublic" inquiry to find out whether and to what extent Section 1464 was being violated, the simultaneous passage of a resolution by the National Association of Broadcasters deploring the airing of such content, and a speech to the NAB by FCC Chairman Dean Burch who urged broadcasters to show restraint and good taste in programming lest the government be forced to take action.

WGLD-FM paid the forfeiture. When citizens appealed, the Court of Appeals upheld the Commission's action on the obscenity (but not indecency) finding. The court held that "where a radio call-in show during daytime hours [when the audience may include children] broadcasts explicit discussions of ultimate sexual acts in a titillating context, the Commission does not unconstitutionally infringe upon the public's right to listening alternatives when it determines that the broadcast is obscene." [*Illinois Citizens Committee for Broadcasting v. FCC*, 515 F. 2d 397 (D.C. Cir. 1975).] Thus the "indecency" question was left unanswered; indeed, even the "obscenity" aspect was not thoroughly resolved, for the issues before the court could have been quite different had WGLD-FM itself contested the forfeiture.

Following on the heels of judicial affirmation, the FCC fashioned a new definition of "indecency," which it applied to a George Carlin recording aired by radio station WBAI in New York City, in *Pacifica Foundation*, 56 FCC 2d 94 (1975). The Commission was responding to a complaint it had received from a member of the national planning

board of a watchdog organization called Morality in Media who was offended upon hearing the broadcast while riding with his 15-year-old son in his car. To some extent the FCC was also reacting to congressional pressures to clear the airwaves of excessive sex and violence. Although the Commission imposed no forfeiture, Pacifica appealed the finding that it had broadcast indecent material. Doubtless the licensee remembered its contested license renewals a decade before when, in response to listener complaints about offensive programming, the FCC had defended broadcasters' freedom of expression with these words:

We recognize that as shown by the complaints here, such provocative programing as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programing off the airwaves. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera. No such drastic curtailment can be countenanced under the Constitution, the Communications Act, or the Commission's policy . . . Our function, we stress, is not to pass on the merits of the program—to commend or to frown.

[*Pacifica Foundation*, 36 FCC 147, 149 (1964).] But then it was noted that Pacifica scheduled the programs complained of in the late evening when children's access was minimized. The Carlin recording was aired during the afternoon.

Pacifica's appeal produced a reversal of the FCC decision by a divided Court of Appeals. The Commission's appeal to the Supreme Court produced the 5-4 decision reprinted below that narrowly upheld the FCC. Justice Powell's concurring opinion is not reproduced, though portions of dissents by Justices Brennan and Stewart appear.

Problems will persist in the area of obscenity and indecency on radio, television, and cable. Advertiser-supported media outlets generally manage to avoid violating standards of taste for fear of offending audience members and losing sponsor support. Because noncommercial stations are more free of economic ties to advertisers, they are likelier to test the limits of taste in programming. Hence, those stations that are least able to afford expensive legal battles are the vanguard of forces tunneling through the shifting sands of free expression in broadcasting. It may be some time before broadcast speech is as protected from inhibiting influences as is intimate, interpersonal dialogue at the informal level.

*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 F.C.C. 2d 94, 99. 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

\*The words were shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. [Ed.]

<sup>1</sup>56 F.C.C., at 99. 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. [§§] 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. [§§] 307, 308." *Id.*, at 96 n. 3.

complaints about indecent speech on the airwaves. *Id.*, at 94. 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. § 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications,"<sup>3</sup> and 47 U.S.C. § 303 (g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest."<sup>4</sup>

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." 56 F.C.C. 2d, at 98.<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," *Id.*, at 99. In summary, the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. [§] 1464."<sup>6</sup> *Ibid.*

<sup>2</sup>"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) unconscioning 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." *Id.*, at 97.

<sup>3</sup>Title 18 U.S.C. § 1464 (1976 ed.) provides:

"Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both."

<sup>4</sup>Section 303 (g) of the Communications Act of 1934, 48 Stat. 1082, as amended, as set forth in 47 U.S.C. § 303 (g), in relevant part, provides:

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

"(g) . . . generally encourage the larger and more effective use of radio in the public interest."

<sup>5</sup>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. 56 F.C.C., at 98.

<sup>6</sup>Chairman Wiley concurred in the result without joining the opinion. Commissioners Reid and Quello filed separate statements expressing the opinion that the language was inappropriate for broadcast at any time. *Id.*, at 102-103. Commissioner Robinson, joined by

After the order issued, the Commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." 59 F.C.C. 2d 892 (1976). The Commission noted that its "declaratory order was issued in a specific factual context," and declined to comment on various hypothetical situations presented by the petition.<sup>7</sup> *Id.*, at 893. It relied on its "long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them." *Ibid.*

The United States Court of Appeals for the District of Columbia Circuit reversed, with each of the three judges on the panel writing separately. 181 U.S. App. D.C. 132, 556 F. 2d 9. Judge Tamm concluded that the order represented censorship and was expressly prohibited by § 326 of the Communications Act.<sup>8</sup> Alternatively, Judge Tamm read the Commission opinion as the functional equivalent of a rule and concluded that it was "overbroad." *Id.*, at 141, 556 F. 2d, at 18. Chief Judge Bazelon's concurrence rested on the Constitution. He was persuaded that § 326's prohibition against censorship is inapplicable to broadcasts forbidden by § 1464. However, he concluded that § 1464 must be narrowly construed to cover only language that is obscene or otherwise unprotected by the First Amendment. 181 U.S. App. D.C., at 140-153, 556 F. 2d, at 24-30. Judge Leventhal, in dissent, stated that the only issue was whether the Commission could regulate the language "as broadcast." *Id.*, at 154, 556 F. 2d, at 31. Emphasizing the interest in protecting children, not only from exposure to indecent language, but also from exposure to the idea that such language has official approval, *id.*, at 160, and n. 18, 556 F. 2d, at 37, and n. 18, he concluded that the Commission had correctly condemned the daytime broadcast as indecent.

Having granted the Commission's petition for certiorari, 434 U.S. 1008, we

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Commissioner Hooks, filed a concurring statement expressing the opinion: "[W]e can regulate offensive speech to the extent it constitutes a public nuisance. . . . The governing idea is that 'indecent' is not an inherent attribute of words themselves; it is rather a matter of context and conduct. . . . If I were called on to do so, I would find that Carlin's monologue, if it were broadcast at an appropriate hour and accompanied by suitable warning, was distinguished by sufficient literary value to avoid being 'indecent' within the meaning of the statute." *Id.*, at 107-108, and n. 9.

<sup>7</sup>The Commission did, however, comment:

"[I]n some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.' Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language. . . . We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes." 59 F.C.C. 2d, at 893 n. 1.

<sup>8</sup>"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." 48 Stat. 1091; 47 U.S.C. § 326.

must decide: (1) whether the scope of judicial review encompasses more than the Commission's determination that the monologue was indecent "as broadcast"; (2) whether the Commission's order was a form of censorship forbidden by § 326; (3) whether the broadcast was indecent within the meaning of § 1464; and (4) whether the order violates the First Amendment of the United States Constitution.

## I

The general statements in the Commission's memorandum opinion do not change the character of its order. Its action was an adjudication under 5 U.S.C. § 554 (e) (1976 ed.); it did not purport to engage in formal rulemaking or in the promulgation of any regulations. The order "was issued in a specific factual context"; questions concerning possible action in other contexts were expressly reserved for the future. The specific holding was carefully confined to the monologue "as broadcast."

"This Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297. That admonition has special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues. *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-569. However appropriate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions. See *Herb v. Pitcairn*, 324 U.S. 117, 126. Accordingly, the focus of our review must be on the Commission's determination that the Carlin monologue was indecent as broadcast.

## II

The relevant statutory questions are whether the Commission's action is forbidden "censorship" within the meaning of 47 U.S.C. § 326 and whether speech that concededly is not obscene may be restricted as "indecent" under the authority of 18 U.S.C. § 1464 (1976 ed.). The questions are not unrelated, for the two statutory provisions have a common origin. Nevertheless, we analyze them separately.

Section 29 of the Radio Act of 1927 provided:

"Nothing in this Act shall be understood or construed to give the licensing authority 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 licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication." 44 Stat. 1172.

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.<sup>9</sup>

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>

Not only did the Federal Radio Commission so construe the statute prior to 1934; its successor, the Federal Communications Commission, has consistently interpreted the provision in the same way ever since. See Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964). And, until this case, the Court of Appeals for the District of Columbia Circuit has consistently agreed with this construction.<sup>11</sup> Thus, for example, in his opinion in *Anti-Defamation League*

<sup>9</sup>Zechariah Chafee, defending the Commission's authority to take into account program service in granting licenses, interpreted the restriction on "censorship" narrowly; "This means, I feel sure, the sort of censorship which went on in the seventeenth century in England—the deletion of specific items and dictation as to what should go into particular programs." 2 Z. Chafee, *Government and Mass Communications* 641 (1947).

<sup>10</sup>In *KFKB Broadcasting Assn. v. Federal Radio Comm'n*, 60 App. D.C. 79, 47 F. 2d 670 (1931), a doctor who controlled a radio station as well as a pharmaceutical association made frequent broadcasts in which he answered the medical questions of listeners. He often prescribed mixtures prepared by his pharmaceutical association. The Commission determined that renewal of the station's license would not be in the public interest, convenience, or necessity because many of the broadcasts served the doctor's private interests. In response to the claim that this was censorship in violation of § 29 of the 1927 Act, the Court held: "This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship," 60 App. D.C., at 81, 47 F. 2d, at 672.

In *Trinity Methodist Church, South v. Federal Radio Comm'n*, 61 App. D.C. 311, 62 F. 2d 850 (1932), cert. denied, 288 U.S. 599, the station was controlled by a minister whose broadcasts contained frequent references to "pimps" and "prostitutes" as well as bitter attacks on the Roman Catholic Church. The Commission refused to renew the license, citing the nature of the broadcasts. The Court of Appeals affirmed, concluding that First Amendment concerns did not prevent the Commission from regulating broadcasts that "offend the religious susceptibilities of thousands . . . or offend youth and innocence by the free use of words suggestive of sexual immorality." 61 App. D.C., at 314, 62 F. 2d, at 853. The court recognized that the licensee had a right to broadcast this material free of prior restraint, 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." *Id.*, at 312, 62 F. 2d, at 851.

<sup>11</sup>See, e.g., *Bay State Beacon, Inc. v. FCC*, 84 U.S. App. D.C. 216, 171 F. 2d 826 (1948); *Idaho Microwave, Inc. v. FCC*, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965); *National Assn. of Theatre Owners v. FCC*, 136 U.S. App. D.C. 352, 420 F. 2d 194 (1969), cert. denied, 397 U.S. 922.

of *B'nai B'rith v. FCC*, 131 U.S. App. D.C. 146, 403 F. 2d 169 (1968), cert. denied, 394 U.S. 930, Judge Wright forcefully pointed out that the Commission is not prevented from canceling the license of a broadcaster who persists in a course of improper programming. He explained:

“This would not be prohibited ‘censorship,’ . . . any more than would the Commission’s considering on a license renewal application whether a broadcaster allowed ‘coarse, vulgar, suggestive, double-meaning’ programming; programs containing such material are grounds for denial of a license renewal.” 131 U.S. App. D.C., at 150–151, n. 3, 403 F. 2d, at 173–174, n. 3.

See also *Office of Communication of United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F. 2d 994 (1966).

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.

There is nothing in the legislative history to contradict this conclusion. The provision was discussed only in generalities when it was first enacted.<sup>12</sup> In 1934, the anticensorship provision and the prohibition against indecent broadcasts were re-enacted in the same section, just as in the 1927 Act. In 1948, when the Criminal Code was revised to include provisions that had previously been located in other Titles of the United States Code, the prohibition against obscene, indecent, and profane broadcasts was removed from the Communications Act and re-enacted as § 1464 of Title 18. 62 Stat. 769 and 866. That rearrangement of the Code cannot reasonably be interpreted as having been intended to change the meaning of the anticensorship provision. H. R. Rep. No. 304, 80th Cong., 1st Sess., A106 (1947). Cf. *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162.

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.

<sup>12</sup>See, e.g., 67 Cong. Rec. 12615 (1926) (remarks of Sen. Dill); *id.*, 5480 (remarks of Rep. White); 68 Cong. Rec. 2567 (1927) (remarks of Rep. Scott); Hearings on S. 1 and S. 1754 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess., 121 (1926); Hearings on H. R. 5589 before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st Sess., 26 and 40 (1926). See also Hearings on H. R. 8825 before the House Committee on the Merchant Marine and Fisheries, 70th Cong., 1st Sess., *passim* (1928).



## 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.<sup>14</sup>

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. § 1461 in *Hamling v. United States*, 418 U.S. 87. See also *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 130 n. 7 (18 U.S.C. § 1462) (dicta). *Hamling* rejected a vagueness attack on § 1461, which forbids the mailing

<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. § 303 (g). We do not need to consider whether § 303 may have independent significance in a case such as this. The statutes authorizing civil penalties incorporate § 1464, a criminal statute. See 47 U.S.C. §§ 312 (a) (6), 312 (b) (2), and 502 (b) (1) (E) (1970 ed. and Supp. V). But the validity of the civil sanctions is not linked to the validity of the criminal penalty. The legislative history of the provisions establishes their independence. As enacted in 1927 and 1934, the prohibition on indecent speech was separate from the provisions imposing civil and criminal penalties for violating the prohibition. Radio Act of 1927, §§ 14, 29, and 33, 44 Stat. 1168 and 1173; Communications Act of 1934, §§ 312, 326, and 501, 48 Stat. 1086, 1091, and 1100, 47 U.S.C. §§ 312, 326, and 501 (1970 ed. and Supp. V). The 1927 and 1934 Acts indicated in the strongest possible language that any invalid provision was separable from the rest of the Act. Radio Act of 1927, § 38, 44 Stat. 1174; Communications Act of 1934, § 608, 48 Stat. 1105, 47 U.S.C. § 608. Although the 1948 codification of the criminal laws and the addition of new civil penalties changes the statutory structure, no substantive change was apparently intended. Cf. *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162. Accordingly, we need not consider any question relating to the possible application of § 1464 as a criminal statute.

<sup>14</sup>Webster defines the term as "a: altogether unbecoming; contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . ." Webster's Third New International Dictionary (1966).

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.<sup>15</sup> 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: "[T]he statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex." *Id.*, 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*, *supra*, 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.<sup>16</sup> The former statute deals primarily with the 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

<sup>15</sup> Indeed, at one point, he used "indecent" as a shorthand term for "patent offensiveness," 370 U.S., at 482, a usage strikingly similar to the Commission's definition in this case. 56 F.C.C. 2d, at 98.

<sup>16</sup> "[W]hile a nudist magazine may be within the protection of the First Amendment . . . the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464. . . . Similarly, regardless of whether the "4-letter words" and sexual description, set forth in "Lady Chatterley's Lover," (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise similar public interest and section 1464 questions." *En banc Programming Inquiry*, 44 F.C.C. 2303, 2307 (1960). See also *In re WUHY-FM*, 24 F.C.C. 2d 408, 412 (1970); *In re Sonderling Broadcasting Corp.*, 27 R. R. 2d 285, on reconsideration, 41 F.C.C. 2d 777 (1973), *aff'd* on other grounds *sub nom. Illinois Citizens Committee for Broadcasting v. FCC*, 169 U.S. App. D.C. 166, 515 F. 2d 397 (1974); *In re Mile High Stations, Inc.*, 28 F.C.C. 795 (1960); *In re Palmetto Broadcasting Co.*, 33 F.C.C. 250 (1962), reconsideration denied, 34 F.C.C. 101 (1963), *aff'd* on other grounds *sub nom. Robinson v. FCC*, 118 U.S. App. D.C. 144, 334 F. 2d 534, cert. denied, 379 U.S. 843.

<sup>17</sup> This conclusion is reinforced 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 Committee for Broadcasting*, 436 U.S. 775; *Red Lion Broadcasting Co. 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.

put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast.

#### IV

Pacifica makes two constitutional attacks on the Commission's order. First, it argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast of the "Filthy Words" monologue is not itself protected by the First Amendment. Second, Pacifica argues that inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

[Parts IV-A and IV-B of Justice Stevens' opinion, supported by two other Justices, are not part of the opinion of the Court and are, therefore, omitted.—Ed.]

#### 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."<sup>26</sup> 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. v. FCC*, 395 U.S. 367.

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 left alone plainly outweighs the First Amendment rights of an intruder. *Rowan v. Post Office Dept.*, 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

<sup>26</sup> 47 U.S.C. §§ 309 (a), 312 (a) (2); *FCC v. WOKO, Inc.*, 329 U.S. 223, 229. Cf. *Shuttlesworth v. Birmingham*, 394 U.S. 147; *Staub v. Baxley*, 355 U.S. 313.

the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.<sup>27</sup>

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,<sup>29</sup> and differences between

<sup>27</sup> Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away. See *Erznoznik v. Jacksonville*, 422 U.S. 205. As we noted in *Cohen v. California*:

"While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . . , we have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.'" 403 U.S., at 21.

The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "plac[ing] telephone calls without meaningful disclosure of the caller's identity"; from "engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number"; and from "us[ing] obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." Consumer Credit Protection Act Amendments, 91 Stat. 877, 15 U.S.C.A. § 1692d (Supp. 1978).

<sup>28</sup> 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 theaters 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.

<sup>29</sup> Even a prime-time recitation of Geoffrey Chaucer's Miller's Tale would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected by passages such as: "And prively he caughte hire by the queynte." *The Canterbury Tales*, Chaucer's Complete Works (Cambridge ed. 1933), p. 58, l. 3276.

radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing 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.

*It is so ordered.*

*Mr. Justice Brennan, with whom Mr. Justice Marshall joins, dissenting.*

... 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 compose 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 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, p. 82 (Georgetown Univ. Press. 1972). Cf. *Keefe v. Geanakos*, 418 F. 2d 359, 361 (CA1 1969) (finding the use of the word "mother-fucker" commonplace among young radicals and protesters).

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed 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. See *Moore v. East Cleveland*, 431 U.S. 494, 506-511 (1977) (BRENNAN, J., concurring).

Pacifica, in response to an FCC inquiry about its broadcast of Carlin's satire on "the words you couldn't say on the public . . . airways," explained that "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." 56 F.C.C. 2d, at 95, 96. In confirming Carlin's prescience as a social commentator by the result it reaches today, the Court evinces an attitude toward the "seven dirty words" that many others besides Mr. Carlin and Pacifica might describe as "silly." Whether today's decision will similarly prove "harmless" remains to be seen. One can only hope that it will.

*Mr. Justice Stewart, with whom Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall join, dissenting.*

. . . I would hold, therefore, that Congress intended, by using the word "indecent" in § 1464, to prohibit nothing more than obscene speech. . . . Under that reading of the statute, the Commission's order in this case was not authorized, and on that basis I would affirm the judgment of the Court of Appeals.

#### *MIND PROBES*

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1. Reasonable restrictions on the time, place, and manner of expression have long been found to be permitted by the First Amendment. What are the benefits and dangers of such constitutionally permissible restrictions in broadcasting?
2. Note that the Court does not rely on the traditional scarcity rationale in upholding the FCC. Is the reasoning used in its stead more convincing or satisfying to you?
3. How does the Court define "indecent"?

#### *RELATED READING*

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FELDMAN, CHARLES, and STANLEY TICKTON, "Obscene/Indecent Programming: Regulation of Ambiguity," *Journal of Broadcasting*, 20:2 (Spring 1976), 273-82.

- "Note: Filthy Words, The FCC, and the First Amendment: Regulating Broadcast Obscenity," *Virginia Law Review*, 61:3 (April 1975), 579-642. (Spring 1969), 203-19.
- STEBBINS, GENE R., "Pacifica's Battle for Free Expression," *Educational Broadcasting Review*, 4:3 (June 1970), 19-28.
- WESOLOWSKI, JAMES WALTER, "Obscene, Indecent, or Profane Broadcast Language as Construed by the Federal Courts," *Journal of Broadcasting*, 13:2 (Spring 1969), 203-19.
- WING, SUSAN, "Morality and Broadcasting: FCC Control of 'Indecent' Material Following *Pacifica*," *Federal Communications Law Journal*, 31:1 (Winter 1978), 145-73.

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# Cable Access Channels

Federal Communications Commission

v. Midwest Video Corporation

440 U.S. 689

April 2, 1979

During the last half of the 1970's it was clear that cable television was an idea whose time, at last, had come. Cable penetration and channel capacity continued to grow despite the hostile federal regulatory climate begun by the FCC the decade before. Cable systems became able to provide satellite-distributed subscription services ("pay cable") to their customers starting in 1975. Additional revenues made possible by pay cable encouraged investment in the cable industry, regardless of the prevalence of high interest rates. Cable viewers' diet was made more varied through "superstation" service as independent TV stations were able to use satellites to transmit their signals to cable systems all around the country. Numerous providers of advertiser-supported cable programming appeared on the scene when satellite distribution and cable's reach made such operations potentially profitable.

But the FCC continued to protect conventional broadcast TV by imposing restrictions and obligations on cable operators. The first significant judicial defeat of the Commission's protectionism occurred in *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), where the Court of Appeals invalidated the FCC's 1975 rules restricting cable delivery of some kinds of subscription services because, *inter alia*, the rules did not meet the "reasonably ancillary" standard of Document 33.

This 6-3 Supreme Court ruling strikes down Commission rules requiring larger cable systems to provide access channels. Again, it is the *Southwestern* standard that is determinative, with recourse to Document 35's construction of § 3(h) of the Communications Act. Justice Stevens' dissent (in which Justices Brennan and Marshall joined),



treated in footnote 15 of the Court's opinion, is omitted. The case is popularly known as *Midwest II*, distinguishing it from *Midwest I*, *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

Following this decision the FCC took deregulation of cable TV into its own hands by deciding in 1980 to delete its prior limitation on the number of distant TV station signals a cable system could carry and its syndicated exclusivity rule that protected some program material transmitted by local stations from duplication by imported station signals. The Commission's action was affirmed in *Malrite T.V. of New York v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied sub nom. National Association of Broadcasters v. FCC*, 454 U.S. 1143 (1982).

Replacing the once formidable federal presence in cable regulation is a growing state and local involvement in cable franchising. Despite *Midwest II*, these latter authorities may require cable systems within their jurisdictions to provide such services as they find desirable, including access channels. The Supreme Court placed a limited restraint on state cable regulation in *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164 (1982), when it held that a New York law requiring owners of rental premises to allow permanent installation of cable system wires and other apparatus was an unconstitutional taking of property without just compensation.

There remain difficulties in establishing congressional policy in the cable field and in adjusting the Copyright Act of 1976 to the changes wrought by deregulation of cable. Such matters are subject to intense lobbying efforts for and against any substantive resolution of the many controversies involved. Broadcasters, active in cable system ownership and the supply of non-broadcast programming for cable, will play an important role in forging solutions to these regulatory dilemmas. Meanwhile, as cable continues to expand its national reach, conventional TV station and network audiences are shrinking and cable's attractiveness as an advertising medium grows.

*Mr. Justice White delivered the opinion of the Court.*

In May 1976, the Federal Communications Commission promulgated rules requiring cable television systems that have 3,500 or more subscribers and carry broadcast signals to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes. *Report and Order in Docket No. 20508*, 59 F.C.C. 2d 294 (1976 Order). The issue here is whether these rules are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *United States v. Southwestern Cable*

Co., 392 U.S. 157, 178 (1968), and hence within the Commission's statutory authority.

I

The regulations now under review had their genesis in rules prescribed by the Commission in 1972 requiring all cable operators in the top 100 television markets to design their systems to include at least 20 channels and to dedicate 4 of those channels for public, governmental, educational, and leased access. The rules were reassessed in the course of further rulemaking proceedings. As a result, the Commission modified a compliance deadline, *Report and Order in Docket No. 20363*, 54 F.C.C. 2d 207 (1975), effected certain substantive changes, and extended the rules to all cable systems having 3,500 or more subscribers, *1976 Order, supra*. In its *1976 Order*, the Commission reaffirmed its view that there was "a definite societal good" in preserving access channels, though it acknowledged that the "overall impact that use of these channels can have may have been exaggerated in the past." 59 F.C.C. 2d, at 296.

As ultimately adopted, the rules prescribe a series of interrelated obligations ensuring public access to cable systems of a designated size and regulate the manner in which access is to be afforded and the charges that may be levied for providing it. Under the rules, cable systems must possess a minimum capacity of 20 channels as well as the technical capability for accomplishing two-way, nonvoice communication.<sup>1</sup> 47 CFR § 76.252 (1977). Moreover, to the extent of their available activated channel capacity,<sup>2</sup> cable systems must allocate four separate channels for

<sup>1</sup>Systems in the top 100 markets and in operation prior to March 31, 1972, and other systems in operation by March 31, 1977, are given until June 21, 1986, to comply with the channel capacity and two-way communication requirements. 47 CFR § 76.252 (b) (1977).

<sup>2</sup>Activated channel capacity consists of the number of usable channels that the system actually provides to the subscriber's home or that it could provide by making certain modifications to its facilities. *1976 Order*, 59 F.C.C. 2d, at 315. The great majority of systems constructed in the major markets from 1962 to 1972 were designed with a 12-channel capacity. Often, additional channels may be activated by installing converters on subscribers' home sets, albeit at substantial cost. See *Notice of Proposed Rule Making*, 53 F.C.C. 2d 782, 785 (1975).

In determining the number of activated channels available for access use, channels already programmed by the cable operator for which a separate charge is made are excluded. Similarly, channels utilized for transmission of television broadcast signals are subtracted. The remaining channels deemed available for access use include channels provided to the subscriber but not programmed and channels carrying other nonbroadcast programming—such as programming originated by the system operator—for which a separate assessment is not made. *1976 Order, supra*, at 315–316. The Commission has indicated that it will "not consider as acting in good faith an operator with a system of limited activated channel capability who attempts to displace existing access uses with his own origination efforts." *Id.*, at 316. Additionally, the Commission has stated that pay entertainment programming should not be "provided at the expense of local access efforts which are displaced. Should a system operator for example have only one complete channel available to provide access services we shall consider it as clear evidence of bad faith in complying with his access obligations if such operator decides to use that channel to provide pay programming." *Id.*, at 317.

use by public, educational, local governmental, and leased access users, with one channel assigned to each. § 76.254 (a). Absent demand for full-time use of each access channel, the combined demand can be accommodated with fewer than four channels but with at least one. §§ 76.254 (b), (c).<sup>3</sup> When demand on a particular access channel exceeds a specified limit, the cable system must provide another access channel for the same purpose, to the extent of the system's activated capacity. § 76.254 (d). The rules also require cable systems to make equipment available for those utilizing public-access channels. § 76.256 (a).

Under the rules, cable operators are deprived of all discretion regarding who may exploit their access channels and what may be transmitted over such channels. System operators are specifically enjoined from exercising any control over the content of access programming except that they must adopt rules proscribing the transmission on most access channels of lottery information and commercial matter.<sup>4</sup> §§ 76.256 (b), (d). The regulations also instruct cable operators to issue rules providing for first-come, nondiscriminatory access on public and leased channels. §§ 76.256 (d) (1), (3).

Finally, the rules circumscribe what operators may charge for privileges of access and use of facilities and equipment. No charge may be assessed for the use of one public-access channel. § 76.256 (c) (2). Operators may not charge for the use of educational and governmental access for the first five years the system services such users. § 76.256 (c) (1). Leased-access-channel users must be charged an "appropriate" fee. § 76.256 (d) (3). Moreover, the rules admonish that charges for equipment, personnel, and production exacted from access users "shall be reasonable and consistent with the goal of affording users a low-cost means of television access." § 76.256 (c) (3). And "[n]o charges shall be made for live public access programs not exceeding five minutes in length." *Ibid.* Lastly, a system may not charge access users for utilization of its playback equipment or the personnel required to operate such equipment when the cable's production equipment is not deployed and when tapes or film can be played without technical alteration to the system's equipment. *Petition for Reconsideration in Docket No. 20508*, 62 F.C.C. 2d 399, 407 (1976).

The Commission's capacity and access rules were challenged on jurisdictional grounds in the course of the rulemaking proceedings. In its *1976 Order*, the Com-

<sup>3</sup> Cable systems in operation on June 21, 1976, that lack sufficient activated channel capacity to furnish one full channel for access purposes may meet their access obligations by providing whatever portions of channels that are available for such purposes. 47 CFR § 76.254 (c) (1977). Systems initiated after that date, and existing systems desirous of adding a non-mandatory broadcast signal after that date, must supply one full channel for access use even if they must install converters to do so. See *1976 Order, supra*, at 314-315.

<sup>4</sup> Cable systems were also required to promulgate rules prohibiting the transmission of obscene and indecent material on access channels. 47 CFR § 76.256 (d) (1977). The Court of Appeals for the District of Columbia Circuit stayed this aspect of the rules in an order filed in *American Civil Liberties Union v. FCC*, No. 76-1695 (Aug. 26, 1977). The court below, moreover, disapproved the requirement in the belief that it imposed censorship obligations on cable operators. The Commission has instituted a review of the requirement, and it is not now in controversy before this Court.

mission rejected such comments on the ground that the regulations furthered objectives that it might properly pursue in its supervision over broadcasting. Specifically, the Commission maintained that its rules would promote "the achievement of long-standing communications regulatory objectives by increasing outlets for local self-expression and augmenting the public's choice of programs." 59 F.C.C. 2d, at 298. The Commission did not find persuasive the contention that "the access requirements are in effect common carrier obligations which are beyond our authority to impose." *Id.*, at 299. The explanation was:

"So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow 'common carrier' in nature. The proper question, we believe, is not whether they fall in one category or another of regulation—whether they are more akin to obligations imposed on common carriers or obligations imposed on broadcasters to operate in the public interest—but whether the rules adopted promote statutory objectives." *Ibid.*

Additionally, the Commission denied that the rules violated the First Amendment, reasoning that when broadcasting or related activity by cable systems is involved First Amendment values are served by measures facilitating an exchange of ideas.

On petition for review, the Eighth Circuit set aside the Commission's access, channel capacity, and facilities rules as beyond the agency's jurisdiction. 571 F.2d 1025 (1978). The court was of the view that the regulations were not reasonably ancillary to the Commission's jurisdiction over broadcasting, a jurisdictional condition established by past decisions of this Court. The rules amounted to an attempt to impose common-carrier obligations on cable operators, the court said, and thus ran counter to the statutory command that broadcasters themselves may not be treated as common carriers. See Communications Act of 1934, § 3 (h), 47 U.S.C. § 153 (h). Furthermore, the court made plain its belief that the regulations presented grave First Amendment problems. We granted certiorari, 439 U.S. 816 (1978), and we now affirm.<sup>5</sup>

## II

### A

The Commission derives its regulatory authority from the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.* The Act preceded the advent of cable television and understandably does not expressly provide for

<sup>5</sup>In the court below, the American Civil Liberties Union (ACLU), petitioner in No. 77-1648, challenged the Commission's modification of its 1972 access rules, which were less favorable to cable operators than are the regulations finally embraced. The ACLU requests that we remand this case for further consideration of its challenge in the event that we reverse the judgment of the Eighth Circuit. As we affirm the judgment below, we necessarily decline the ACLU's invitation to remand.

the regulation of that medium. But it is clear that Congress meant to confer "broad authority" on the Commission, H. R. Rep. No. 1850, 73d Cong., 2d Sess., 1 (1934), so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). To that end, Congress subjected to regulation "all interstate and foreign communication by wire or radio." Communications Act of 1934, § 2 (a), 47 U.S.C. § 152 (a). In *United States v. Southwestern Cable Co.*, we construed § 2 (a) as conferring on the Commission a circumscribed range of power to regulate cable television, and we reaffirmed that determination in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). The question now before us is whether the Act, as construed in these two cases, authorizes the capacity and access regulations that are here under challenge.

The *Southwestern* litigation arose out of the Commission's efforts to ameliorate the competitive impact on local broadcasting operations resulting from importation of distant signals by cable systems into the service areas of local stations. Fearing that such importation might "destroy or seriously degrade the service offered by a television broadcaster," *First Report and Order*, 38 F.C.C. 683, 700 (1965), the Commission promulgated rules requiring CATV systems<sup>6</sup> to carry the signals of broadcast stations into whose service area they brought competing signals, to avoid duplication of local station programming on the same day such programming was broadcast, and to refrain from bringing new distant signals into the 100 largest television markets unless first demonstrating that the service would comport with the public interest. See *Second Report and Order*, 2 F.C.C. 2d 725 (1966).<sup>7</sup>

The Commission's assertion of jurisdiction was based on its view that "the successful performance" of its duty to ensure "the orderly development of an appropriate system of local television broadcasting" depended upon regulation of cable operations. 392 U.S., at 177. Against the background of the administrative undertaking at issue, the Court construed § 2 (a) of the Act as granting the Commission jurisdiction over cable television "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S., at 178.

Soon after our decision in *Southwestern*, the Commission resolved "to condition the carriage of television broadcast signals . . . upon a requirement that the CATV system also operate to a significant extent as a local outlet by originating." *Notice of Proposed Rulemaking and Notice of Inquiry*, 15 F.C.C. 2d 417, 422 (1968). It stated that its "concern with CATV carriage of broadcast signals [was]

<sup>6</sup>CATV, or "community antenna television," refers to systems that receive television broadcast signals, amplify them, transmit them by cable or microwave, and distribute them by wire to subscribers. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161 (1968). "Because of the broader functions to be served by such facilities in the future," the Commission adopted the "more inclusive term cable television systems" in *Cable Television Report and Order in Docket No. 18397*, 36 F.C.C. 2d 143, 144 n. 9 (1972).

<sup>7</sup>The validity of the particular regulations issued by the Commission was not at issue in *Southwestern*. See 392 U.S., at 167. In dicta in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), the plurality noted that *Southwestern* had properly been applied by the courts of appeals to sustain the validity of the rules. *Id.*, at 659 n. 17.

not just a matter of avoidance of adverse effects, but extend[ed] also to requiring CATV affirmatively to further statutory policies." *Ibid.* Accordingly, the Commission promulgated a rule providing that CATV systems having 3,500 or more subscribers may not carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by originating its own programs—or cablecasting—and maintains facilities for local production and presentation of programs other than automated services. 47 CFR § 74.1111 (a) (1970). This Court, by a 5-to-4 vote but without an opinion for the Court, sustained the Commission's jurisdiction to issue these regulations in *United States v. Midwest Video Corp.*, *supra*.

Four Justices, in an opinion by MR. JUSTICE BRENNAN, reaffirmed the view that the Commission has jurisdiction over cable television and that such authority is delimited by its statutory responsibilities over television broadcasting. They thought that the reasonably ancillary standard announced in *Southwestern* permitted regulation of CATV "with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." 406 U.S., at 667. The Commission had reasonably determined, MR. JUSTICE BRENNAN'S opinion declared, that the origination requirement would "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services. . . ." *Id.*, at 667-668, quoting *First Report and Order*, 20 F.C.C. 2d 201, 202 (1969). The conclusion was that the "program-origination rule [was] within the Commission's authority recognized in *Southwestern*." 406 U.S., at 670.

THE CHIEF JUSTICE, in a separate opinion concurring in the result, admonished that the Commission's origination rule "strain[ed] the outer limits" of its jurisdiction. *Id.*, at 676. Though not "fully persuaded that the Commission ha[d] made the correct decision in [the] case," he was inclined to defer to its judgment. *Ibid.*<sup>8</sup>

## B

Because its access and capacity rules promote the long-established regulatory goals of maximization of outlets for local expression and diversification of programming—the objectives promoted by the rule sustained in *Midwest Video*—the Com-

<sup>8</sup>The Commission repealed its mandatory origination rule in December 1974. It explained:

"Quality, effective, local programming demands creativity and interest. These factors cannot be mandated by law or contract. The net effect of attempting to require origination has been the expenditure of large amounts of money for programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation. In those cases in which the operator showed an interest or the cable community showed a desire for local programming, an outlet for local expression began to develop, regardless of specific legal requirements. During the suspension of the mandatory rule, cable operators have used business judgment and discretion in their origination decisions. For example, some operators have felt compelled to originate programming to attract and retain subscribers. These decisions have been made in light of local circumstances. This, we think, is as it should be." *Report and Order in Docket No. 19988*, 49 F.C.C. 2d 1090, 1105-1106.

mission maintains that it plainly had jurisdiction to promulgate them. Respondents, in opposition, view the access regulations as an intrusion on cable system operations that is qualitatively different from the impact of the rule upheld in *Midwest Video*. Specifically, it is urged that by requiring the allocation of access channels to categories of users specified by the regulations and by depriving the cable operator of the power to select individual users or to control the programming on such channels, the regulations wrest a considerable degree of editorial control from the cable operator and in effect compel the cable system to provide a kind of common-carrier service. Respondents contend, therefore, that the regulations are not only qualitatively different from those heretofore approved by the courts but also contravene statutory limitations designed to safeguard the journalistic freedom of broadcasters, particularly the command of § 3 (h) of the Act that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier." 47 U.S.C. § 153 (h).

We agree with respondents that recognition of agency jurisdiction to promulgate the access rules would require an extension of this Court's prior decisions. Our holding in *Midwest Video* sustained the Commission's authority to regulate cable television with a purpose affirmatively to promote goals pursued in the regulation of television broadcasting; and the plurality's analysis of the origination requirement stressed the requirement's nexus to such goals. But the origination rule did not abrogate the cable operators' control over the composition of their programming, as do the access rules. It compelled operators only to assume a more positive role in that regard, one comparable to that fulfilled by television broadcasters. Cable operators had become enmeshed in the field of television broadcasting, and, by requiring them to engage in the functional equivalent of broadcasting, the Commission had sought "only to ensure that [they] satisfactorily [met] community needs within the context of their undertaking." 406 U.S., at 670 (opinion of BRENNAN, J.).

With its access rules, however, the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has relegated cable systems, *pro tanto*, to common-carrier status.<sup>9</sup> A common-carrier service in the communications context<sup>10</sup> is one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their

<sup>9</sup> A cable system may operate as a common carrier with respect to a portion of its service only. See *National Association of Regulatory Utility Comm'rs v. FCC*, 174 U.S. App. D.C. 374, 381, 533 F. 2d 601, 608 (1976) (opinion of Wilkey, J.) ("Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others"); *First Report and Order in Docket No. 18397*, 20 F.C.C. 2d 201, 207 (1969).

<sup>10</sup> Section 3 (h) defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy . . ." Due to the circularity of the definition, resort must be had to court and agency pronouncements to ascertain the term's meaning. See *National Association of Regulatory Utility Comm'rs v. FCC*, 173 U.S. App. D.C. 413, 423, 525 F. 2d 630, 640, cert. denied, 425 U.S. 992 (1976); *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251, 254 (1958); H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess., 46 (1934).

own design and choosing . . . ." *Report and Order, Industrial Radiolocation Service, Docket No. 16106*, 5 F.C.C. 2d 197, 202 (1966); see *National Association of Regulatory Utility Comm'rs v. FCC*, 173 U.S. App. D.C. 413, 424, 525 F. 2d 630, 641, cert. denied, 425 U.S. 992 (1976); *Multipoint Distribution Service*, 45 F.C.C. 2d 616, 618 (1974). A common carrier does not "make individualized decisions, in particular cases, whether and on what terms to deal." *National Association of Regulatory Utility Comm'rs v. FCC, supra*, at 424, 525 F. 2d, at 641.

The access rules plainly impose common-carrier obligations on cable operators.<sup>11</sup> Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis. 47 CFR §§ 76.254 (a), 76.256 (d) (1977).<sup>12</sup> Operators are prohibited from determining or influencing the content of access programming. § 76.256 (b). And the rules delimit what operators may charge for access and use of equipment. § 76.256 (c). Indeed, in its early consideration of access obligations—whereby "CATV operators [would] furnish studio facilities and technical assistance [but] have no control over program content except as may be required by the Commission's rules and applicable law"—the Commission acknowledged that the result would be the operation of cable systems "as common carriers on some channels." *First Report and Order in Docket No. 18397*, 20 F.C.C. 2d, at 207; see *id.*, at 202; *Cable Television Report and Order*, 36 F.C.C. 2d 143, 197 (1972). In its 1976 *Order*, the Commission did not directly deny that its access requirements compelled common carriage, and it has conceded before this Court that the rules "can be viewed as a limited form of common carriage-type obligation." Brief for Petitioner in No. 77-1575, p. 39. But the Commission continues to insist that this characterization of the obligation imposed by the rules is immaterial to the question of its power to issue them; its authority to promulgate the rules is assured, in the Commission's view, so long as the rules promote statutory objectives.

Congress, however, did not regard the character of regulatory obligations as irrelevant to the determination of whether they might permissibly be imposed in the context of broadcasting itself. The Commission is directed explicitly by § 3 (h) of the Act not to treat persons engaged in broadcasting as common carriers. We considered the genealogy and the meaning of this provision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). The issue in that case was whether a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak on issues important to them violated the Communications Act of 1934 or the First Amendment. Our examination of the legislative history of the Radio Act of 1927—the precursor to the Communications Act of 1934—prompted us to conclude that "in the area of discussion of public issues Congress chose to leave broad journalistic discretion with

<sup>11</sup> As we have noted, and as the Commission has held, cable systems otherwise "are not common carriers within the meaning of the Act." *United States v. Southwestern Cable Co.*, 392 U.S., at 169 n. 29; see *Frontier Broadcasting Co. v. Collier, supra*.

<sup>12</sup> See also 1976 *Order*, 59 F.C.C. 2d, at 316 ("We expect the operator in general to administer all access channels on a first come, first served non-discriminatory basis").



the licensee.” 412 U.S., at 105. We determined, in fact, that “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.” *Ibid.* The Court took note of a bill reported to the Senate by the Committee on Interstate Commerce providing in part that any licensee who permits “‘a broadcasting station to be used . . . for the discussion of any question affecting the public . . . shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce: Provided, that such licensee shall have no power to censor the material broadcast.’” *Id.*, at 106, quoting 67 Cong. Rec. 12503 (1926). That bill was amended to eliminate the common-carrier obligation because of the perceived lack of wisdom in “‘put[ting] the broadcaster under the hampering control of being a common carrier’” and because of problems in administering a nondiscriminatory right of access. 412 U.S., at 106; see 67 Cong. Rec. 12502, 12504 (1926).

The Court further observed that, in enacting the 1934 Act, Congress rejected still another proposal “that would have imposed a limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain public issues.” 412 U.S., at 107-108.<sup>13</sup> “Instead,” the Court noted, “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.’” *Id.*, at 108-109.

“Congress’ flat refusal to impose a ‘common carrier’ right of access for all persons wishing to speak out on public issues,” *id.*, at 110, was perceived as consistent with other provisions of the 1934 Act evincing “a legislative desire to preserve values of private journalism.” *Id.*, at 109. Notable among them was § 326 of the Act, which enjoins the Commission from exercising “‘the power of censorship over the radio communications or signals transmitted by any radio station,’” and commands that “‘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.’” 412 U.S., at 110, quoting 47 U.S.C. § 326.

The holding of the Court in *Columbia Broadcasting* was in accord with the view of the Commission that the Act itself did not require a licensee to accept paid editorial advertisements. Accordingly, we did not decide the question whether the Act, though not mandating the claimed access, would nevertheless permit the Commission to require broadcasters to extend a range of public access by regulations

<sup>13</sup>The proposal adopted by the Senate provided:

“[I]f any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, or for the presentation of opposite views on such public questions.” See Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., 19 (1934). The portion regarding discussion of public issues was excised by the House-Senate Conference. See H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess., 49 (1934).

similar to those at issue here. The Court speculated that the Commission might have flexibility to regulate access, 412 U.S., at 122, and that “[c]onceivably 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,” *id.*, at 131. But this is insufficient support for the Commission’s position in the present case. The language of § 3 (h) is unequivocal; it stipulates that broadcasters shall not be treated as common carriers. As we see it, § 3 (h), consistently with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems.<sup>14</sup> The provision’s background manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access. It is difficult to deny, then, that forcing broadcasters to develop a “nondiscriminatory system for controlling access . . . is precisely what Congress intended to avoid through § 3 (h) of the Act.” 412 U.S., at 140 n. 9 (STEWART, J., concurring); see *id.*, at 152, and n. 2 (Douglas, J., concurring in judgment).<sup>15</sup>

Of course, § 3 (h) does not explicitly limit the regulation of cable systems. But without reference to the provisions of the Act directly governing broadcasting,

<sup>14</sup>Whether less intrusive access regulation might fall within the Commission’s jurisdiction, or survive constitutional challenge even if within the Commission’s power, is not presently before this Court. Certainly, our construction of § 3 (h) does not put into question the statutory authority for the fairness-doctrine obligations sustained in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The fairness doctrine does not require that a broadcaster provide common carriage; it contemplates a wide range of licensee discretion. See *Report on EditorIALIZING by Broadcast Licensees*, 13 F.C.C. 1246, 1251 (1949) (in meeting fairness-doctrine obligations the “licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view”).

<sup>15</sup>The dissent maintains that § 3 (h) does not place “limits on the Commission’s exercise of powers otherwise within its statutory authority because a lawfully imposed requirement might be termed a ‘common carrier obligation.’” . . . Rather, § 3 (h) means only that “every broadcast station is not to be *deemed* a common carrier, and therefore subject to common-carrier regulation under Title II of the Act, simply because it is engaged in radio broadcasting.” . . . But Congress was plainly anxious to avoid regulation of broadcasters as common carriers under Title II, which commands, *inter alia*, that regulated entities shall “furnish . . . communication service upon reasonable request therefor.” 47 U.S.C. § 201 (a). Our review of the Act in *Columbia Broadcasting* led us to conclude that § 3 (h) embodies a substantive determination not to abrogate a broadcaster’s journalistic independence for the purpose of, and as a result of, furnishing members of the public with media access:

“Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; § 3 (h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. [The] provisio[n] clearly manifest[s] the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.” 412 U.S., at 116.

We now reaffirm that view of § 3 (h): The purpose of the provision and its mandatory wording preclude Commission discretion to compel broadcasters to act as common carriers, even with respect to a portion of their total services. As we demonstrate in the following text, that same constraint applies to the regulation of cable television systems.

the Commission's jurisdiction under § 2 (a) would be unbounded. See *United States v. Midwest Video Corp.*, 406 U.S., at 661 (opinion of BRENNAN, J.). Though afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority. The Court regarded the Commission's regulatory effort at issue in *Southwestern* as consistent with the Act because it had been found necessary to ensure the achievement of the Commission's statutory responsibilities.<sup>16</sup> Specifically, regulation was imperative to prevent interference with the Commission's work in the broadcasting area. And in *Midwest Video* the Commission had endeavored to promote long-established goals of broadcasting regulation. Petitioners do not deny that statutory objectives pertinent to broadcasting bear on what the Commission might require cable systems to do. Indeed, they argue that the Commission's authority to promulgate the access rules derives from the relationship of those rules to the objectives discussed in *Midwest Video*. But they overlook the fact that Congress has restricted the Commission's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting.

That limitation is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions. Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include. As the Commission, itself, has observed, "both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide." *Report and Order in Docket No. 20829*, 43 Fed. Reg. 53742, 53746 (1978).<sup>17</sup>

In determining, then, whether the Commission's assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting," *United States v. Southwestern Cable Co.*, 392 U.S., at 178, we are unable to ignore Congress' stern disapproval—evidenced in § 3 (h)—of negation of the editorial discretion otherwise enjoyed by

<sup>16</sup>The Commission contends that the signal carriage rules involved in *Southwestern* are, in part, analogous to the Commission's access rules in question here. The signal carriage rules required, *inter alia*, that cable operators transmit, upon request, the broadcast signals of broadcast licensees into whose service area the cable operator imported competing signals. See *First Report and Order in Docket No. 14895*, 38 F.C.C. 683, 716-719 (1965). But that requirement did not amount to a duty to hold out facilities indifferently for public use and thus did not compel cable operators to function as common carriers. See *supra*, at 701. Rather, the rule was limited to remedying a specific perceived evil and thus involved a balance of considerations not addressed by § 3 (h).

<sup>17</sup>We do not suggest, nor do we find it necessary to conclude, that the discretion exercised by cable operators is of the same magnitude as that enjoyed by broadcasters. Moreover, we reject the contention that the Commission's access rules will not significantly compromise the editorial discretion actually exercised by cable operators. At least in certain instances the access obligations will restrict expansion of other cable services. See nn. 2, 3, *supra*. And even when not occasioning the displacement of alternate programming, compelling cable operators indiscriminately to accept access programming will interfere with their determinations regarding the total service offering to be extended to subscribers.

broadcasters and cable operators alike. Though the lack of congressional guidance has in the past led us to defer—albeit cautiously—to the Commission’s judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited.

The exercise of jurisdiction in *Midwest Video*, it has been said, “strain[ed] the outer limits” of Commission authority. 406 U.S., at 676 (BURGER, C. J., concurring in result). In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are constrained to hold that the Commission exceeded those limits in promulgating its access rules.<sup>18</sup> The Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters. We think authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress.<sup>19</sup>

*Affirmed.*

### MIND PROBES

1. Is the Court correct in interpreting § 3 (h) of the Communications Act so as to foreclose even partial regulation of broadcasters and cable systems as common carriers?
2. To what extent may *Midwest II* be viewed as a policy decision rather than a legal decision?

<sup>18</sup>The Commission has argued that the capacity, access, and facilities regulations should not be reviewed as a unit, but as discrete rules entailing unique considerations. But the Commission concedes that the facilities and access rules are integrally related, see Brief for Petitioner in No. 77-1575, p. 36 n. 32, and acknowledges that the capacity rules were adopted in part to complement the access requirement, see *id.*, at 35; *1976 Order*, 59 F.C.C. 2d, at 313, 322. At the very least it is unclear whether any particular rule or portion thereof would have been promulgated in isolation. Accordingly, we affirm the lower court’s determination to set aside the amalgam of rules without intimating any view regarding whether a particular element thereof might appropriately be revitalized in a different context.

<sup>19</sup>The court below suggested that the Commission’s rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute. The Court of Appeals intimated, additionally, that the rules might effect an unconstitutional “taking” of property or, by exposing a cable operator to possible criminal prosecution for offensive cablecasting by access users over which the operator has no control, might affront the Due Process Clause of the Fifth Amendment. We forgo comment on these issues as well.

*RELATED READING*

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- BESEN, STANLEY M., and ROBERT W. CRANDALL, "The Deregulation of Cable Television," *Journal of Law and Contemporary Problems*, 44 (Winter 1981), 77-124.
- CABINET COMMITTEE ON CABLE COMMUNICATIONS, *Cable: Report to the President*. Washington, D.C.: Government Printing Office, 1974.
- HAMBURG, MORTON I., *All About Cable: Legal and Business Aspects of Cable and Pay Television* (revised edition). New York: Law Journal-Seminars Press, 1981.
- NIMELMAN, ANDREW A., "Of Common Carriage and Cable Access: Deregulation of Cable Television by the Supreme Court," *Federal Communications Law Journal*, 34:1 (Winter 1982), 167-92.

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# Radio Deregulation

Notice of Inquiry and Proposed Rulemaking  
in the Matter of Deregulation of Radio  
73 FCC 2d 457  
September 27, 1979

Call it what you will—"deregulation," "reregulation," and "unregulation" were appellations designated by various Commission administrations—relief from unnecessary regulatory restraint achieved a prominent position on the FCC's priority list in the last decade. This document presents the core of the Commission's initial economic rationale for deregulating commercial radio whose AM and FM outlets comprise four-fifths of all broadcast stations. The expressed line of thought has also been of importance in loosening restrictions on such competitive services as over-the-air subscription television and cable TV and in authorizing new competitors like direct broadcast satellites.

The radio deregulation proceeding produced a torrent of 20,000 comments and another 2,000 reply comments. The rulemaking terminated in 1981 when the FCC's *Report and Order* (84 FCC 2d 968) announced the elimination of advertising and nonentertainment programming staff guidelines and formal ascertainment and program logging requirements. A court decision remanded the logging issue for Commission reconsideration and upheld the FCC on all other matters [*Office of Communication of the United Church of Christ v. FCC—F.2d—(D.C. Cir.) (May 10, 1983)*].

The push in deregulation's direction is unlikely to abate as all broadcast services seek relief from rules that have outlived their usefulness. An overworked FCC and a Congress intent on achieving efficiencies in government are willing to grant and support such relief—within limits. That few, if any, significant post-deregulatory changes in broadcasting are perceived by the audience is testimony to the ineffectuality of seemingly potent regulation that was once in place.

There may come a time when broadcasters prefer strong regulation

to strong competition. Prominent segments of the industry, however, are making this speculation superfluous by acquiring stakes in the technologies most likely to draw on their markets for audience, programming, and advertising.

*By the Commission: . . .*

## I. INTRODUCTION

1. We are today initiating a proceeding looking toward the substantial deregulation of commercial broadcast radio. The Commission is proposing rule and policy changes that would remove current requirements in nontechnical areas including nonentertainment programming, ascertainment, and commercialization. This represents a clear departure from our present involvement in such matters . . .

[Section II, omitted here, treats the history of the rules at issue in the proceeding. Section III is entitled "A Reevaluation of Our Current Regulatory Approach in Light of Changed Circumstances." Its subsection B deals with "Structural Changes in Radio Markets," concluding with the following paragraph.—Ed.]

91. In sum, there have been three major, ongoing structural changes in radio: (1) competition has increased substantially, especially in the larger markets, with many markets enjoying the benefits of a large number of viable, competing stations; (2) radio's role among the various media has shifted from being the major mass medium to being more of a secondary and often specialized medium; and (3) the concept of community has changed in recognition of the diversity of American society, and radio has been responsive to this change.

## C. THE ECONOMIC POLICY MODEL

92. The structural changes outlined above have prompted this re-evaluation of Commission rules and policies. It is necessary to perform such a re-evaluation within an analytical framework that appropriately takes into account the Commission's public interest objectives. Consumer well-being is the major yardstick of this framework. [Footnote omitted.—Ed.]

93. There are two fundamental criteria of good performance in a market: (1) the goods or services supplied should closely correspond to the goods and services that the public wants; and (2) these goods and services should be provided at the lowest possible cost (consistent with the producers being able to remain in business over the long term).

94. The American public is very diverse and so are its wants. Each individual has his own set of tastes and preferences. Not only are many different goods and services desired, but in addition there is a considerable diversity in the *intensity* with which people want these various products. Some consumers value a particular product more highly than others and as a consequence are willing to pay more for the item. If there is no price tag on the item, there is no way to take into account the intensity of demand felt by individual consumers.

95. When consumer wants are diverse, they are difficult to measure. Government regulators lack the wherewithal to gather the information necessary to ascertain consumer preferences accurately. At best, centralized regulators can construct an aggregate picture that reflects overall tastes but probably fails to recognize local differences. Competitive markets, on the other hand, are particularly effective at determining varied wants (both of kind and of intensity). Consumers with the most intense demand for a scarce commodity will outbid those with less desire for the good.

96. For any given item, say apples, there is a group of consumers who will value apples, but the degree to which they value apples differs.<sup>139</sup> At a low price for apples compared to other items, many consumers will buy apples. If the price rises relative to the prices of other items, fewer and fewer consumers will continue to buy apples. The consumers who cease buying apples will be those who value apples less than the price. Thus, the pricing mechanism will ensure that the consumers who value apples most get them when they are scarce. Moreover, if there are no barriers preventing persons from becoming apple producers and if apple producers are able to earn profits equivalent to the return from other activities, they will serve the consumers with intense demand even if those consumers are very few in number.

97. Producers (providers) of goods and services must be responsive to consumers' desires in order to compete successfully with rival producers.<sup>140</sup> Consumers, by their choice of purchases, determine which producers (providers) will succeed. Moreover, not only does the competition among producers for consumers lead to the production of the goods and services that consumers want most, the same competitive process forces producers continually to seek less costly ways of providing those goods and services. As a result, parties operating freely in a competitive market environment will determine and fulfill consumer wants, and do so efficiently. That is, for any given distribution of income and wealth among consumers, competitive markets will produce at lowest cost those goods and services that consumers value the most. Therefore, in the absence of strong countervailing reasons, it is good public policy to encourage competition, to pursue policies that ease entry and increase the number of competitors, and wherever possible to allow market forces to operate freely.

<sup>139</sup> There will be some consumers who will not acquire apples even if they are given away, but this group is likely to be quite small.

<sup>140</sup> If other firms could fairly easily become producers, they serve almost the same competitive spur as actual rival producers in a market.



## MARKET FAILURE IN GENERAL

98. There are situations, however, in which markets may fail, that is, in which a market may not respond fully to consumer wants. In particular, markets may not satisfy consumer preferences at least cost if: (1) they have noncompetitive structures; (2) the good or service, once produced, can be made available to additional consumers without cost (labeled by economists a "public good"); or (3) there are relevant social costs or benefits from the market activity that the market does not take into account. In these situations, regulatory intervention in the market may be warranted, if the benefits from that intervention outweigh the costs.

### a. Noncompetitive Markets

99. Noncompetitive markets, with few producers, and with barriers that prevent other possible producers from coming in to challenge the existing producers, are less likely to be responsive to consumer preferences than competitive markets. Consumers will have fewer alternate sources of supply to turn to if their wants are not met, and therefore suppliers can set prices above costs of production. Furthermore, since the consequences of failing to produce at lowest cost are not as drastic as for competitive firms, the few producers will be likely to waste resources using less efficient production techniques.

### b. Public Goods

100. "Public goods" are those that, once produced, can be made available to additional consumers without having to use any additional resources and without diminishing the supply available to the initial consumers.<sup>141</sup> It can be said that the consumers of public goods are "jointly supplied." An example of a public good is national defense. Once a given expenditure has been made for national defense, the protection accorded covers all. New citizens receive the benefits of protection without diminishing the quantity accorded to other citizens.

101. Public goods are also unique in that additional consumers either cannot be excluded from enjoying the good or service, or can be excluded only at prohibitive expense to the initial consumers.

102. Many goods are not "pure" public goods but to some extent can be jointly supplied to consumers. In other cases, it may be very difficult to exclude consumers from enjoying the good or service. For example, a large public park can be enjoyed by many consumers, although a group on a picnic may find the noise from a nearby volleyball game slightly bothersome—this alters the "joint supply" feature mildly. The park could be privately owned and operated by an entrepreneur who was able to erect a fence and charge a fee to recover operating and maintenance fees. Although the benefits could be restricted to those willing to pay the entry fee,

<sup>141</sup>The classic reference in the modern literature is P.A. Samuelson, "The Pure Theory of Public Expenditure," *Review of Economics and Statistics* 36 (November 1954), 387-89.

society may be unwilling to abide by that sort of exclusion. This is an example of what economists call a "quasi-public good."

103. Markets implicitly ask consumers how much they are willing to pay for a good or service. If a consumer is unwilling to pay the price necessary to induce suppliers to provide the item, he will not get the good. For a public good, however, the consumption of that good or service does not reduce its availability to others and, therefore, if an individual consumer can induce others to pay for the initial production of the good, he can enjoy it for free. In effect, he gets a "free ride." If the rational consumer were asked how much he would be willing to pay for a public good, he would say zero and still enjoy the good if others were willing to pay the costs of producing the item. The rub is that there must be enough people willing to cover the (fixed) costs of production, in order to get the good produced initially.

104. Even if it were possible to make all consumers contribute to the cost of a quasi-public good, because adding more consumers does not add to the cost of making that good available, making all users contribute equally results in fewer users than could be allowed. For example, a large museum could be maintained profitably by a private owner charging admission fees to cover the operating and acquisition costs. But this will deny admission to consumers interested in the collection who would be willing to pay the costs of wear and tear they impose on the museum but not the full admittance fee that also covers the costs of the exhibits.<sup>142</sup>

105. The private market for this quasi-public good therefore denies the good to some consumers, even though they could "consume" it without diminishing its availability to other consumers or requiring additional resource expenditure.

### **c. Social Benefits or Costs Not Accounted for by the Market**

106. The third set of circumstances that can lead to market performance inconsistent with the public well-being involves cases where the producers and consumers of a good or service are not the only parties affected by the production or consumption of that item.

107. For most goods and services in our economy, the costs of producing a particular good or service and the benefits from consuming that item are easy to identify, and are received by the persons who produce or buy the item. The costs are the total value of the scarce resources (materials, labor, capital) used to produce the item. These are costs to society because these resources otherwise could have been used to produce other goods or services. The benefits derived are the value of the well-being that the consumer attains from purchasing (consuming) the item. The producer of the item takes into account his costs and the consumer his benefits when their decisions are made to supply or purchase the item at a particular price. The market mechanism incorporates all this information and a price is set equal to the cost of producing an additional unit of the good.

<sup>142</sup>We are assuming, of course, that the museum will remain uncrowded.

108. There may exist situations, however, in which others besides the producer or consumer of an item directly benefit or suffer from the production or consumption of the item. For example, if the use of an automobile creates air pollution, then others who breathe the polluted air will suffer. The total costs to society of using that automobile are greater than the simple sum of the costs of producing the car and the gasoline it burns.

109. Because the market prices of the automobile and the gasoline do not take into account the costs to society of correcting for the pollution, those pollution costs remain "external" to the market and the market price does not include all the social costs of operating the automobile. If the pollution costs were "internalized" into the market, then the price of operating automobiles would increase, and the number in use would fall. When the market mechanism does not take into account the "external" cost, more automobiles are used than is optimal. The failure to take into account such "externalities" therefore results in market solutions that are not socially optimal.

#### GOVERNMENT RESPONSE TO MARKET FAILURES

110. In each of these circumstances—noncompetitive market structure, provision of public or quasi-public goods, or the existence of externalities—market failure may warrant corrective government action. Noncompetitive market structures might be indirectly policed (e.g., antitrust surveillance), or certain market activities might be prohibited. In the extreme (e.g., a natural monopoly such as electric power transmission or a subway) the government may own or regulate production of this good. In the case of externalities, direct regulation (e.g., mandatory pollution control devices) or compensatory taxes or subsidies (e.g., tax credits for energy conserving devices) may be implemented.

111. Each of these forms of government actions, however, has costs associated with it—the direct cost of government enforcement, the costs imposed on the regulated parties,<sup>143</sup> and the indirect costs imposed on consumers if regulators fail to gauge accurately (or decide to override) consumer wants. Ultimately these costs fall upon the public both as taxpayers and as consumers. It is therefore appropriate to compare these costs to the benefits of government action before undertaking such action. Government intervention should be considered only on a case-by-case basis.

112. Government remedies for the provision of public and quasi-public goods have varied, but have generally involved either direct supply of public goods by the government (e.g., national defense, police protection, fireworks displays, dams), or intervention in private markets for quasi-public goods (grants to museums and research foundations). The difficulty lies in determining whether or not a public good

<sup>143</sup> Some of these costs may include efforts by the regulated parties to thwart, bend, or otherwise evade the government action.

should be produced, and if so how much. "How much" national defense is optimal? Presumably it is appropriate to keep on expending resources as long as the additional benefits from the increased production exceed the additional costs. The "additional benefit" is merely the sum of all consumers' demand (or willingness to pay) for the public good. More intense demand by consumers for a public good increases the socially optimal level of its production.<sup>144</sup>

113. The actual social accounting of consumer preferences is never carried out in practice, since consumers would have the incentive to mask their preferences for the public good, in order to exploit the "free ride" when others come forward and pay the costs. Instead, the government must rely on the political process in which citizens vote for candidates whose preferences agree as nearly as possible with their own preferences about which public goods should be produced. Voters implicitly compare the benefits from the public goods to their expected share of the tax burden necessary to produce those goods.

114. Clearly government provision of public goods is subject to at least as many pitfalls as other forms of intervention in the market, and the decision to supplant the private market for quasi-public goods (e.g., education, libraries, public health) has had massive consequences for the economy.

## OTHER REASONS FOR GOVERNMENT INTERVENTION

115. There are certain social, political, and moral goals in a society that are largely independent of market considerations. Thus, when markets respond efficiently to consumer wants, some persons may nonetheless judge that those wants are "undesirable" and should not be satisfied. As an example of "undesirable wants," consider that there is a strong demand by some consumers for pornographic literature, and surely a market exists for such products. Others, however, have deemed those wants undesirable and have successfully sought various restrictions on the distribution of this literature. One should note that this example represents a moral judgment that markets do not address. It is not a situation of market failure, but of a noneconomic social decision.

116. Further, some consumers, though they have strong wants, have insufficient income and wealth to register their wants in the marketplace. Society may decide, however, that those people's basic needs should be satisfied. The usual means of providing for those with insufficient income and wealth has been the various income redistribution programs of the government that enable the poor to register at least their basic needs for food, clothing and shelter in the marketplace.

<sup>144</sup> For example, other things being equal, the optimal level of national defense would be higher for a "hawkish" than a "dovish" population.

## **POLICY CONSEQUENCE OF THE ECONOMIC MODEL**

117. Because it is always costly, government intervention to correct market failure should occur only to attain otherwise unattainable public interest objectives. It is therefore necessary for the government agency involved to articulate the public interest objectives that underlie any particular law, rule, or policy. Since government intervention has costs associated with it, it is appropriate to show why, absent that government action, the marketplace is unlikely to attain a public interest objective. A distinction should be made between potential market failure to attain the objective and actual or proven market failure. Policy decisions based on the former can be risky, in that once government intervention occurs it is impossible to show conclusively how the market would have operated absent the intervention. Therefore it is impossible to compare unambiguously the regulated result to a market result.

118. It is also appropriate to determine how far the market would stray from the public interest objective. If the market would fall just short of the goal, then the benefits from government intervention may be minimal while being costly. In that case the market may offer the better alternative. If, however the market will be far short of the goal, then government intervention will likely be preferable. In short, both the costs and the benefits of government intervention should be considered.

119. In addition, there sometimes exist situations in which government action directed at one public interest objective may have an adverse effect on other objectives. In these instances, the positive and negative consequences must be weighed, and some balance struck among the various public interest objectives before any government action is undertaken.

120. Finally, it should be noted that government intervention generally occurs in response to market conditions at a point in time. However, market conditions often change rapidly. So do public interest objectives. Government regulations and other governmental activities should therefore be reviewed periodically to check their current relevance.

## **APPLYING THE ECONOMIC POLICY MODEL TO RADIO MARKETS**

### **a. The Scarcity Theory**

121. Before analyzing the various unique features of radio markets, it is appropriate to consider the key assumption about market structure that has become the basis for most Commission regulatory activity—the “scarcity” theory. This theory was first developed in the 1920’s when broadcasting was in its infancy and suffering from poor spectrum management and from monopolistic control of most radio outlets. Analysts in that period blamed the monopolization on an inherent

technological scarcity that would of necessity yield a monopolistic or oligopolistic structure that could not respond to public needs. In order to reduce technological interference to acceptable levels, it was assumed that the number of radio stations would have to be limited. In return for this monopoly position licensees, rather than being subject to traditional rate of return regulation like public utilities, would be required to provide certain unprofitable programming services that were construed to be in the public interest.

122. Developments since the 1920's render the scarcity theory overly simplified. In turn, the policies that have followed from it suffer both from the oversimplification and from a number of highly questionable assumptions. As will be shown below, some of the supposedly unprofitable programming services that were to be part of the *quid pro quo* for use of a limited resource are indeed profitable and would be supplied by licensees anyway. Of greater concern, some of the required programming is not favored by the listening public and therefore its provision may reduce consumer well-being. Given this, the question then becomes whether the benefits of such programming exceed the cost of regulations requiring it.

123. More fundamentally, the concept of scarcity is more complex than the simple scarcity theory suggests. Any good or service is scarce if, when offered at zero price, the total amount people would take exceeds the total amount available. As can be seen, virtually all goods and services in the economy are scarce. For each scarce good or service, some method must be devised to determine its allocation among would-be consumers.<sup>145</sup> Typically allocation takes place according to some pricing mechanism (i.e., people bid for scarce goods or services in terms of how much they are willing to pay for the items), or by government fiat (e.g., quotas or other rationing devices are imposed), or by some combination of the two (e.g., rationing tickets are provided but can be bought and sold).

124. The misconception of scarcity of radio spectrum arose in part from confusion between two aspects of spectrum use that interact to determine the total number of stations possible. One is the problem of interference among radio users. The second is the total quantity of spectrum allocated to radio.

125. Government intervention is needed to prevent interference among radio users. To do this the government has to determine such factors as the amount of frequency per channel, allowable power limits, and geographic spacing of stations. These do not necessarily remain constant over time, and the Commission has revisited these issues periodically.<sup>146</sup> Changes in these parameters change the total

<sup>145</sup> Some things, such as air, are important because they are needed for survival, but they are not scarce. There is enough available for all to enjoy at zero price. It need not be allocated. This may not always be the case. Consider how drinkable water always has been scarce in some places.

<sup>146</sup> See, for example: *Further Notice of Proposed Rule Making in the matter of Clear Channel Broadcasting in the AM Broadcast Band*, Docket 20642, 70 F.C.C. 2d 1077 (1979); *Notice of Inquiry in the matter of 9 kHz Channel Spacings for AM Broadcasting*, adopted June 17, 1979.

number of stations that can be allowed in any one geographic area even when the total amount of spectrum allocated to the broadcast radio service is constant.<sup>147</sup>

126. Radio spectrum has also been seen as scarce because additional spectrum space can be made available only with difficulty and at some expense. Radio listeners would have to purchase new receivers to take advantage of the new spectrum, and previous users of these frequencies would have to move to other parts of the spectrum. Hence adherents of the scarcity theory talk of technological scarcity. Such analysis, however, only looks at the supply of radio frequencies, not the demand for them. Currently, in many small radio markets not all allocations are taken.<sup>147A</sup> Radio frequencies are applied for only when the would-be broadcaster thinks he can make a profit selling advertising time and supply programming. Goods and services will not be produced, even if such production is technologically possible unless there is sufficient demand to cover the costs (including a return to capital investment) of supplying the item. Thus, in many small markets, despite the fixed amount of radio spectrum available, there is no scarcity of spectrum space. The problem is limited demand for advertising that in turn limits the amount of programming that can be provided.

127. In the long run, economic scarcity tends to induce changes in the amount of spectrum available for radio. It is possible to increase the number of radio outlets by increasing the amount of spectrum space allocated to radio.<sup>148</sup> The number of outlets can also be increased by changing how the radio spectrum is managed. By installing improved equipment the parameters such as frequency per channel, power limits, and geographic spacing may be able to be reduced without increasing interference.<sup>149</sup>

128. The willingness to adopt technological advances that will increase the number of stations depends on economic considerations. At some point after demand exceeds supply, the costs associated with technological changes like those listed above may become smaller than the benefits from the increased number of radio stations. In this regard, radio is analogous to other goods and services that, at least in the reasonably short run, are fixed in supply. Consider land or mineral ores. Over time, as demand increases, more and more previously unusable land is made usable through various technological advances. To take the most extreme case, Holland reclaimed the sea: drained large areas, removed the salt, and made it usable for

<sup>147</sup> It should be noted that the total amount of spectrum allocated to the radio broadcast spectrum has changed. In 1940, the FM band was established. Currently, the United States position at the 1979 World Administrative Radio Conference includes a proposal that the AM band be expanded, permitting hundreds of additional outlets.

<sup>147A</sup> As of June 5, 1979, there were 386 vacant FM assignments for which no applications were pending. The FM Table of Assignments was not designed to totally saturate the spectrum, but rather was designed to allow for the possibility of dropping-in a limited number of additional stations in the future in response to growth over time. Additional FM stations are therefore technologically, if not economically, feasible. There is no table of assignments for AM radio but it would be technologically possible to drop-in a limited number of additional stations.

<sup>148</sup> See note 147, *supra*.

<sup>149</sup> See note 146, *supra*.

farming. Similarly, as the demand for metallic ores increases and supply falls, new techniques are developed for recovering lesser grades of ore.

129. The limits on spectrum use, as on other goods, have been primarily economic rather than imposed by some immutable technology. It is appropriate, therefore, that broadcast radio be treated the same way as land, mineral ore—or newspapers—and that regulation be limited to the kinds of situations previously set out in which the market is perceived to work imperfectly.

#### b. Radio as a Quasi-public Good

130. Radio markets possess both the major characteristics of public goods, nonexcludability and joint supply. Broadcast signals can be received by anyone possessing a receiver without payment to the signal originator. Only by use of a complex and expensive scrambling and revenue collection system could radio broadcasters charge directly for their programs, and that system would probably not be viable since the benefits from the programming might not be as great as the costs of the system. Joint supply, or the failure of consumption by one person to detract from availability to others, is also clearly a feature of radio broadcasting.

131. The expected failure of a private radio broadcasting market, as predicted by the theory of public goods, would seem to dictate direct government provision of the service. As with national defense, it would appear optimal for the government to supply the radio broadcasts that satisfy the perceived collective wants of society. This would require the government to estimate and weigh consumer preferences, both between specific program types and between radio and other commodities.

132. The willingness of advertisers to support programming in order to sell their messages, however, presents the government with the alternative of relying primarily on private enterprise to supply this public good. Congress and this Commission have enthusiastically endorsed this alternative (particularly with the addition of public broadcasting to supplement commercial broadcasting) as it is consistent with the First Amendment provisions on Free Speech and decentralizes access and control over information and ideas in society.<sup>150</sup> Moreover, private broadcasting to a great degree can allow consumers considerable choice over programming (to the extent advertisers must attract listeners), and eliminates the basic inefficiencies inherent in direct government ownership or control over an industry.<sup>151</sup>

<sup>150</sup> Despite public funding for public broadcasting, great efforts are being made to prevent governmental involvement in programming decisions in deference to the First Amendment.

<sup>151</sup> *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting*, (New York: Bantam Books, 1979), pp. 93–148. Government ownership of industry results in many of the same problems as does monopolization: lack of competition means laxity in the use of resources, and slows the adoption of technological innovations. The ability (and frequent willingness) of the government to subsidize government-owned industries may hold down prices that consumers pay for a while, but the slow adoption of technological improvements ultimately requires either growing subsidies or higher prices. For a more lengthy discussion of the inefficiencies, see Charles Wolf, Jr., "A Theory of Nonmarket Failure Framework for Implementation Analysis," *Journal of Law and Economics*, vol. xxii, No. 1, April 1979, pp. 107–139.



133. The question that naturally arises in this reevaluation of our regulation of radio broadcast markets is to what extent does the advertiser supported medium satisfy listener demand. Our review of structural changes in radio markets, as well as the ensuing discussion of behavior in the industry, leads us to believe that consumers have a great deal of control over radio programming. Competition among stations makes them very attentive to consumer demand in order to increase their audience share. These forces place a natural limit on the proportion of time devoted to advertising as well as inducing stations to broadcast certain types of programming. To that extent we can remove many regulatory constraints and devote government resources to supplementing private broadcasting by continued support to noncommercial radio.

### BEHAVIOR OF THE ADVERTISER SUPPORTED INDUSTRY

134. Advertisers are interested in selling their products. To the extent that fulfilling consumers' broadcasting wants is consistent with that goal, they will fulfill consumer wants. There is considerable overlap of interest. Advertisers do seek large audiences and therefore will provide programming that is broadly popular. Advertisers, however, primarily seek to reach those particular audiences most likely to purchase their products. Therefore, advertisers may be more responsive to the broadcast wants of certain groups—the more affluent and the young adult, for example. Others may be less well served.

135. An alternate way to view radio markets is to consider the audience the product, and the advertiser the purchaser. That is, the advertiser is purchasing eardrums. Programming is the medium used to attract these eardrums. In general, the more eardrums attracted for a given amount of money, the better off the advertiser. Not all eardrums are equally valued by the advertiser, however. The most highly valued eardrums are those of individuals who will buy his advertised product. Higher income and young adult eardrums may be generally preferred by advertisers and therefore may become the target of advertisers. Programming would then be addressed to these groups. The more specialized the product being advertised, the more specialized the programming will be.

136. Although certain audiences may be preferred to others, it may well be that some of the nonfavored audiences (for example, low income groups) will fare as well or better in a commercially sponsored radio market than in a traditional direct payment market. While advertisers may not particularly seek low income audiences, it is also true that in traditional markets individuals with low incomes will have fewer dollars to "vote" with in making their consumer choices.<sup>151A</sup> Hence,

<sup>151A</sup>In fact, there is considerable empirical evidence that low income individuals tend more than higher income individuals to buy brand name products and therefore advertisers are likely to try to appeal to that group which is most highly responsive to advertised products.

these individuals may not be harmed by advertisers' preferences.<sup>152</sup> Certain demographic groups, however, particularly the elderly, may not be valued highly by advertisers and thereby may have less impact on programming than they would under a traditional market arrangement.

137. Of even greater concern, however, is the fact that, by providing programming at a zero price, the market is unable to measure the intensity of demand for particular programming. The market chooses programming that will attract the targeted audiences at zero price. Under the present system, there is no way to distinguish between programming that consumers would be willing to pay for, if necessary, and that which consumers would take for free, but not pay for. Clearly, consumers are better off if they receive programs with a high value rather than ones with a low or zero value to them.

138. It is difficult to determine the consequences of zero prices on policy making. For example, it is sometimes argued that minority tastes are not met by the broadcast media because zero pricing recognizes market size, but not intensity of demand. Without considerable information on individual consumers' demand (which is expensive to collect) it is impossible to measure demand intensity. How would one determine whether the intensity of demand for the first sports talk program was greater than that for the third rock program? It has been suggested that listener complaints—especially if organized—are a measure of demand intensity. Unfortunately, such complaints may represent only one segment of the population (and likely the better educated one) and therefore may not be representative of overall consumer wants.

139. It seems likely, however, that the more stations there are providing programming, the more likely minority tastes will be served adequately. As the number of stations in a market increases, the expected market share (and the expected audience size) of each station will fall. With smaller expected audiences, it may become more attractive for individual stations to seek small, specialized audiences with strongly held, but not widely shared, tastes. Consider for example a market in which the number of stations doubled in a decade from five to ten. Suppo[se] that throughout the decade in that market 10% of the population had a strong preference for a certain type of programming that nobody else liked, but that minority audience would listen to other programming if the preferred programming were unavailable. Initially, it would have been unlikely that any of the five stations would have catered to that minority audience, since expected market share with other programming would be 20%. But at the end of the decade when there were ten stations, there might well be a station that would provide that minority programming in order to gain a 10% audience share. In general, the more competitors there are in a radio market, the more responsive that market will be to strong, but limited, minority tastes.

<sup>152</sup> This impression, however, does not take into account that such groups may have a high intensity of demand for certain types of programming. In other words, they might be willing to pay more than others and more than might be expected if the programming were provided by a direct pay system.

140. A number of economists have tried to model more formally the workings of broadcast markets. As a result literature exists that addresses the issue of performance in these markets in terms of their ability to satisfy consumer wants (provide consumer well-being).<sup>153</sup> As is often the case, the models raise important new questions as well as answering old ones. In particular, these models very clearly demonstrate the vast body of information needed for a regulator to be able to intervene in the market with confidence that such intervention will be beneficial.

141. The earliest economic models of broadcast markets, in order to avoid difficult data collection problems, relied on simplistic (even heroic) assumptions that made the analysis manageable, but reduced the applicability of any policy implications. Thus, when Steiner made the first attempt to model radio markets, he assumed that each listener had one preferred program type and that if that program type were not available the listener would tune out entirely. The listener had no second choice that provided some, though less, satisfaction. Hence, any listener whose minority tastes were not met would receive no satisfaction whatsoever. Also, Steiner attached equal weight to each listener; no one listener had greater intensity of demand for radio than any other. In this simplified world, consumer well-being could be unambiguously measured by the size of the audience. A monopolist, or an omniscient regulator, need not know anything more than the program type preferred by each listener to be able to provide maximum consumer well-being. In fact, however, listeners seem to have a hierarchy of preferences, and therefore simple audience maximization will not result in maximum consumer well-being.

142. Economists were not satisfied with the analytical capabilities of the Steiner model and several constructed new models that allowed for greater variety and complexity of consumer tastes. As the literature evolved it showed an increasing awareness of the many factors that affect broadcast markets and an increasing comprehension of how, and how well, those markets, with or without regulatory intervention, will satisfy consumer wants. Among the important considerations that must be taken into account:

Are different programs within particular program types indistinguishable to listeners? That is, do listeners prefer some programs within a program type over others so that the programs are not perfect substitutes for one another, or are they indifferent, suggesting all programming within a given program type is perfectly substitutable? If these programs are distinguishable, then the

<sup>153</sup> For example, Steiner, Peter O., "Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting," *Quarterly Journal of Economics*, LXVI (May 1952), 194-223; Wiles, Peter, "Pilkington and the Theory of Value," *Economic Journal*, LXXIII (June 1963), 183-200; Rothenberg, Jerome, "Consumer Sovereignty and the Economics of TV Programming," *Studies in Public Communication*, IV (Fall 1962), 45-54; Spence, Michael and Bruce Owen, "Television Programming, Monopolistic Competition, and Welfare," *Quarterly Journal of Economics*, XCI (Feb. 1977), 103-126; Beebe, Jack H., "Institutional Structure and Program Choices in Television Markets," *Quarterly Journal of Economics*, XCI (Feb. 1977), 15-37. Although several of these models directly address policy issues relating to television, they are all sufficiently general to apply to radio broadcasting as well.

broadcast of additional programs of a given type can increase consumer well-being, it does not simply represent duplication or imitation. Now it becomes very difficult and requires considerable information to compare the satisfaction from a third rock program to that from the first sports talk show.

Do listeners have a second choice program, third choice program, and so on, if their higher choice programs are not available?

Do listeners have a hierarchy of choices? If so, what are its characteristics? For example, are most first choices highly specialized and therefore unlikely to be met by mass audience "common denominator" programming? Does common denominator programming represent lower choice programming for most people? Do the lower choice programs provide listeners almost as much satisfaction as their higher choices, or not nearly so much? Without this information it is impossible to evaluate how well individual markets are satisfying consumer wants.

How skewed is the distribution of tastes among the listening population? For example, if there is a listening audience of 100 people, one would expect different programming (and consumer well-being demands different programming) if 80 people prefer rock, 15 beautiful music, and 5 all-news as opposed to 40 preferring rock, 32 beautiful music, and 28 all-news. The latter distribution of preferences would (and should, if all rock stations are not perfect substitutes) provide more program types.

What technological constraints are there on the number of stations in the market?

Are there differentials in the costs of producing different radio programs?

What are the values of advertising revenues?<sup>154</sup>

Using either assumed values or actual empirical data for the variables outlined above, it is possible to analyze how well radio markets will satisfy consumer wants.

143. Recent papers by Beebe and by Spence and Owen have provided quite general frameworks free of the restrictive assumptions used by earlier modelers for analyzing radio markets under many alternate demand and cost conditions. These models provide considerable insight into advertiser-supported broadcast markets that can aid us in policymaking.

144. Beebe, Spence and Owen agree that advertiser-supported broadcast markets will not respond perfectly to consumer wants, primarily due to the failure to ascertain intensity of demand. Programming may not be offered even where there are no technological constraints on capacity and the marginal benefits of the programming would exceed the marginal costs. This is because total revenues for those programs would not cover total costs. Most likely to be omitted are (1) programming for which there is a small audience that highly values the programming

<sup>154</sup>The last two considerations will affect the number of stations and type of programs that can be supported *economically* in a market. In the case of small markets especially, the constraint on the number of stations is likely to be economic not technological, *see* Note 158, *infra*.

(but cannot register that preference due to the lack of a pricing mechanism) and (2) high-cost programming.<sup>155</sup> There will be a tendency toward program duplication and imitation (if one defines provision of more than one program within a program type as representing duplication or imitation). Without specific information on relative demand intensities, however, it is impossible to judge whether the "duplicative" programming would provide less consumer well-being than the by-passed minority programming. It can only be stated that programming that provides less consumer satisfaction *might* be offered under the advertiser-supported system.

145. Beebe, Spence and Owen agree, however, that as the number of stations increases the radio market will cater increasingly to less well represented consumer tastes, so long as the demand for that programming is sufficient to cover its costs.<sup>156</sup> It can be stated unequivocally that an increase in the number of stations never leads to a decrease in program offerings or listener satisfaction.

146. One very important policy implication of the discussion above is how little an isolated piece of information tells us about a radio market. The fact that a market has no classical music programming but three beautiful music stations, for example, does not necessarily imply an imperfect market. To determine how well that market is functioning requires information on:

How many people want classical music programming and how many want beautiful music as their first choice of programming?

How strongly do each of these individuals want these first choices?

Given the intensity with which the individuals want their first choice programming, how often would each individual *actually* listen if the format were available?

What are their second choices?

How strongly do they value their second choices?

What are the relative costs of programming the two formats?

147. Without the answers to all these questions it is not possible to compare the consumer well-being from the "market" outcome (no classical music stations, three beautiful music stations), with the consumer well-being that would result if governmental intervention induced one or more stations to switch to classical music.

148. Such information will not be available to the Commission staff and is most unlikely to be provided in a Commission hearing room. Yet without such information it is impossible to predict whether or not any government action

<sup>155</sup> It is noteworthy that some of this type of programming, which predictably would be undersupplied by the advertiser-supported market, is presently being provided by National Public Radio stations and noncommercial listener-supported stations. This is perfectly consistent with the efficient satisfaction of consumer wants.

<sup>156</sup> It is impossible to generalize about how many stations are necessary for given amounts of minority programming to be provided. This will depend on the specific consumer preferences and cost conditions that exist in particular markets. The tendency toward provision of more minority programming as the number of stations increases, however, is unambiguous.

intended to influence programming in a marketplace will improve consumer well-being, even in an unambiguously imperfect market.<sup>157</sup>

149. It can be safely stated, however, that increasing the number of economically viable stations in a market will improve consumer well-being. This suggests that Commission involvement in radio markets ought to be limited, as much as possible, to easing entry into the industry.<sup>158</sup>

150. The structural and social changes discussed earlier are consistent with the predictions of the economic models of radio markets. A trend toward program specialization has followed the substantial increase in the number of radio stations. Data at such an aggregate level cannot be used to verify that individual markets are or are not providing optimal amounts of minority interest programming, but they do strongly support the generalization that increasing the number of competitors will improve the satisfaction of minority consumer wants. . . .

[Sections IV and V, covering regulatory options and preferred options, respectively, are omitted.—Ed.]

## CONCLUSION

268. In this Notice we have provided evidence that market forces will, in most instances, yield programming that serves consumer well-being, and that whenever possible the Commission should allow consumer choices rather than regulatory decision making to be the determinant of the public interest. . . .

270. The radio deregulation we are proposing today is part of an overall scheme that has as its hub a shift in our regulatory approach based on structural means of achieving diversity rather than one emphasizing conduct, fraught with all the dangers and inefficiencies inherent in such a system. Such an approach would entail more effective use of multiple ownership regulation, creation of a more representative pool of people making decisions about programs through EEO and minority ownership policies, and increasing the number of outlets through more ef-

<sup>157</sup>There may be Commission actions aimed at public interest objectives unrelated to consumer choice. These are not considered here.

<sup>158</sup>The economics literature suggests that in small markets there may be less than optimal amounts of minority interest programming. This is due as much to economic conditions that exist in small markets for *all* goods and services, as to technological conditions unique to broadcasting. Consider, for example, restaurants, movie theatres, or furniture stores in small markets. In each of these cases only a small number of establishments can be economically supported by the small population, and they will tend to provide "common denominator" products. There will not be sufficient demand to support foreign restaurants, or art films, or Scandinavian modern furniture stores. Foregoing some of these special, minority consumer taste items is one cost of living in a small community. The same phenomenon holds in radio broadcasting. In fact, to the extent that listeners in small markets can receive distant signals they may be better served by radio than by markets for other goods and services.

ficient use of the spectrum, expanding the spectrum available to broadcast radio, and fostering new technologies. It is our belief that such measures will increase the number of independent voices in a fashion most likely to serve the public interest without the need for government intrusion in programming areas. . . .

### *MIND PROBES*

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1. Is it possible to tell what is meant by "more effective use of multiple ownership regulation" in paragraph 270, *i.e.*, does the envisioned regulatory shift portend an increase or decrease in the number of stations that may be multiply owned?
2. Would there be difficulties in applying this document's theoretical economics to television deregulation. Why?
3. What are the potentials and pitfalls of the FCC's equating consumer well-being and satisfaction with the statutory standard of the Communications Act?

### *RELATED READING*

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- CAMPBELL, ANGELA J., "The FCC's Proposal to Deregulate Radio: Is it Permissible Under the Communications Act of 1934?" *Federal Communications Law Journal*, 32:2 (Spring 1980), 233-68.
- FOWLER, MARK S., and DANIEL L. BRENNER, "A Marketplace Approach to Broadcast Regulation," *Texas Law Review*, 60:2 (February 1982), 207-57.
- NOLL, ROGER G., MERTON J. PECK, and JOHN J. MCGOWAN, *Economic Aspects of Television Regulation*. Washington, D.C.: The Brookings Institution, 1973.
- OWEN, BRUCE M., *Economics and Freedom of Expression: Media Structure and the First Amendment*. Cambridge, Mass.: Ballinger, 1975.
- \_\_\_\_\_, JACK H. BEEBE, and WILLARD G. MANNING, JR., *Television Economics*. Lexington, Mass.: Lexington Books, 1974.
- SMYTHE, DALLAS W., "Radio: Deregulation and the Relation of the Private and Public Sectors," *Journal of Communication*, 32:1 (Winter 1982), 192-200.

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# TV in the Courtroom

Chandler v. Florida

449 U.S. 560

January 26, 1981

"... free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges v. California*, 314 U.S. 252, 259 (1941).

There were many offshoots of the notoriously publicized trial of Bruno Richard Hauptmann [*State v. Hauptmann*, 180 A. 809 (N.J. 1935), *cert. denied*, 296 U.S. 649], convicted kidnapper-slayer of the son of famed flier Charles Lindbergh. These included career boosts for radio personalities such as Gabriel Heatter ("There's good news to-night!") and Martin Block, the dean of disc jockies. Another outcome was promulgation of Canon 35, quoted in footnote 1 of this document.

Canon 35 gained stature as a prohibition of possibly constitutional dimension when the Supreme Court decided *Estes v. Texas* in 1965 (381 U.S. 532), for it was possible to interpret *Estes* as a *per se* ban against televising criminal trials because of TV's presumed inherent prejudicial influence. The canon, as amended over the years, was replaced by Canon 3A(7) in 1972 when the American Bar Association adopted a new Code of Judicial Conduct. Canon 3A(7) retained the ban against televising trials for general public dissemination. See the Court's second footnote for its text.

The Radio Television News Directors Association's "Code of Broadcast News Ethics" became effective the year following *Estes*. It provided that newsmen "shall make constant efforts to open doors closed to the reporting of public proceedings" and contained an article outlining journalists' duties to be dignified and keep equipment unobtrusive in courtrooms.

Pressures from broadcasters to gain access to trials with the tools of their trade began to bear fruit in the 1970's as states started permitting TV trial coverage with different degrees of caution. This appeal



from a Florida conviction covered by television was hailed as a grand victory by the electronic media. In reality, the decision is more of a success for the notion of federalism than it is a broadcasting win, for it leaves to the states the question of whether and under what safeguards TV may cover criminal trials. Two members of the minority in *Estes*, Justices Stewart and White, separately concurred in the result and the judgment, respectively, in this 8-0 decision. Both stated that *Estes* should have been overruled, rather than merely distinguished, to reach *Chandler's* result.

Federal Rule of Criminal Procedure 53, enacted in 1946, continues to exclude cameras and microphones from federal district courts where trials are conducted. In 1982, however, the American Bar Association repealed Canon 3A(7), thereby removing another impediment preventing some states from permitting broadcast coverage of courtroom proceedings. Radio and TV have not yet been accorded the same First Amendment right to attend trials that several members of the Court appeared to grant the print media in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

*Chief Justice Burger delivered the opinion of the Court.*

The question presented on this appeal is whether, consistent with constitutional guarantees, a state may provide for radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused.

I

A

*Background.* Over the past 50 years, some criminal cases characterized as "sensational" have been subjected to extensive coverage by news media, sometimes seriously interfering with the conduct of the proceedings and creating a setting wholly inappropriate for the administration of justice. Judges, lawyers, and others soon became concerned, and in 1937, after study, the American Bar Association House of Delegates adopted Judicial Canon 35, declaring that all photographic and broadcast coverage of courtroom proceedings should be prohibited.<sup>1</sup> In 1952, the

<sup>1</sup>62 A. B. A. Rep. 1134-1135 (1937). As adopted on September 30, 1937, Judicial Canon 35 read:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted."

House of Delegates amended Canon 35 to proscribe television coverage as well. 77 A. B. A. Rep. 610-611 (1952). The Canon's proscription was reaffirmed in 1972 when the Code of Judicial Conduct replaced the Canons of Judicial Ethics and Canon 3A(7) superseded Canon 35. E. Thode, Reporter's Notes to Code of Judicial Conduct 56-59 (1973). Cf. Fed. Rule Crim. Proc. 53. A majority of the states, including Florida, adopted the substance of the ABA provision and its amendments. In Florida, the rule was embodied in Canon 3A(7) of the Florida Code of Judicial Conduct.<sup>2</sup>

In February 1978, the American Bar Association Committee on Fair Trial-Free Press proposed revised standards. These included a provision permitting courtroom coverage by the electronic media under conditions to be established by local rule and under the control of the trial judge, but only if such coverage was carried out unobtrusively and without affecting the conduct of the trial.<sup>3</sup> The revision was endorsed by the ABA's Standing Committee on Standards for Criminal Justice and by its Committee on Criminal Justice and the Media, but it was rejected by the House of Delegates on February 12, 1979. 65 A. B. A. J. 304 (1979).

In 1978, based upon its own study of the matter, the Conference of State Chief Justices, by a vote of 44 to 1, approved a resolution to allow the highest court of each state to promulgate standards and guidelines regulating radio, television, and other photographic coverage of court proceedings.<sup>4</sup>

*The Florida Program.* In January 1975, while these developments were unfolding, the Post-Newsweek Stations of Florida petitioned the Supreme Court of Florida urging a change in Florida's Canon 3A(7). In April 1975, the court invited presentations in the nature of a rulemaking proceeding, and, in January 1976, an-

<sup>2</sup> As originally adopted in Florida, Canon 3A (7) provided:

"A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

"(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

"(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

"(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions;

"(i) the means of recording will not distract participants or impair the dignity of the proceedings;

"(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

"(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

"(iv) the reproduction will be exhibited only for instructional purposes in educational institutions."

<sup>3</sup> Proposed Standard 8-3.6 (a) of the ABA Project on Standards for Criminal Justice, Fair Trial and Free Press (Tent. Draft 1978).

<sup>4</sup> Resolution I, Television, Radio, Photographic Coverage of Judicial Proceedings, adopted at the Thirtieth Annual Meeting of the Conference of Chief Justices, Burlington, Vt., Aug. 2, 1978.

nounced an experimental program for televising one civil and one criminal trial under specific guidelines. *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So. 2d 1. These initial guidelines required the consent of all parties. It developed, however, that in practice such consent could not be obtained. The Florida Supreme Court then supplemented its order and established a new 1-year pilot program during which the electronic media were permitted to cover all judicial proceedings in Florida without reference to the consent of participants, subject to detailed standards with respect to technology and the conduct of operators. *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 347 So. 2d 402 (1977). The experiment began in July 1977 and continued through June 1978.

When the pilot program ended, the Florida Supreme Court received and reviewed briefs, reports, letters of comment, and studies. It conducted its own survey of attorneys, witnesses, jurors, and court personnel through the Office of the State Court Coordinator. A separate survey was taken of judges by the Florida Conference of Circuit Judges. The court also studied the experience of 6 States<sup>5</sup> that had, by 1979, adopted rules relating to electronic coverage of trials, as well as that of the 10 other States that, like Florida, were experimenting with such coverage.<sup>6</sup>

Following its review of this material, the Florida Supreme Court concluded "that on balance there [was] more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage." *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 780 (1979). The Florida court was of the view that because of the significant effect of the courts on the day-to-day lives of the citizenry, it was essential that the people have confidence in the process. It felt that broadcast coverage of trials would contribute to wider public acceptance and understanding of decisions. *Ibid.* Consequently, after revising the 1977 guidelines to reflect its evaluation of the pilot program, the Florida Supreme Court promulgated a revised Canon 3A (7). *Id.*, at 781. The Canon provides:

"Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida." *Ibid.*

<sup>5</sup> Alabama, Colorado, Georgia, New Hampshire, Texas, and Washington.

<sup>6</sup> The number of states permitting electronic coverage of judicial proceedings has grown larger since 1979. As of October 1980, 19 States permitted coverage of trial and appellate courts, 3 permitted coverage of trial courts only, 6 permitted appellate court coverage only, and the court systems of 12 other States were studying the issue. Brief for the Radio Television News Directors Association et al. as *Amici Curiae*. On November 10, 1980, the Maryland Court of Appeals authorized an 18-month experiment with broadcast coverage of both trial and appellate court proceedings. 49 U. S. L. W. 2335 (1980).

The implementing guidelines specify in detail the kind of electronic equipment to be used and the manner of its use. *Id.*, at 778-779, 783-784. For example, no more than one television camera and only one camera technician are allowed. Existing recording systems used by court reporters are used by broadcasters for audio pickup. Where more than one broadcast news organization seeks to cover a trial, the media must pool coverage. No artificial lighting is allowed. The equipment is positioned in a fixed location, and it may not be moved during trial. Videotaping equipment must be remote from the courtroom. Film, videotape, and lenses may not be changed while the court is in session. No audio recording of conferences between lawyers, between parties and counsel, or at the bench is permitted. The judge has sole and plenary discretion to exclude coverage of certain witnesses, and the jury may not be filmed. The judge has discretionary power to forbid coverage whenever satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial. The Florida Supreme Court has the right to revise these rules as experience dictates, or indeed to bar all broadcast coverage or photography in courtrooms.

## B

In July 1977, appellants were charged with conspiracy to commit burglary, grand larceny, and possession of burglary tools. The counts covered breaking and entering a well-known Miami Beach restaurant.

The details of the alleged criminal conduct are not relevant to the issue before us, but several aspects of the case distinguish it from a routine burglary. At the time of their arrest, appellants were Miami Beach policemen. The State's principal witness was John Sion, an amateur radio operator who, by sheer chance, had overheard and recorded conversations between the appellants over their police walkie-talkie radios during the burglary. Not surprisingly, these novel factors attracted the attention of the media.

By pretrial motion, counsel for the appellants sought to have experimental Canon 3A (7) declared unconstitutional on its face and as applied. The trial court denied relief but certified the issue to the Florida Supreme Court. However, the Supreme Court declined to rule on the question, on the ground that it was not directly relevant to the criminal charges against the appellants. *State v. Granger*, 352 So. 2d 175 (1977).

After several additional fruitless attempts by the appellants to prevent electronic coverage of the trial, the jury was selected. At *voir dire*, the appellants' counsel asked each prospective juror whether he or she would be able to be "fair and impartial" despite the presence of a television camera during some, or all, of the trial. Each juror selected responded that such coverage would not affect his or her consideration in any way. A television camera recorded the *voir dire*.

A defense motion to sequester the jury because of the television coverage was denied by the trial judge. However, the court instructed the jury not to watch or read anything about the case in the media and suggested that jurors "avoid the local

news and watch only the national news on television." App. 13. Subsequently, defense counsel requested that the witnesses be instructed not to watch any television accounts of testimony presented at trial. The trial court declined to give such an instruction, for "no witness' testimony was [being] reported or televised [on the evening news] in any way." *Id.*, at 14.

A television camera was in place for one entire afternoon, during which the State presented the testimony of Sion, its chief witness.<sup>7</sup> No camera was present for the presentation of any part of the case for the defense. The camera returned to cover closing arguments. Only 2 minutes and 55 seconds of the trial below were broadcast—and those depicted only the prosecution's side of the case.

The jury returned a guilty verdict on all counts. Appellants moved for a new trial, claiming that because of the television coverage, they had been denied a fair and impartial trial. No evidence of specific prejudice was tendered.

The Florida District Court of Appeal affirmed the convictions. It declined to discuss the facial validity of Canon 3A (7); it reasoned that the Florida Supreme Court, having decided to permit television coverage of criminal trials on an experimental basis, had implicitly determined that such coverage did not violate the Federal or State Constitutions. Nonetheless, the District Court of Appeal did agree to certify the question of the facial constitutionality of Canon 3A (7) to the Florida Supreme Court. The District Court of Appeal found no evidence in the trial record to indicate that the presence of a television camera had hampered appellants in presenting their case or had deprived them of an impartial jury.

The Florida Supreme Court denied review, holding that the appeal, which was limited to a challenge to Canon 3A (7), was moot by reason of its decision in *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764 (1979), rendered shortly after the decision of the District Court of Appeal.

## II

At the outset, it is important to note that in promulgating the revised Canon 3A (7), the Florida Supreme Court pointedly rejected any state or federal constitutional right of access on the part of photographers or the broadcast media to televise or electronically record and thereafter disseminate court proceedings. It carefully framed its holding as follows:

"While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the [Post-Newsweek stations] that the first and

<sup>7</sup>At one point during Sion's testimony, the judge interrupted the examination and admonished a cameraman to discontinue a movement that the judge apparently found distracting. App. 15. Otherwise, the prescribed procedures appear to have been followed, and no other untoward events occurred.

sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings." 370 So. 2d, at 774.

The Florida court relied on our holding in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), where we said:

"In the first place, . . . there is no constitutional right to have [live witness] testimony recorded and broadcast. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is 'a safeguard against any attempt to employ our courts as instruments of persecution,' it confers no special benefit on the press. Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." *Id.*, at 610 (citations omitted).

The Florida Supreme Court predicated the revised Canon 3A (7) upon its supervisory authority over the Florida courts, and not upon any constitutional imperative. Hence, we have before us only the limited question of the Florida Supreme Court's authority to promulgate the Canon for the trial of cases in Florida courts.

This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, we are confined to evaluating it in relation to the Federal Constitution.

### III

Appellants rely chiefly on *Estes v. Texas*, 381 U.S. 532 (1965), and Chief Justice Warren's separate concurring opinion in that case. They argue that the televising of criminal trials is inherently a denial of due process, and they read *Estes* as announcing a *per se* constitutional rule to that effect.

Chief Justice Warren's concurring opinion, in which he was joined by Justices Douglas and Goldberg, indeed provides some support for the appellants' position:

"While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so. In doing this, I wish to emphasize that our condemnation of televised criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom." *Id.*, at 552.

If appellants' reading of *Estes* were correct, we would be obliged to apply that holding and reverse the judgment under review.

The six separate opinions in *Estes* must be examined carefully to evaluate the claim that it represents a *per se* constitutional rule forbidding all electronic coverage. Chief Justice Warren and Justices Douglas and Goldberg joined Justice Clark's opinion announcing the judgment, thereby creating only a plurality. Justice Harlan provided the fifth vote necessary in support of the judgment. In a separate opinion, he pointedly limited his concurrence:

"I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion." *Id.*, at 587.

A careful analysis of Justice Harlan's opinion is therefore fundamental to an understanding of the ultimate holding of *Estes*.

Justice Harlan began by observing that the question of the constitutional permissibility of televised trials was one fraught with unusual difficulty:

"Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the states from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment." *Ibid.* (emphasis added).

He then proceeded to catalog what he perceived as the inherent dangers of televised trials.

"In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a 'hidden audience' of unknown but large dimensions. There is certainly a strong possibility that the 'cocky' witness having a thirst for the limelight will become more 'cocky' under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense attorney, and even a conscientious judge will not stray, albeit unconsciously, from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance'?" *Id.*, at 591.

Justice Harlan faced squarely the reality that these possibilities carry "grave potentialities for distorting the integrity of the judicial process," and that, although such distortions may produce no telltale signs, "their effects may be far more pervasive and deleterious than the physical disruptions which all would concede would vitiate

a conviction." *Id.*, at 592. The "countervailing factors" alluded to by Justice Harlan were, as here, the educational and informational value to the public.

JUSTICE STEWART, joined by JUSTICES Black, BRENNAN, and WHITE in dissent, concluded that no prejudice had been shown and that *Estes'* Fourteenth Amendment rights had not been violated. While expressing reservations not unlike those of Justice Harlan and those of Chief Justice Warren, the dissent expressed unwillingness to "escalate this personal view into a *per se* constitutional rule." *Id.*, at 601. The four dissenters disagreed both with the *per se* rule embodied in the plurality opinion of Justice Clark and with the judgment of the Court that "the circumstances of [that] trial led to a denial of [*Estes'*] Fourteenth Amendment rights." *Ibid.* (emphasis added).

Parsing the six opinions in *Estes*, one is left with a sense of doubt as to precisely how much of Justice Clark's opinion was joined in, and supported by, Justice Harlan. In an area charged with constitutional nuances, perhaps more should not be expected. Nonetheless, it is fair to say that Justice Harlan viewed the holding as limited to the proposition that "what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment," *id.*, 587 (emphasis added), he went on:

"At the present juncture I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned." *Id.*, at 596 (emphasis added).

Justice Harlan's opinion, upon which analysis of the constitutional holding of *Estes* turns, must be read as defining the scope of that holding; we conclude that *Estes* is not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances.<sup>8</sup> It does not stand

<sup>8</sup>Our subsequent cases have so read *Estes*. In *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966), the Court noted *Estes* as an instance where the "totality of circumstances" led to a denial of due process. In *Murphy v. Florida*, 421 U.S. 794, 798 (1975), we described it as "a state-court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage." And, in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 552 (1976), we depicted *Estes* as a trial lacking in due process where "the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself" prevented a sober search for the truth.

In his opinion concurring in the result in the instant case, Justice Stewart, restates his dissenting view in *Estes* that the *Estes* Court announced a *per se* rule banning all broadcast coverage of trials as a denial of due process. This view overlooks the critical importance of Justice Harlan's opinion in relation to the ultimate holding of *Estes*. It is true that Justice Harlan's opinion "sounded a note" that is central to the proposition that broadcast coverage inherently violates the Due Process Clause. . . . But the presence of that "note" in no sense alters Justice Harlan's explicit reservations in his concurrence. Not all of the dissenting Justices in *Estes* read the Court as announcing a *per se* rule; Justice Brennan, for example, was explicit in emphasizing "that only four of the five Justices [in the majority] rest[ed] on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances." 381 U.S., at 617. Today, Justice Stewart concedes . . . that Justice Harlan purported to limit his conclusion to a subclass of cases. And, as he concluded his opinion, Justice Harlan took pains to emphasize his view that "the day may come when television will have become so



as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change.

#### IV

Since we are satisfied that *Estes* did not announce a constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process, we turn to consideration, as a matter of first impression, of the appellants' suggestion that we now promulgate such a *per se* rule.

##### A

Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial. Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law. Over the years, courts have developed a range of curative devices to prevent publicity about a trial from infecting jury deliberations. See, e.g., *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 563-565 (1976).

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage. A case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly. See Part IV-D, *infra*.

##### B

As we noted earlier, the concurring opinions in *Estes* expressed concern that the very presence of media cameras and recording devices at a trial inescapably gives rise to an adverse psychological impact on the participants in the trial. This

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commonplace an affair in the daily life of the average person as to dissipate *all* reasonable likelihood that its use in courtrooms *may* disparage the judicial process." 381 U.S., at 595 (emphasis added). That statement makes clear that there was not a Court holding of a *per se* rule in *Estes*. As noted in text, Justice Harlan pointedly limited his conclusion to cases like the one then before the Court, those "utterly corrupted" by press coverage. There is no need to "overrule" a "holding" never made by the Court.

kind of general psychological prejudice, allegedly present whenever there is broadcast coverage of a trial, is different from the more particularized problem of prejudicial impact discussed earlier. If it could be demonstrated that the mere presence of photographic and recording equipment and the knowledge that the event would be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness, our task would be simple; prohibition of broadcast coverage of trials would be required.

In confronting the difficult and sensitive question of the potential psychological prejudice associated with broadcast coverage of trials, we have been aided by *amici* briefs submitted by various state officers involved in law enforcement, the Conference of Chief Justices, and the Attorneys General of 17 States<sup>9</sup> in support of continuing experimentation such as that embarked upon by Florida, the American College of Trial Lawyers, and various members of the defense bar<sup>10</sup> representing essentially the views expressed by the concurring Justices in *Estes*.

Not unimportant to the position asserted by Florida and other states is the change in television technology since 1962, when *Estes* was tried. It is urged, and some empirical data are presented,<sup>11</sup> that many of the negative factors found in *Estes*—cumbersome equipment, cables, distracting lighting, numerous camera technicians—are less substantial factors today than they were at that time.

It is also significant that safeguards have been built into the experimental programs in state courts, and into the Florida program, to avoid some of the most egregious problems envisioned by the six opinions in the *Estes* case. Florida admonishes its courts to take special pains to protect certain witnesses—for example, children, victims of sex crimes, some informants, and even the very timid witness or party—from the glare of publicity and the tensions of being “on camera.” *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d, at 779.

The Florida guidelines place on trial judges positive obligations to be on

<sup>9</sup>Brief for the Attorneys General of Alabama, Alaska, Arizona, Iowa, Kentucky, Louisiana, Maryland, Montana, Nevada, New Mexico, New York, Ohio, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin as *Amici Curiae*.

<sup>10</sup>Brief for the California State Public Defenders Association, the California Attorneys for Criminal Justice, the Office of the California State Public Defender, the Los Angeles County Public Defenders Association, the Los Angeles Criminal Courts Bar Association, and the Office of the Los Angeles County Public Defender as *Amici Curiae*.

<sup>11</sup>Considerable attention is devoted by the parties to experiments and surveys dealing with the impact of electronic coverage on the participants in a trial other than the defendant himself. The Florida pilot program itself was a type of study, and its results were collected in a postprogram survey of participants. While the data thus far assembled are cause for some optimism about the ability of states to minimize the problems that potentially inhere in electronic coverage of trials, even the Florida Supreme Court conceded the data were “limited,” *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 781 (1979), and “non-scientific,” *id.*, at 768. Still, it is noteworthy that the data now available do not support the proposition that, in every case and in all circumstances, electronic coverage creates a significant adverse effect upon the participants in trials—at least not one uniquely associated with electronic coverage as opposed to more traditional forms of coverage. Further research may change the picture. At the moment, however, there is no unimpeachable empirical support for the thesis that the presence of the electronic media, *ipso facto*, interferes with trial proceedings.

guard to protect the fundamental right of the accused to a fair trial. The Florida Canon, being one of the few permitting broadcast coverage of criminal trials over the objection of the accused, raises problems not present in the rules of other states. Inherent in electronic coverage of a trial is the risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected. Given this danger, it is significant that Florida requires that objections of the accused to coverage be heard and considered on the record by the trial court. See, e.g., *Green v. State*, 377 So. 2d 193, 201 (Fla. App. 1979). In addition to providing a record for appellate review, a pre-trial hearing enables a defendant to advance the basis of his objection to broadcast coverage and allows the trial court to define the steps necessary to minimize or eliminate the risks of prejudice to the accused. Experiments such as the one presented here may well increase the number of appeals by adding a new basis for claims to reverse, but this is a risk Florida has chosen to take after preliminary experimentation. Here, the record does not indicate that appellants requested an evidentiary hearing to show adverse impact or injury. Nor does the record reveal anything more than generalized allegations of prejudice.

Nonetheless, it is clear that the general issue of the psychological impact of broadcast coverage upon the participants in a trial, and particularly upon the defendant, is still a subject of sharp debate—as the *amici* briefs of the American College of Trial Lawyers, and others of the trial bar in opposition to Florida's experiment demonstrate. These *amici* state the view that the concerns expressed by the concurring opinions in *Estes*, see Part III, *supra*, have been borne out by actual experience. Comprehensive empirical data are still not available—at least on some aspects of the problem. For example, the *amici* brief of the Attorneys General concedes:

“The defendant's interests in not being harassed and in being able to concentrate on the proceedings and confer effectively with his attorney are crucial aspects of a fair trial. There is not much data on defendant's reactions to televised trials available now, but what there is indicates that it is possible to regulate the media so that their presence does not weigh heavily on the defendant. *Particular attention should be paid to this area of concern as study of televised trials continues.*” Brief for the Attorney General of Alabama et al. as *Amici Curiae* 40 (emphasis added).

The experimental status of electronic coverage of trials is also emphasized by the *amicus* brief of the Conference of Chief Justices:

“Examination and reexamination, by state courts, of the in-court presence of the electronic news media, *vel non*, is an exercise of authority reserved to the states under our federalism.” Brief for Conference of Chief Justices as *Amicus Curiae* 2.

presence of cameras. In short, there is no showing that the trial was compromised by television coverage, as was the case in *Estes*.

## V

It is not necessary either to ignore or to discount the potential danger to the fairness of a trial in a particular case in order to conclude that Florida may permit the electronic media to cover trials in its state courts. Dangers lurk in this, as in most experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment. We are not empowered by the Constitution to oversee or harness state procedural experimentation; only when the state action infringes fundamental guarantees are we authorized to intervene. We must assume state courts will be alert to any factors that impair the fundamental rights of the accused.

The Florida program is inherently evolutionary in nature; the initial project has provided guidance for the new canons which can be changed at will, and application of which is subject to control by the trial judge. The risk of prejudice to particular defendants is ever present and must be examined carefully as cases arise. Nothing of the "Roman circus" or "Yankee Stadium" atmosphere, as in *Estes*, prevailed here, however, nor have appellants attempted to show that the unsequestered jury was exposed to "sensational" coverage, in the sense of *Estes* or of *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Absent a showing of prejudice of constitutional dimensions to those defendants, there is no reason for this Court either to endorse or to invalidate Florida's experiment.

In this setting, because this Court has no supervisory authority over state courts, our review is confined to whether there is a constitutional violation. We hold that the Constitution does not prohibit a state from experimenting with the program authorized by revised Canon 3A (7).

*Affirmed.*

Justice Stevens took no part in the decision of this case.

## MIND PROBES

1. Many civilized countries permit only the briefest news coverage of ongoing criminal trials and require that the media exercise considerable restraint even after a verdict has been rendered. [See Justice Frankfurter on denial of *certiorari* in *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950).] Why does the United States place comparatively few restrictions on the journalist in the courtroom?

2. What would warrant the establishment of federal standards for broadcast coverage of trials if Congress chose to exercise its dormant commerce power in this field? Might the First Amendment bar such exercise?

*RELATED READING*

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# Radio Format Changes

**Federal Communications Commission**

**v. WNCN Listeners Guild**

**450 U.S. 582**

**March 24, 1981**

Imagine that your favorite radio station is the only one in town that offers a diet of "golden oldies." The station enjoys a good deal of support among listeners and advertisers. The corporation that owns it, however, has commissioned a study showing that profits could be increased if the station switched to a "contemporary hits" format, one presently followed by several other area outlets with great economic rewards. The station implements the change and abandons what had been a unique and profitable format.

Reacting to this action, you and other disgruntled former listeners organize a group called the "Golden Oldsters." Its initial purpose is to convince the station to restore your preferred format. Meetings are held with station personnel who are cordial and candid, but Golden Oldsters finds the station resistant to its entreaties. Management even refuses to program one hour of oldies a day in response to an Oldster's suggestion for compromise. Discussion terminates at this juncture. The group then decides to raise funds and seek legal redress by filing a petition to deny renewal of the station's license in timely fashion with the FCC.

Between 1970 and 1981 such a petition might have been successful in persuading the station to grant concession to the Golden Oldsters. This situation arose from a series of Court of Appeals decisions requiring the Commission to take account of minority programming preferences when allocating the public airwaves "for the greatest good of the greatest number" [*Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC*, 436 F.2d 263, 269 (D.C. Cir. 1970)]. Nothing gets the attention of a broadcaster quite as well as the fear of having a license renewal application designated for hearing. The petition to deny provided ordinary citizens with the clout often needed to get licensees to

negotiate seriously with them. See Document 30.

This Supreme Court decision removed radio entertainment format change as a public interest factor by upholding a 1976 policy statement whereby the FCC artfully evaded the thrust of Court of Appeals' *ad hoc* reversals of Commission format noninvolvement. The 7-2 vote found Justice Marshall, joined by Justice Brennan, dissenting. Though the dissent is omitted below, it is addressed in footnotes 44 and 45 of the Court's opinion.

This document is a restatement of the notion that reviewing courts are to grant substantial deference to the discretion of the expert administrative agency Congress established to determine what serves the public interest in broadcasting. Despite this disavowal of the "hard look" doctrine sometimes favored by the judiciary when reviewing agency determinations, comparison of this decision with Document 38 conveys some notion of the variety of arrows in the judicial quiver.

*Justice White delivered the opinion of the Court.*

Sections 309 (a) and 310 (d) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.* (Act), empower the Federal Communications Commission to grant an application for license transfer<sup>1</sup> or renewal only if it determines that "the public interest, convenience, and necessity" will be served thereby.<sup>2</sup> The issue before us is whether there are circumstances in which the

<sup>1</sup>We shall refer to transfers and assignments of licenses as "transfers."

<sup>2</sup>Title 47 U.S.C. § 309 (a) provides:

"Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title 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."

Title 47 U.S.C. § 310 (d) provides in part:

"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."

The Act requires broadcasting station licensees to apply for license renewal every three years. 47 U.S.C. § 307 (d). It provides that the Commission shall grant the application for renewal if it determines that the public interest, convenience, and necessity will be served thereby. §§ 307 (a), (d), 309 (a).

Section 309 (d) (1) of the Act provides that any party in interest may petition the Commission to deny an application for license transfer or renewal, but the petition must contain specific allegations of fact sufficient to show that granting the application would be "prima facie inconsistent" with the public interest. If the Commission determines on the basis of the application, the pleadings filed, or other matters which it may officially notice that no sub-

Commission must review past or anticipated changes in a station's entertainment programming when it rules on an application for renewal or transfer of a radio broadcast license. The Commission's present position is that it may rely on market forces to promote diversity in entertainment programming and thus serve the public interest.

This issue arose when, pursuant to its informal rulemaking authority, the Commission issued a "Policy Statement" concluding that the public interest is best served by promoting diversity in entertainment formats through market forces and competition among broadcasters and that a change in entertainment programming is therefore not a material factor that should be considered by the Commission in ruling on an application for license renewal or transfer. Respondents, a number of citizen groups interested in fostering and preserving particular entertainment formats, petitioned for review in the Court of Appeals for the District of Columbia Circuit. That court held that the Commission's Policy Statement violated the Act. We reverse the decision of the Court of Appeals.

I

Beginning in 1970, in a series of cases involving license transfers,<sup>3</sup> the Court of Appeals for the District of Columbia Circuit gradually developed a set of criteria for determining when the "public-interest" standard requires the Commission to hold a hearing to review proposed changes in entertainment formats.<sup>4</sup> Noting that the aim of the Act is "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, 217 (1943), the Court of Appeals ruled in 1974 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." *Citizens Committee to Save WEFM v. FCC*, 165 U.S. App. D.C. 185, 207, 506 F. 2d 246, 268 (en banc). It concluded that a change in format would not present "substantial and material questions of fact" requiring a hearing if (1) notice of the change had not precipitated "significant public grumbling"; (2) the segment of the

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stantial and material questions of fact are presented, it may grant the application and deny the petition without conducting a hearing. § 309 (d) (2). However, if a substantial and material question of fact is presented or if the Commission is unable to determine that granting the application would be consistent with the public interest, the Commission must conduct a hearing on the application. § 309 (d) (2).

<sup>3</sup>*Citizens Committee to Save WEFM v. FCC*, 165 U.S. App. D.C. 185, 506 F. 2d 246 (1974) (en banc); *Citizens Committee to Keep Progressive Rock v. FCC*, 156 U.S. App. D.C. 16, 478 F. 2d 926 (1973); *Lakewood Broadcasting Service, Inc. v. FCC*, 156 U.S. App. D.C. 9, 478 F. 2d 919 (1973); *Hartford Communications Committee v. FCC*, 151 U.S. App. D.C. 354, 467 F. 2d 408 (1972); *Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC*, 141 U.S. App. D.C. 109, 436 F. 2d 263 (1970).

<sup>4</sup>We shall refer to the Court of Appeals' views on when the Commission must review changes in entertainment format as the "format doctrine," and we shall often refer to a change in entertainment programming by a radio broadcaster as a change in format.



population preferring the format was too small to be accommodated by available frequencies; (3) there was an adequate substitute in the service area for the format being abandoned;<sup>5</sup> or (4) the format would be economically unfeasible even if the station were managed efficiently.<sup>6</sup> The court rejected the Commission's position that the choice of entertainment formats should be left to the judgment of the licensee,<sup>7</sup> stating that the Commission's interpretation of the public-interest standard was contrary to the Act.<sup>8</sup>

In January 1976, the Commission responded to these decisions by undertaking an inquiry into its role in reviewing format changes.<sup>9</sup> In particular, the Commission sought public comment on whether the public interest would be better served by Commission scrutiny of entertainment programming or by reliance on the competitive marketplace.<sup>10</sup>

Following public notice and comment, the Commission issued a Policy Statement<sup>11</sup> pursuant to its rulemaking authority under the Act.<sup>12</sup> The Commission concluded in the Policy Statement that review of format changes was not compelled by the language or history of the Act, would not advance the welfare of the radio-listening public, would pose substantial administrative problems, and would deter innovation in radio programming. In support of its position, the Commission

<sup>5</sup>In *Citizens Committee to Save WEFM v. FCC*, for example, the court directed the Commission to consider whether a "fine arts" format was a reasonable substitute for a classical music format. 165 U.S. App. D.C., at 203-204, 506 F. 2d, at 264-265. The court observed that 19th-century classical music and 20th-century classical music could be classified as different formats, since "the loss of either would unquestionably lessen diversity." *Id.*, at 204, n. 28, 506 F. 2d, at 265, n. 28.

<sup>6</sup>These criteria were summarized by the Court of Appeals in the opinion below. 197 U.S. App. D.C. 319, 323-324, 610 F. 2d 838, 842-843 (1979). It was also stated that the format doctrine logically applies to renewal as well as transfer applications. The court noted that a midterm format change would not be considered until the broadcaster applied for license renewal. *Id.*, at 330, and n. 29, 610 F. 2d, at 849, and n. 29. See also *Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC*, *supra*, at 118, 436 F. 2d, at 272.

<sup>7</sup>See *Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC*, *supra*, at 113, 436 F. 2d, at 267. See also 197 U.S. App. D.C., at 330, n. 31, 610 F. 2d, at 849, n. 31.

<sup>8</sup>*Citizens Committee to Save WEFM v. FCC*, *supra*, at 207, and n. 34, 506 F. 2d, at 268, and n. 34.

Although the issue before the Court of Appeals in each of the format cases was whether a hearing was required, the court warned the Commission in *Citizens Committee to Keep Progressive Rock* that its public-interest determination would also be subject to judicial review:

"[F]ailure to render a reasoned decision will be, as always, reversible error. No more is required, no less is accepted." 156 U.S. App. D.C., at 24, 478 F. 2d, at 934.

<sup>9</sup>*Notice of Inquiry, Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C. 2d 580 (1976).

<sup>10</sup>The Commission also invited interested parties to consider the impact of the format doctrine on First Amendment values.

<sup>11</sup>*Memorandum Opinion and Order*, 60 F.C.C. 2d 858 (1976) (*Policy Statement*), reconsideration denied, 66 F.C.C. 2d 78 (1977).

<sup>12</sup>Section 303 (r) of the Act, 47 U.S.C. § 303 (r), provides that "the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act]."

quoted from *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940): "Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee . . . to survive or succumb according to his ability to make his programs attractive to the public."<sup>13</sup> The Commission also emphasized that a broadcaster is not a common carrier<sup>14</sup> and therefore should not be subjected to a burden similar to the common carrier's obligation to continue to provide service if abandonment of that service would conflict with public convenience or necessity.<sup>15</sup>

The Commission also concluded that practical considerations as well as statutory interpretation supported its reluctance to regulate changes in formats. Such regulation would require the Commission to categorize the formats of a station's prior and subsequent programming to determine whether a change in format had occurred; to determine whether the prior format was "unique";<sup>16</sup> and to weigh the

<sup>13</sup>The Commission observed that radio broadcasters naturally compete in the area of program formats, since there is virtually no other form of competition available. A staff study of program diversity in major markets supported the Commission's view that competition is effective in promoting diversity in entertainment formats. *Policy Statement, supra*, at 861.

The *Notice of Inquiry* also explained the Commission's reasons for relying on competition to provide diverse entertainment formats:

"Our traditional view has been that the station's entertainment format is a matter best left to the discretion of the licensee or applicant, since he will tend to program to meet certain preferences of the area and fill significant voids which are left by the programming of other stations. The Commission's accumulated experience indicates that . . . [f]requently, when a station changes its format, other stations in the area adjust or change their formats in an effort to secure the listenership of the discontinued format." 57 F.C.C. 2d, at 583.

<sup>14</sup>Section 3 (h) of the Act provides that "a person engaged in radio broadcasting shall not . . . be deemed a common carrier." 47 U.S.C. § 153 (h). See also, *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940) ("[B]roadcasters are not common carriers and are not to be dealt with as such. Thus the [Communications] Act recognizes that the field of broadcasting is one of free competition") (footnote omitted).

<sup>15</sup>The Commission discussed the problems arising from "the obligation to continue service" created by the Court of Appeals' format doctrine. The Commission apparently used this phrase to describe those cases in which it thought the Court of Appeals would hold that an application for license transfer or renewal should have been denied because the abandonment of a unique entertainment format was inconsistent with the public interest. Although the format cases only addressed whether a hearing was required, the Court of Appeals implied that in some situations the Commission would be required to deny an application because of a change in entertainment format. See *Citizens Committee to Keep Progressive Rock v. FCC*, 156 U.S. App. D.C., at 24, 478 F. 2d, at 934.

The Commission also addressed the "constitutional dimension" of the format doctrine. It concluded that the doctrine would be likely to deter many licensees from experimenting with new forms of entertainment programming, since the licensee could be burdened with the expense of participating in a hearing before the Commission if for some reason it wished to abandon the experimental format. Thus, "[t]he existence of the obligation to continue service . . . inevitably deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no off-setting justifications, either in terms of specific First Amendment or diversity-related values or in broader public interest terms." *Policy Statement, supra*, at 865.

<sup>16</sup>In the *Notice of Inquiry*, the Commission discussed the difficult task of categorizing formats, noting that the Court of Appeals had suggested in the *WEFM* case that 19th-century classical music should be distinguished from 20th-century classical music. *Notice of Inquiry, supra*, at 583, and n. 2.

public detriment resulting from the abandonment of a unique format against the public benefit resulting from that change. The Commission emphasized the difficulty of objectively evaluating the strength of listener preferences, of comparing the desire for diversity within a particular type of programming to the desire for a broader range of program formats and of assessing the financial feasibility of a unique format.<sup>17</sup>

Finally, the Commission explained why it believed that market forces were the best available means of producing diversity in entertainment formats. First, in large markets, competition among broadcasters had already produced "an almost bewildering array of diversity" in entertainment formats.<sup>18</sup> Second, format allocation by market forces accommodates listeners' desires for diversity within a given format and also produces a variety of formats.<sup>19</sup> Third, the market is far more flexible than governmental regulation and responds more quickly to changing public tastes. Therefore, the Commission concluded that "the market is the allocation mechanism of preference for entertainment formats, and . . . Commission supervision in this area will not be conducive either to producing program diversity [or] satisfied radio listeners."<sup>20</sup>

The Court of Appeals, sitting en banc, held that the Commission's policy was contrary to the Act as construed and applied in the court's prior format decisions. 197 U.S. App. D.C. 319, 610 F. 2d 838 (1979). The court questioned whether the Commission had rationally and impartially re-examined its position<sup>21</sup> and particularly criticized the Commission's failure to disclose a staff study on the effectiveness of market allocation of formats before it issued the Policy Statement.<sup>22</sup> The court

<sup>17</sup>*Policy Statement*, 60 F.C.C. 2d, at 862-864.

<sup>18</sup>*Id.*, at 863.

<sup>19</sup>The Commission pointed out that a significant segment of the public may strongly prefer one station to another even if both stations play the same type of music. Although it would be difficult for the Commission to compare the strength of intraformat preferences to the strength of interformat preferences, market forces would naturally respond to intraformat preferences, albeit in an imperfect manner. *Id.*, at 863-864.

<sup>20</sup>*Id.*, at 866, n. 8.

<sup>21</sup>The Court was of the view that the Commission's "Notice of Inquiry" revealed a substantial bias against the *WEFM* decision, and that the Commission had overstated the administrative problems created by the format doctrine.

<sup>22</sup>The study was released prior to the Commission's denial of reconsideration of its Policy Statement. The court questioned whether the public had had an adequate opportunity to comment on the study but found it unnecessary to consider whether the Policy Statement should be set aside on that ground:

"Petitioners urge this defect as an independent ground for overturning the Commission. We agree that the study does raise serious questions about the overall rationality and fairness of the Commission's decision. However, because certain broader defects, of which the study is symptomatic, are fatal to the Commission's action, we need not decide whether the failure to obtain public comment on the study is itself of sufficient gravity to warrant rejection of the *Policy Statement*." 197 U.S. App. D.C., at 328, n. 24, 610 F. 2d, at 847, n. 24.

Respondents urge the Court to set aside the Policy Statement because of this alleged procedural error if the Court determines that the Commission's views do not conflict with the Act or the First Amendment. We have considered the submissions of the parties and do not consider the action of the Commission, even if a procedural lapse, to be a sufficient ground for reopening the proceedings before the Commission.

then responded to the Commission's criticisms of the format doctrine. First, although conceding that market forces generally lead to diversification of formats, it concluded that the market only imperfectly reflects listener preferences<sup>23</sup> and that the Commission is statutorily obligated to review format changes whenever there is "strong prima facie evidence that the market has in fact broken down." *Id.*, at 332, 610 F. 2d, at 851. Second, the court stated that the administrative problems posed by the format doctrine were not insurmountable. Hearings would only be required in a small number of cases, and the Commission could cope with problems such as classifying radio format by adopting "a rational classification schema." *Id.*, at 334, 610 F. 2d, at 853. Third, the court observed that the Commission had not demonstrated that the format doctrine would deter innovative programming.<sup>24</sup> Finally, the court explained that it had not directed the Commission to engage in censorship or to impose common carrier obligations on licensees: *WEFM* did not authorize the Commission to interfere with licensee programming choices or to force retention of an existing format; it merely stated that the Commission had the power to consider a station's format in deciding whether license renewal or transfer would be consistent with the public interest. 197 U.S. App. D.C., at 332-333, 610 F. 2d, at 851-852.

Although conceding that it possessed neither the expertise nor the authority to make policy decisions in this area, the Court of Appeals asserted that the format doctrine was "law," not "policy,"<sup>25</sup> and was of the view that the Commission had not disproved the factual assumptions underlying the format doctrine.<sup>26</sup> Accordingly, the court declared that the Policy Statement was "unavailing and of no force and effect." *Id.*, at 339, 610 F. 2d, at 858.<sup>27</sup>

<sup>23</sup> The court observed, as it had in *WEFM*, that because broadcasters rely on advertising revenue they tend to serve persons with large discretionary incomes. 197 U.S. App. D.C., at 332, 610 F. 2d, at 851. The dissenting opinion noted that the Commission had not rejected this assumption. *Id.*, at 341, 610 F. 2d, at 861.

<sup>24</sup> The court stated that the Commission's staff study demonstrated that licensees had continued to develop diverse entertainment formats after the *WEFM* decision.

<sup>25</sup> The court acknowledged that Congress had entrusted to the Commission the task of ensuring that license grants are used in the public interest. Nevertheless, the Commission's position on review of entertainment format changes "could not be sustained even when all due deference was given that construction." 197 U.S. App. D.C., at 336, n. 51, 610 F. 2d, at 855, n. 51.

<sup>26</sup> The Court of Appeals was not satisfied that the market functioned adequately in every case; nor was it persuaded that the loss of a unique format is comparable to the loss of a favorite station within a particular format.

<sup>27</sup> Two judges dissented, arguing that the Policy Statement should have been upheld, since the Commission had made a reasonable judgment that the format doctrine was unnecessary to further the public interest. A third judge agreed with the dissenters that the majority had not accorded sufficient deference to the Commission's judgment, but concluded that the Commission's order should be vacated so that the record could be reopened to permit public comment on the staff study.

## II

Rejecting the Commission's reliance on market forces to develop diversity in programming as an unreasonable interpretation of the Act's public-interest standard, the Court of Appeals held that in certain circumstances the Commission is required to regard a change in entertainment format as a substantial and material fact in deciding whether a license renewal or transfer is in the public interest. With all due respect, however, we are unconvinced that the Court of Appeals' format doctrine is compelled by the Act and that the Commission's interpretation of the public-interest standard must therefore be set aside.

It is common ground that the Act does not define the term "public interest, convenience, and necessity."<sup>28</sup> The Court has characterized the public-interest standard of the Act as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Although it was declared in *National Broadcasting Co. v. United States*, that the goal of the Act is "to secure the maximum benefits of radio to all the people of the United States," 319 U.S., at 217, it was also emphasized that Congress had granted the Commission broad discretion in determining how that goal could best be achieved. The Court accordingly declined to substitute its own views on the best method of encouraging effective use of the radio for the views of the Commission. *Id.*, at 218. Similarly, in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), we deemed the policy of promoting the widest possible dissemination of information from diverse sources to be consistent with both the public-interest standard and the First Amendment, *id.*, at 795, but emphasized the Commission's broad power to regulate in the public interest. We noted that the Act permits the Commission to promulgate "such rules and regulations, . . . not inconsistent with law, as may be necessary to carry out the provisions of [the Act],"<sup>29</sup> and that this general rule-making authority permits the Commission to implement its view of the public-interest standard of the Act "so long as that view is based on consideration of permissible factors and is otherwise reasonable." *Id.*, at 793.<sup>30</sup> Furthermore, we

<sup>28</sup>The Act provides in general terms that the Commission shall perform administrative functions "as public convenience, interest, or necessity requires." 47 U.S.C. § 303.

<sup>29</sup>See 47 U.S.C. § 303 (t), quoted in n. 12, *supra*.

<sup>30</sup>Section 10 (e) of the Administrative Procedure Act provides in part: "The reviewing court shall—

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706 (2) (A).

In *FCC v. National Citizens Committee for Broadcasting*, we observed that a reviewing court applying this standard "is not empowered to substitute its judgment for that of the agency." 436 U.S., at 803, quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

recognized that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases complete factual support for the Commission's ultimate conclusions is not required since " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " <sup>31</sup>

The Commission has provided a rational explanation for its conclusion that reliance on the market is the best method of promoting diversity in entertainment formats. The Court of Appeals and the Commission agree that in the vast majority of cases market forces provide sufficient diversity. The Court of Appeals favors government intervention when there is evidence that market forces have deprived the public of a "unique" format, while the Commission is content to rely on the market, pointing out that in many cases when a station changes its format, other stations will change their formats to attract listeners who preferred the discontinued format. The Court of Appeals places great value on preserving diversity among formats, while the Commission emphasizes the value of intraformat as well as interformat diversity. Finally, the Court of Appeals is convinced that review of format changes would result in a broader range of formats, while the Commission believes that government intervention is likely to deter innovative programming.

In making these judgments, the Commission has not forsaken its obligation to pursue the public interest. On the contrary, it has assessed the benefits and the harm likely to flow from government review of entertainment programming, and on balance has concluded that its statutory duties are best fulfilled by not attempting to oversee format changes. This decision was in major part based on predictions as to the probable conduct of licensees and the functioning of the broadcasting market and on the Commission's assessment of its capacity to make the determinations required by the format doctrine. The Commission concluded that "[e]ven after all relevant facts ha[d] been fully explored in an evidentiary hearing, [the Commission] would have no assurance that a decision finally reached by [the Commission] would contribute more to listener satisfaction than the result favored by station management.'" *Policy Statement*, 60 F.C.C. 2d 858, 865 (1976). It did not assert that reliance on the marketplace would achieve a perfect correlation between listener preferences and available entertainment programming. Rather, it recognized that a perfect correlation would never be achieved, and it concluded that the marketplace alone could best accommodate the varied and changing tastes of the listening public. These predictions are within the institutional competence of the Commission.

Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference. See, e.g., *FCC v. National Citizens Committee for Broadcasting*, *supra*; *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946). Furthermore, diversity is not the

<sup>31</sup> *FCC v. National Citizens Committee for Broadcasting*, *supra*, at 814, quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

only policy the Commission must consider in fulfilling its responsibilities under the Act. The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S., at 810. The Commission's position on review of format changes reflects a reasonable accommodation of the policy of promoting diversity in programming and the policy of avoiding unnecessary restrictions on licensee discretion. As we see it, the Commission's Policy Statement is in harmony with cases recognizing that the Act seeks to preserve journalistic discretion while promoting the interests of the listening public.<sup>32</sup>

The Policy Statement is also consistent with the legislative history of the Act. Although Congress did not consider the precise issue before us, it did consider and reject a proposal to allocate a certain percentage of the stations to particular types of programming.<sup>33</sup> Similarly, one of the bills submitted prior to passage of the Radio Act of 1927<sup>34</sup> included a provision requiring stations to comply with programming priorities based on subject matter.<sup>35</sup> This provision was eventually deleted since it was considered to border on censorship.<sup>36</sup> Congress subsequently added a section to the Radio Act of 1927 expressly prohibiting censorship and other "interfer[ence] with the right of free speech by means of radio communication."<sup>37</sup> That section was retained in the Communications Act.<sup>38</sup> As we read the legislative history of the Act, Congress did not unequivocally express its disfavor of

<sup>32</sup> See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (recognizing the "policy of the Act to preserve editorial control of programming in the licensee"); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 120 (1973) (discussing the Commission's duty to chart a workable "middle course" to preserve "essentially private broadcast journalism held only broadly accountable to public interest standards").

<sup>33</sup> Congress rejected a proposal to allocate 25% of all radio stations to educational, religious, agricultural, and similar nonprofit associations. See 78 Cong. Rec. 8843-8846 (1934).

<sup>34</sup> 44 Stat. 1162. The Radio Act of 1927 was the predecessor to the Communications Act.

<sup>35</sup> This bill would have required the administrative agency created by the Radio Act of 1927 to prescribe "priorities as to subject matter to be observed by each class of licensed stations." H. R. 7357, 68th Cong., 1st Sess., § 1 (B) (1924).

<sup>36</sup> Hearings on H. R. 5589 before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st Sess., 39 (1926).

<sup>37</sup> 44 Stat. 1172-1173. See Hearings on S. 1 and S. 1754 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess., 121 (1926); H. R. Conf. Rep. No. 1886, 69th Cong., 2d Sess., 16-19 (1927).

<sup>38</sup> Section 326 of the Act provides:

"Nothing in this chapter 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." 47 U.S.C. § 326.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court concluded that although this section prohibits the Commission from editing proposed broadcasts in advance, it does not preclude subsequent review of program content. *Id.*, at 735, 737.

entertainment format review by the Commission, but neither is there substantial indication that Congress expected the public-interest standard to *require* format regulation by the Commission. The legislative history of the Act does not support the Court of Appeals and provides insufficient basis for invalidating the agency's construction of the Act.

In the past we have stated that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . ." <sup>39</sup> Prior to 1970, the Commission consistently stated that the choice of programming formats should be left to the licensee. <sup>40</sup> In 1971, the Commission restated that position but announced that any application for license transfer or renewal involving a substantial change in program format would have to be reviewed in light of the Court of Appeals' decision in *Citizens Committee to Preserve the Voice of the Arts in Atlanta*, 141 U.S. App. D.C. 109, 436 F. 2d 267 (1970), in which the Court of Appeals first articulated the format doctrine. <sup>41</sup> In 1973, in a statement accompanying the grant of the transfer application that was later challenged in *WEFM*, a majority of the Commissioners joined in a commitment to "take an extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming." <sup>42</sup> However, the Commission's later Policy Statement concluded that this approach was "neither administratively tenable nor necessary in the public interest." <sup>43</sup> It is

<sup>39</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). See also *Columbia Broadcasting System, Inc. v. Democratic National Committee*, *supra*, at 121.

<sup>40</sup> See, e.g., *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2308-2309 (1960); *Bay Radio, Inc.*, 22 F.C.C. 1351, 1364 (1957).

<sup>41</sup> *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C. 2d 650, 679-680 (1971).

The Commission explained:

"Our view has been that the station's program format is a matter best left to the discretion of the licensee or applicant, since as a matter of public acceptance and economic necessity he will tend to program to meet the preferences of the area and fill whatever void is left by the programming of other stations." *Id.*, at 679.

The Commission noted that this policy only applied to entertainment programming. "It does not include matters such as an increase in commercial matter or decrease in the amount of non-entertainment programming, both of which are subjects of review and concern, and have been for some time." *Id.*, at 679, n. 15.

The Commission continues to review nonentertainment programming to some degree. In its memorandum opinion denying reconsideration of the Policy Statement, the Commission explained that it has limited its review of programming to preserve licensee discretion in this area: "To the extent that the Commission exercises some direct control of programming, it is primarily through the fairness doctrine and political broadcasting rules pursuant to Section 315. In both cases the Commission's role is limited to directing the licensee to broadcast some *additional* material so as not to completely ignore the viewpoints of others in the community. . . . These regulations are extremely narrow, the Commission's role is limited by strictly defined standards, and the licensee is left with virtually unrestricted discretion in programming most of the broadcast day. In contrast, [under the format doctrine] we would be faced with the prospect of rejecting virtually the entire broadcast schedule proposed by the private licensee. . . ." 66 F.C.C. 2d, at 83.

<sup>42</sup> *Zenith Radio Corp.*, 40 F.C.C. 2d 223, 231 (1973) (additional views of Chairman Burch).

<sup>43</sup> *Policy Statement*, 60 F.C.C. 2d, at 866, n. 8.



thus apparent that although the Commission was obliged to modify its policies to conform to the Court of Appeals' format doctrine, the Policy Statement reasserted the Commission's traditional preference for achieving diversity in entertainment programming through market forces.

### III

It is contended that rather than carrying out its duty to make a particularized public-interest determination on every application that comes before it, the Commission, by invariably relying on market forces, merely assumes that the public interest will be served by changes in entertainment format. Surely, it is argued, there will be some format changes that will be so detrimental to the public interest that inflexible application of the Commission's Policy Statement would be inconsistent with the Commission's duties. But radio broadcasters are not required to seek permission to make format changes. The issue of past or contemplated entertainment format changes arises in the courses of renewal and transfer proceedings; if such an application is approved, the Commission does not merely assume but affirmatively determines that the requested renewal or transfer will serve the public interest.

Under its present policy, the Commission determines whether a renewal or transfer will serve the public interest without reviewing past or proposed changes in entertainment format. This policy is based on the Commission's judgment that market forces, although they operate imperfectly, not only will more reliably respond to listener preference than would format oversight by the Commission but also will serve the end of increasing diversity in entertainment programming. This Court has approved of the Commission's goal of promoting diversity in radio programming, *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699 (1979), but the Commission is nevertheless vested with broad discretion in determining how much weight should be given to that goal and what policies should be pursued in promoting it. The Act itself, of course, does not specify how the Commission should make its public-interest determinations.

A major underpinning of its Policy Statement is the Commission's conviction, rooted in its experience, that renewal and transfer cases should not turn on the Commission's presuming to grasp, measure, and weigh the elusive and difficult factors involved in determining the acceptability of changes in entertainment format. To assess whether the elimination of a particular "unique" entertainment format would serve the public interest, the Commission would have to consider the benefit as well as the detriment that would result from the change. Necessarily, the Commission would take into consideration not only the number of listeners who favor the old and the new programming but also the intensity of their preferences. It would also consider the effect of the format change on diversity within formats as well as on diversity among formats. The Commission is convinced that its judgments in these respects would be subjective in large measure and would only ap-

proximately serve the public interest. It is also convinced that the market, although imperfect, would serve the public interest as well or better by responding quickly to changing preferences and by inviting experimentation with new types of programming. Those who would overturn the Commission's Policy Statement do not take adequate account of these considerations.<sup>44</sup>

It is also contended that since the Commission has responded to listener complaints about nonentertainment programming, it should also review challenged changes in entertainment formats.<sup>45</sup> But the difference between the Commission's treatment of nonentertainment programming and its treatment of entertainment programming is not as pronounced as it may seem. Even in the area of nonentertainment programming, the Commission has afforded licensees broad discretion in selecting programs. Thus, the Commission has stated that "a substantial and material question of fact [requiring an evidentiary hearing] is raised *only* when it appears that the licensee has abused its broad discretion by acting unreasonably or in bad faith." *Mississippi Authority for Educational TV*, 71 F.C.C. 2d 1296, 1308 (1979). Furthermore, we note that the Commission has recently re-examined its regulation of commercial radio broadcasting in light of changes in the structure of the radio industry. See *Notice of Inquiry and Proposed Rulemaking, In the Matter of Deregulation of Radio*, 73 F.C.C. 2d 457 (1979). As a result of that re-examination, it has eliminated rules requiring maintenance of comprehensive program logs, guidelines on the amount of nonentertainment programming radio stations must offer, formal requirements governing ascertainment of community needs, and guidelines limiting commercial time. See *Deregulation of Radio*, 46 Fed. Reg. 13888 (1981) (to be codified at 47 CFR Parts 0 and 73).

<sup>44</sup> It is asserted that the Policy Statement violates the Act because it does not contain a "safety valve" procedure. The dissent relies primarily on *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), and *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). In *National Broadcasting Co. v. United States*, the Court noted that license applicants had been advised by the Commission that they could call to its attention any reason why the challenged chain broadcasting rule should be modified or held inapplicable to their situations. 319 U.S., at 207. In *United States v. Storer Broadcasting Co.*, the Court observed that under the Commission's regulations, an applicant who alleged "adequate reasons why the [Multiple Ownership] Rules should be waived or amended" would be granted a hearing. 351 U.S., at 205. In each case the Court considered the validity of the challenged rules in light of the flexibility provided by the procedures. However, it did not hold that the Commission may never adopt a rule that lacks a waiver provision.

<sup>45</sup> The Commission in the past has sought to promote "balanced" radio programming, but these efforts did not involve Commission review of changes in entertainment format. For example, in the *En Banc Programming Inquiry*, 44 F.C.C. 2303 (1960), relied on by the dissent, the Commission identified 14 types of programming that it considered "major elements usually necessary to meet the public interest." *Id.*, at 2314. One of these categories was "entertainment programs." The Commission suggested only that a licensee should usually provide some entertainment programming: it did not require licensees to provide specific types of entertainment programming. Moreover, the Commission emphasized that a licensee is afforded broad discretion in determining what programs should be offered to the public: "The ascertainment of the needed elements of the broadcast matter to be provided by a particular licensee for the audience he is obligated to serve remains primarily the function of the licensee. His honest and prudent judgments will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the licensee." *Ibid.*

This case does not require us to consider whether the Commission's present or past policies in the area of nonentertainment programming comply with the Act. We attach some weight to the fact that the Commission has consistently expressed a preference for promoting diversity in entertainment programming through market forces, but our decision ultimately rests on our conclusion that the Commission has provided a reasonable explanation for this preference in its Policy Statement.

We decline to overturn the Commission's Policy Statement, which prefers reliance on market forces to its own attempt to oversee format changes at the behest of disaffected listeners. Of course, the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully. As we stated in *National Broadcasting Co. v. United States*:

"If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." 319 U.S., at 225.

#### IV

Respondents contend that the Court of Appeals' judgment should be affirmed because, even if not violative of the Act, the Policy Statement conflicts with the First Amendment rights of listeners "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). *Red Lion* held that the Commission's "fairness doctrine" was consistent with the public-interest standard of the Communications Act and did not violate the First Amendment, but rather enhanced First Amendment values by promoting "the presentation of vigorous debate of controversial issues of importance and concern to the public." *Id.*, at 385. Although observing that the interests of the people as a whole were promoted by debate of public issues on the radio, we did not imply that the First Amendment grants individual listeners the right to have the Commission review the abandonment of their favorite entertainment programs. The Commission seeks to further the interests of the listening public as a whole by relying on market forces to promote diversity in radio entertainment formats and to satisfy the entertainment preferences of radio listeners.<sup>46</sup> This policy does not conflict with the First Amendment.<sup>47</sup>

<sup>46</sup> Respondents place particular emphasis on the role of foreign language programming in providing information to non-English-speaking citizens. However, the Policy Statement only applies to entertainment programming. It does not address the broadcaster's obligation to respond to community needs in the area of informational programming. See Tr. of Oral Arg. 81 (remarks of counsel for the Commission).

<sup>47</sup> Cf. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (the First Amendment does not require the Commission to adopt a "fairness doctrine" with respect to paid editorial advertisements).

Contrary to the judgment of the Court of Appeals, the Commission's Policy Statement is not inconsistent with the Act. It is also a constitutionally permissible means of implementing the public-interest standard of the Act. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*So ordered.*

### ***MIND PROBES***

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1. The plain language of some uncited portions of the Communications Act and its 1927 precursor suggest it may not have been Congress' intent that the FCC disengage itself from program review as completely as it did in its 1976 format change policy statement. Which portions are these? Why did the Court ignore them in its treatment of legislative history?
2. Is there anything in this document that would prevent the Commission from extending its reliance on marketplace forces to achieve diversity in radio entertainment formats to TV entertainment? To all programming, including nonentertainment?

### ***RELATED READING***

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- DANNA, SAMMY R., "The Six-Year Fight to Save WEFM," *Journal of Broadcasting*, 22:4 (Fall 1978), 425-37.
- KAHN, FRANK J., "Radio: Regulating Format Diversity," *Journal of Communication*, 32:1 (Winter 1982), 181-91.
- PENNYBACKER, JOHN H., "The Format Change Issue: FCC vs. U.S. Court of Appeals," *Journal of Broadcasting*, 22:4 (Fall 1978), 411-24.
- ROUTT, EDD, JAMES B. McGRATH, and FREDRIC A. WEISS, *The Radio Format Conundrum*. New York: Hastings House, 1978.
- TANNENWALD, PETER, and ALAN AUCKENTHALER, "Changes in Radio Entertainment Formats," *Saint Louis University Law Journal*, 21:2 (1977), 358-65.

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# The Communications Act of 1934

**Public Law 416, 73d Congress  
June 19, 1934 (Amended to  
January, 1983)**

This Act is the organic statute through which Congress currently exercises its jurisdiction over interstate communication by wire and radio. Only those sections most relevant to broadcasting appear in this edited version. Title II, which deals with common carriers such as telegraph and telephone, is entirely omitted.

Comparison of the Communications Act as amended with the Radio Acts of 1912 (Document 3) and 1927 (Document 9) lends insight into the regulatory evolution that was both a reason for and a reaction to the burgeoning growth of radio and television. Like chickens and eggs, broadcasting and the law have shaped each other with puzzling primacy. Documents 7, 17, and 31 illustrate the roles of three Presidents in prompting Congress to enact statutes influenced by and affecting broadcasting.

The Communications Act is the fundamental embodiment of American public policy in broadcasting. It reiterates the sense of Congress, first expressed in the Radio Act of 1927, that broadcasting in the United States should not be a government operation, a private monopoly, or purely free enterprise with unlimited competition. Instead, Congress opted for private ownership of broadcast stations under licenses issued by a bipartisan commission in "the public interest, convenience, and necessity." Having established basic policy, Congress left it to the Federal Communications Commission (FCC) to implement and elaborate it, reserving to the President the function of appointing commissioners and to the courts the power to review contested Commission decisions. Congress itself retained the right to pass on presidential appointments to the Commission and to oversee the functioning of the licensing agency to which it delegated broad powers.

An example of that "fourth branch of government" not provided for in the Constitution, the FCC performs duties typically associated with the three "traditional" branches, namely, the executive, legislative, and judicial arms of government that are central to the American constitutional system of checks and balances. For this reason administrative bodies like the FCC, Federal Trade Commission, Securities and Exchange Commission, etc., are called "independent regulatory agencies." A commission functions like a government-within-a-government; even though it is ultimately accountable to the other three branches, it uses its own discretion to interpret and apply its statutory standard (the "public interest") within its sphere of congressionally delegated jurisdiction.

This makes the caliber of commissioners a crucial determinant of the quality of regulation, for it is the commissioners who mold an adaptable law through their policy-making, quasi-legislative, and quasi-judicial functions. The President and Congress, who share responsibility for constituting the membership of the FCC, also share a conflict of interest. Their reliance on the good will of networks and stations to develop public sentiment for issues and candidates compromises the ability of these elected officials to adopt strong positions on broadcasting that are reflected by the appointment of commissioners with similarly positive regulatory philosophies. Therefore, the FCC has become a repository for those to whom political favors are owed and who are unopposed by regulated industries.

The degree to which the Commission is politically "independent" is occasionally subject to question. Such an instance arose in 1979 when the Carter-Mondale Presidential Committee asked to purchase a half-hour of time on each of the commercial TV networks so that President Jimmy Carter could announce the formal start of his campaign for reelection. The times requested were eleven months prior to Election Day. The networks refused the request because of its earliness and their liabilities under § 315 if the time were made available to one candidate. The Committee then obtained a 4-3 FCC ruling that the networks were in violation of § 312(a) (7) because their refusal was unreasonable under Commission standards. This decision was upheld by reviewing courts in *CBS, Inc. v. FCC*, 629 F.2d 1 (D.C. Cir. 1980) and 453 U.S. 367 (1981). Carter was, of course, a Democrat. So were the four Commissioners who voted to grant his Committee's complaint. The three dissenting Commissioners were Republicans. Surely such decisions compromise the appearance of FCC independence.

Shortly after the Supreme Court affirmation, the Commission proposed to Congress that §§ 312(a) (7) and 315 be repealed as part of a comprehensive deregulatory legislative package. Since Congress is a

prime beneficiary of these provisions, favorable action seems unlikely for the time being.

Whatever criticisms may be made about the formulation and administration of broadcast law in the United States, it is clear that American broadcasting could never have achieved its amazing accomplishments without the regulatory scheme whose foundation was laid in 1927, reinforced in 1934, and which has been built upon ever since. Recognized miscalculations of the past are rectifiable under democratic trial-and-error processes, as exemplified by the 1967 additions to the Communications Act (part IV of title III) that made viable a dual commercial-noncommercial system of broadcasting capable of serving pluralistic needs and interests more fully than a monolithic system. Widespread public satisfaction with radio and television lends credence to the contention that America's unique amalgam of private enterprise and the public interest in broadcasting is consistent with public policy as enunciated by the people's elected representatives and their appointees.

As emerging technologies gain a firmer grip on the mass audience, public policy will respond. After all, communication lies at the heart of human intercourse. Legislative and administrative bodies at all levels of government must remain sensitive to public perceptions of how to deploy the products of science, business, and the arts to provide satisfactory results.

## **TITLE I GENERAL PROVISIONS**

### **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; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Except as provided in section 224 of this Act and subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

### Definitions

**Sec. 3.** For the purposes of this Act, unless the context otherwise requires—

(a) “Wire communication” or “communication by wire” means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(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.



(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.

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act (other than section 223 thereof), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(f) "Foreign communication" or "foreign transmission" means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States.

(g) "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone.

(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.

(l) "Mobile station" means a radio-communication station capable of being moved and which ordinarily does move.

(m) "Land station" means a station, other than a mobile station, used for radio communication with mobile stations.

(n) "Mobile service" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes both one-way and two-way radio communication services.

(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.

(q) "Amateur station" means a radio station operated by a duly authorized person interested in radio technique solely with a personal aim and without pecuniary interest. . . .

(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 five commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.

(b) (1) Each member of the Commission shall be a citizen of the United States.

(2) (A) No member of the Commission or person employed by the Commission shall—

(i) be financially interested in any company or other entity engaged in the manufacture or sale of telecommunications equipment which is subject to regulation by the Commission;

(ii) be financially interested in any company or other entity engaged in the business of communication by wire or radio or in the use of the electromagnetic spectrum;

(iii) be financially interested in any company or other entity which controls any company or other entity specified in clause (i) or clause (ii), or which derives a significant portion of its total income from ownership of stocks, bonds, or other securities of any such company or other entity; or

(iv) be employed by, hold any official relation to, or own any stocks, bonds, or other securities of, any person significantly regulated by the Commission under this Act;

except that the prohibitions established in this subparagraph shall apply only to financial interests in any company or other entity which has a significant interest in

communications, manufacturing, or sales activities which are subject to regulation by the Commission.

(B) (i) The Commission shall have authority to waive, from time to time, the application of the prohibitions established in subparagraph (A) to persons employed by the Commission if the Commission determines that the financial interests of a person which are involved in a particular case are minimal, except that such waiver authority shall be subject to the provisions of section 208 of Title 18. The waiver authority established in this subparagraph shall not apply with respect to members of the Commission.

(ii) In any case in which the Commission exercises the waiver authority established in this subparagraph, the Commission shall publish notice of such action in the Federal Register and shall furnish notice of such action to the appropriate committees of each House of the Congress. Each such notice shall include information regarding the identity of the person receiving the waiver, the position held by such person, and the nature of the financial interests which are the subject of the waiver.

(3) The Commission, in determining whether a company or other entity has a significant interest in communications, manufacturing, or sales activities which are subject to regulation by the Commission, shall consider (without excluding other relevant factors)—

(A) the revenues, investments, profits, and managerial efforts directed to the related communications, manufacturing, or sales activities of the company or other entity involved, as compared to the other aspects of the business of such company or other entity;

(B) the extent to which the Commission regulates and oversees the activities of such company or other entity;

(C) the degree to which the economic interests of such company or other entity may be affected by any action of the Commission; and

(D) the perceptions held by the public regarding the business activities of such company or other entity.

(4) Members of the Commission shall not engage in any other business, vocation, profession, or employment while serving as such members.

(5) The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.

(c) Commissioners shall be appointed for terms of seven years and until their successors are appointed and have been confirmed and taken the oath of office, except that they shall not continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office; except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he succeeds. No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission.

(d) Each Commissioner shall receive an annual salary at the annual rate payable from time to time for level IV of the Executive Schedule, payable in

monthly installments. The Chairman of the Commission, during the period of his service as Chairman, shall receive an annual salary at the annual rate payable from time to time for level III of the Executive Schedule.

(e) The principal office of the Commission shall be in the District of Columbia, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States.

(f) (1) The Commission shall have authority, subject to the provisions of the civil-service laws and the Classification Act of 1949, as amended, to appoint such officers, engineers, accountants, attorneys, inspectors, examiners, and other employees as are necessary in the exercise of its functions.

(2) Without regard to the civil-service laws, but subject to the Classification Act of 1949, each commissioner may appoint three professional assistants and a secretary, each of whom shall perform such duties as such commissioner shall direct. In addition, the chairman of the Commission may appoint, without regard to the civil-service laws, but subject to the Classification Act of 1949, an administrative assistant who shall perform such duties as the chairman shall direct.

(3) The Commission shall fix a reasonable rate of extra compensation for overtime services of engineers in charge and radio engineers of the Field Engineering and Monitoring Bureau of the Federal Communications Commission, who may be required to remain on duty between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian or on Sundays or holidays to perform services in connection with the inspection of ship radio equipment and apparatus for the purposes of part II of title III of this Act or the Great Lakes Agreement, on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond 5 o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from 5 o'clock postmeridian to 8 o'clock antemeridian) and two additional days' pay for Sunday or holiday duty. The said extra compensation for overtime services shall be paid by the master, owner, or agent of such vessel to the local United States collector of customs or his representative, who shall deposit such collection into the Treasury of the United States to an appropriately designated receipt account: *Provided*, That the amounts of such collections received by the said collector of customs or his representatives shall be covered into the Treasury as miscellaneous receipts; and the payments of such extra compensation to the several employees entitled thereto shall be made from the annual appropriations for salaries and expenses of the Commission: *Provided further*, That to the extent that the annual appropriations which are hereby authorized to be made from the general fund of the Treasury are insufficient, there are hereby authorized to be appropriated from the general fund of the Treasury such additional amounts as may be necessary to the extent that the amounts of such receipts are in excess of the amounts appropriated: *Provided further*, That such extra compensation shall be paid if such field employees have been ordered to report for duty and have so reported whether the actual inspection of the radio equipment or apparatus takes place or not: *And provided further*, That in those

ports where customary working hours are other than those hereinabove mentioned, the engineers in charge are vested with authority to regulate the hours of such employees so as to agree with prevailing working hours in said ports where inspections are to be made, but nothing contained in this proviso shall be construed in any manner to alter the length of a working day for the engineers in charge and radio engineers or the overtime pay herein fixed.

(4) (A) The Commission, for purposes of preparing any examination for an amateur station operator license, may accept and employ the voluntary and uncompensated services of any individual who holds an amateur station operator license of a higher class than the class license for which the examination is being prepared. In the case of examinations for the highest class of amateur station operator license, the Commission may accept and employ such services of any individual who holds such class of license.

(B) The Commission, for purposes of administering any examination for an amateur station operator license, may accept and employ the voluntary and uncompensated services of any individual who holds an amateur station operator license of a higher class than the class license for which the examination is being conducted. In the case of examinations for the highest class of amateur station operator license, the Commission may accept and employ such services of any individual who holds such class of license. Any person who owns a significant interest in, or is an employee of, any company or other entity which is engaged in the manufacture or distribution of equipment used in connection with amateur radio transmissions, or in the preparation or distribution of any publication used in preparation for obtaining amateur station operator licenses, shall not be eligible to render any service under this subparagraph.

(C) (i) The Commission, for purposes of monitoring violations of any provision of this Act (and of any regulation prescribed by the Commission under this Act) relating to the amateur radio service, may—

(I) recruit and train any individual licensed by the Commission to operate an amateur station; and

(II) accept and employ the voluntary and uncompensated services of such individual.

(ii) The Commission, for purposes of recruiting and training individuals under clause (i) and for purposes of screening, annotating, and summarizing violation reports referred under clause (i), may accept and employ the voluntary and uncompensated services of any amateur station operator organization.

(iii) The functions of individuals recruited and trained under this subparagraph shall be limited to—

(I) the detection of improper amateur radio transmissions;

(II) the conveyance to Commission personnel of information which is essential to the enforcement of this Act (or regulations prescribed by the Commission under this Act) relating to the amateur radio service; and

(III) issuing advisory notices, under the general direction of the Commission, to persons who apparently have violated any provision of this Act (or regulations prescribed by the Commission under this Act) relating to the amateur radio service.

Nothing in this clause shall be construed to grant individuals recruited and trained under this subparagraph any authority to issue sanctions to violators or to take any enforcement action other than any action which the Commission may prescribe by rule.

(D) (i) The Commission, for purposes of monitoring violations of any provision of this Act (and of any regulation prescribed by the Commission under this Act) relating to the citizens band radio service, may—

(I) recruit and train any citizens band radio operator; and

(II) accept and employ the voluntary and uncompensated services of such operator.

(ii) The Commission, for purposes of recruiting and training individuals under clause (i) and for purposes of screening, annotating, and summarizing violation reports referred under clause (i), may accept and employ the voluntary and uncompensated services of any citizens band radio operator organization. The Commission, in accepting and employing services of individuals under this subparagraph, shall seek to achieve a broad representation of individuals and organizations interested in citizens band radio operation.

(iii) The functions of individuals recruited and trained under this subparagraph shall be limited to—

(I) the detection of improper citizens band radio transmissions;

(II) the conveyance to Commission personnel of information which is essential to the enforcement of this Act (or regulations prescribed by the Commission under this Act) relating to the citizens band radio service; and

(III) issuing advisory notices, under the general direction of the Commission, to persons who apparently have violated any provision of this Act (or regulations prescribed by the Commission under this Act) relating to the citizens band radio service.

Nothing in this clause shall be construed to grant individuals recruited and trained under this subparagraph any authority to issue sanctions to violators or to take any enforcement action other than any action which the Commission may prescribe by rule.

(E) The authority of the Commission established in this paragraph shall not be subject to or affected by the provisions of part III of title 5 or section 665(b) of title 31.

(F) Any person who provides services under this paragraph shall not be considered, by reason of having provided such services, a Federal employee.

(G) The Commission, in accepting and employing services of individuals under subparagraphs (A), (B), and (C), shall seek to achieve a broad representation of individuals and organizations interested in amateur station operation.

(H) The Commission may establish rules of conduct and other regulations governing the service of individuals under this paragraph.

(g) (1) The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for office supplies, law books, periodicals, and books of reference, for printing and binding, for land for use as sites for radio monitoring stations and related facilities, including living quarters where necessary in remote areas, for the construction of such stations and facilities, and for the improvement, furnishing, equipping, and repairing of such stations and facilities and of laboratories and other related facilities (including construction of minor subsidiary buildings and structures not exceeding \$25,000 in any one instance) used in connection with technical research activities), as may be necessary for the execution of the functions vested in the Commission and as may be appropriated for by the Congress in accordance with the authorizations of appropriations established in section 6 of this Act. All expenditures of the Commission, including all necessary expenses for transportation incurred by the commissioners or by their employees, under their orders, in making any investigation or upon any official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission or by such other member or officer thereof as may be designated by the Commission for that purpose.

(2) (A) If—

(i) the necessary expenses specified in the last sentence of paragraph (1) have been incurred for the purpose of enabling commissioners or employees of the Commission to attend and participate in any convention, conference, or meeting;

(ii) such attendance and participation are in furtherance of the functions of the Commission; and

(iii) such attendance and participation are requested by the person sponsoring such convention, conference, or meeting;

then the Commission shall have authority to accept direct reimbursement from such sponsor for such necessary expenses.

(B) The total amount of unreimbursed expenditures made by the Commission for travel for any fiscal year, together with the total amount of reimbursements which the Commission accepts under subparagraph (A) for such fiscal year, shall not exceed the level of travel expenses appropriated to the Commission for such fiscal year.

(C) The Commission shall submit to the appropriate committees of the Congress, and publish in the Federal Register, quarterly reports specifying reimbursements which the Commission has accepted under this paragraph.

(D) The provisions of this paragraph shall cease to have any force or effect at the end of fiscal year 1985.

(h) Three members of the Commission shall constitute a quorum thereof. The Commission shall have an official seal which shall be judicially noticed.

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

(k) The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such reports shall contain—

(1) such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy;

(2) such information and data concerning the functioning of the Commission as will be of value to Congress in appraising the amount and character of the work and accomplishments of the Commission and the adequacy of its staff and equipment;

(3) an itemized statement of all funds expended during the preceding year by the Commission, of the sources of such funds, and of the authority in this Act or elsewhere under which such expenditures were made; and

(4) specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable, including all legislative proposals submitted for approval to the Director of the Office of Management and Budget.

(l) All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier or licensee that may have been complained of.

(m) The Commission shall provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof.

(n) Rates of compensation of persons appointed under this section shall be subject to the reduction applicable to officers and employees of the Federal Government generally.



(d) Meetings of the Commission shall be held at regular intervals, not less frequently than once each calendar month, at which times the functioning of the Commission and the handling of its work load shall be reviewed and such orders shall be entered and other action taken as may be necessary or appropriate to expedite the prompt and orderly conduct of the business of the Commission with the objective of rendering a final decision (1) within three months from the date of filing in all original application, renewal, and transfer cases in which it will not be necessary to hold a hearing, and (2) within six months from the final date of the hearing in all hearing cases.

(f) The Commission shall have a Managing Director who shall be appointed by the Chairman subject to the approval of the Commission. The Managing Director, under the supervision and direction of the Chairman, shall perform such administrative and executive functions as the Chairman shall delegate. The Managing Director shall be paid at a rate equal to the rate then payable for level V of the Executive Schedule.

(g) The Commission shall submit an annual report to the Congress no later than January 31 of each year. Such report shall—

(1) list the specific goals, objectives, and priorities of the Commission which shall be projected over 12-month, 24-month, and 36-month periods;

(2) describe in detail the programs which are, or shall be, established to meet or carry out such goals, objectives, and priorities;

(3) provide an evaluation of actions taken during the preceding year with regard to fulfilling the functions of the Commission; and

(4) contain recommendations for legislative action required to enable the Commission to meet its objectives.

**Sec. 6.** There is authorized to be appropriated for the administration of this Act by the Commission \$76,900,000, together with such sums as may be necessary for increases resulting from adjustments in salary, pay, retirement, other employee benefits required by law, and other nondiscretionary costs, for each of the fiscal years 1982 and 1983.

### TITLE III PROVISIONS RELATING TO RADIO

#### 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 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 (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or district; or (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) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, 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; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this Act) or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

*Sec. 302a.* (a) The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications; and (2) establishing minimum performance standards for home electronic equipment and systems to reduce their susceptibility to interference from radio frequency energy. Such regulations shall be applicable to the manufacture, import, sale, offer for sale, or shipment of such devices and home electronic equipment and systems, and to the use of such devices.

(b) No person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.

(c) The provisions of this section shall not be applicable to carriers transporting such devices or home electronic equipment and systems without trading in them, to devices or home electronic equipment and systems manufactured solely for export, to the manufacture, assembly, or installation of devices or home electronic equipment and systems for its own use by a public utility engaged in providing electric service, or to devices or home electronic equipment and systems for use by the Government of the United States or any agency thereof. Devices and home electronic equipment and systems for use by the Government of the United States or any agency thereof shall be developed, procured, or otherwise acquired, including offshore procurement, under United States Government criteria, standards, or specifications designed to achieve the objectives of reducing interference to radio

reception and to home electronic equipment and systems, taking into account the unique needs of national defense and security.

### 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;
- (k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;
- (l) (1) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to persons who are found to be qualified by the Commission and who otherwise are legally eligible for employment in the United States, except that such requirement relating to eligibility for employment in the United States shall not apply in the case of licenses issued by the Commission to (A) persons holding United States pilot certificates; or (B) persons holding foreign aircraft pilot certificates which are valid in the United States, if the foreign government

involved has entered into a reciprocal agreement under which such foreign government does not impose any similar requirement relating to eligibility for employment upon citizens of the United States;

(2) Notwithstanding paragraph (1) of this subsection, an individual to whom a radio station is licensed under the provisions of this Act may be issued an operator's license to operate that station. . . .

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) Has violated, or caused, aided, or abetted the violation of, any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) Has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) Has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) Has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) False or deceptive signals or communications, or

(2) A call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) Has willfully or maliciously interfered with any other radio communications or signals; or

(F) Has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under section 307(e)(1) of this Act, or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they con-

form to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. The permittee or licensee shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation.

(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.

(t) Notwithstanding the provisions of section 301(e) of this Act, have authority, in any case in which an aircraft registered in the United States is operated (pursuant to a lease, charter, or similar arrangement) by an aircraft operator who is subject to regulation by the government of a foreign nation, to enter into an agreement with such government under which the Commission shall recognize and accept any radio station licenses and radio operator licenses issued by such government with respect to such aircraft.

#### Waiver by Licensee

*Sec. 304.* No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the electromagnetic spectrum 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. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business, shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the Commission may prescribe.

(b) Radio stations on board vessels of the United States Maritime Administration of the Department of Transportation or the Inland and Coastwise Waterways Service shall be subject to the provisions of this title.

(c) All stations owned and operated by the United States, except mobile stations of the Army of the United States, and all other stations on land and sea, shall have special call letters designated by the Commission.

(d) The provisions of sections 301 and 303 of this Act notwithstanding, the President may, provided he determines it to be consistent with and in the interest of national security, authorize a foreign government, under such terms and conditions as he may prescribe, to construct and operate at the seat of government of the United States a low-power radio station in the fixed service at or near the site of the embassy or legation of such foreign government for transmission of its messages to points outside the United States, but only (1) where he determines that the authorization would be consistent with the national interest of the United States and (2) where such foreign government has provided reciprocal privileges to the United States to construct and operate radio stations within territories subject to its jurisdiction. Foreign government stations authorized pursuant to the provisions of this subsection shall conform to such rules and regulations as the President may prescribe. The authorization of such stations, and the renewal, modification, suspension, revocation, or other termination of such authority shall be in accordance with such procedures as may be established by the President and shall not be subject to the other provisions of this Act or of the Administrative Procedure Act.

### Foreign Ships

**Sec. 306.** Section 301 of this Act shall not apply to any person sending radio communications or signals on a foreign ship while the same is within the jurisdiction of the United States, but such communications or signals shall be transmitted only in accordance with such regulations designed to prevent interference as may be promulgated under the authority of this Act.

**Allocation of Facilities; Terms 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.

(c) No license granted for the operation of a television broadcasting station shall be for a longer term than five years and no license so granted for any other class of station (other than a broadcasting station) shall be for a longer term than ten years, and any license granted may be revoked as hereinafter provided. Each license granted for the operation of a radio broadcasting station shall be for a term of not to exceed seven years. The term of any license for the operation of any auxiliary broadcast station or equipment which can be used only in conjunction with a primary radio, television, or translator station shall be concurrent with the term of the license for such primary radio, television, or translator station. 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 five years in the case of television broadcasting licenses, for a term of not to exceed seven years in the case of radio broadcasting station licenses, and for a term of not to exceed ten years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that effect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this Act, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

(d) 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.

(e) (1) Notwithstanding any licensing requirement established in this Act,

the Commission may by rule authorize the operation of radio stations without individual licenses in the radio control service and the citizens band radio service if the Commission determines that such authorization serves the public interest, convenience, and necessity.

(2) Any radio station operator who is authorized by the Commission under paragraph (1) to operate without an individual license shall comply with all other provisions of this Act and with rules prescribed by the Commission under this Act.

(3) For purposes of this subsection, the terms "radio control service" and "citizens band radio service" shall have the meanings given them by the Commission by rule.

**Applications for Licenses;  
Conditions in License for Foreign Communication**

**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: *Provided*, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(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 and of the stations, if any, with which it is proposed to communicate; 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. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States," approved May 24, 1921.

**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 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 or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe, 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) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(b) where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a).

(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; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. 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 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. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. 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 temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such temporary operations for a period not exceeding 180 days, and upon making like findings may extend such temporary authorization for additional periods not to exceed 180 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 filed under section 405.

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(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; (3) every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 of this Act.

(i) (1) If there is more than one application for any initial license or construction permit which will involve any use of the electromagnetic spectrum, then the Commission, after determining that each such application is acceptable for filing, shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

(2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) of this section and section 308(b) of this Act. When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law—

(A) adopt procedures for the submission of all or part of the evidence in written form;

(B) delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and

(C) omit the determination required by subsection (a) of this section with respect to any application other than the one selected pursuant to paragraph (1).

(3) (A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

(C) For purposes of this paragraph:

(i) The term “media of mass communications” includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term “minority group” includes Blacks, Hispanics, American Indians, Alaska Natives, Asians and Pacific Islanders.

(4) (A) The Commission, not later than 180 days after September 13, 1982, shall, after notice and opportunity for hearing, prescribe rules establishing

a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

#### Limitation on Holding and Transfer of Licenses

*Sec. 310.* (a) The station license required under this Act shall not be granted to or held by any foreign government or the representative thereof.

(b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) 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 aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country.

(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(c) In addition to amateur station licenses which the Commission may issue to aliens pursuant to this Act, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a bilateral agreement between the United States and the alien's government for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this Act and of the Administrative Procedure Act shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(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 of this Act 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.

(b) Hearings referred to in subsection (a) may be held at such places as the Commission shall determine to be appropriate, and in making such determination in any case the Commission shall consider whether the public interest, convenience, or necessity will be served by conducting the hearing at a place in, or in the vicinity of, the principal area to be served by the station involved.

(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 (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

(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.

(d) (1) If there are pending before the Commission an application for the renewal of a license granted for the operation of a broadcasting station and one or

more applications for a construction permit relating to such 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 in exchange for the payment of money, or the transfer of assets or any other thing of value by the remaining applicant or applicants.

(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 require.

(3) The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

(4) For 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;

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of 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. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of section 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

(f) For purposes of this section:

(1) The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate 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.

(2) The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

#### **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: *Provided, however,* That such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court.

(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.

#### Preservation of Competition in Commerce

*Sec. 314.* After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of

the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share of any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case, the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

#### 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.

**Modification by Commission of Construction Permits  
or Licenses**

*Sec. 316.* (a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: *Provided*, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

**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 507 of this Act, of circumstances which would have required an an-

nouncement 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.

(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

#### Operation of Transmitting Apparatus

*Sec. 318.* The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: *Provided, however,* That the Commission if it shall find that the public interest, convenience, or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting (other than those engaged primarily in the function of rebroadcasting the signals of broadcast stations) and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: *Provided further,* That the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices.

#### 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 and of the station or stations with which it is proposed to communicate, 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. Such application shall be signed by the applicant.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and 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.

(d) A permit for construction shall not be required for Government stations, amateur stations, or mobile stations. A permit for construction shall not be required for public coast stations, privately owned fixed microwave stations, or stations licensed to common carriers, unless the Commission determines that the public interest, convenience, and necessity would be served by requiring such permits for any such stations. With respect to any broadcasting station, the Commission shall not have any authority to waive the requirement of a permit for construction. With respect to any other station or class of stations, the Commission shall not waive such requirement unless the Commission determines that the public interest, convenience, and necessity would be served by such a waiver. . . .

**False Distress Signals; Rebroadcasting;  
Studios of Foreign Stations**

**Sec. 325.** (a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

(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 converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and 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.

(c) Such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of section 309 hereof with respect to applications for station licenses or renewal or modification thereof, and the license or permission so granted shall be revocable for false statements in the application so required or when the Commission, after hearings, shall find its continuation no longer in the public interest.

#### **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.

(b) For the purposes of this section and section 303(s)—

(1) The term “interstate commerce” means (A) commerce between any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States and any place outside thereof which is within the United States, (B) commerce between points in the same State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States but through any place outside thereof, or (C) commerce wholly within the District of Columbia or any possession of the United States.

(2) The term “United States” means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States, but does not include the Canal Zone.

#### **State Priority for Allocation of Very High Frequency Television Stations**

**Sec. 337.** It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which [the] licensee of a very high fre-

quency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time [of] such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in section 307(d) of this Act.\*

**PART IV—ASSISTANCE FOR PLANNING AND CONSTRUCTION  
OF PUBLIC TELECOMMUNICATIONS FACILITIES;  
TELECOMMUNICATIONS DEMONSTRATIONS;  
CORPORATION FOR PUBLIC BROADCASTING;  
GENERAL PROVISIONS**

**SUBPART A—ASSISTANCE FOR PLANNING AND CONSTRUCTION  
OF PUBLIC TELECOMMUNICATIONS FACILITIES**

**Declaration of Purpose**

*Sec. 390.* The purpose of this subpart is to assist, through matching grants, in the planning and construction of public telecommunications facilities in order to achieve the following objectives: (1) extend delivery of public telecommunications services to as many citizens of the United States as possible by the most efficient and economical means, including the use of broadcast and nonbroadcast technologies; (2) increase public telecommunications services and facilities available to, operated by, and owned by minorities and women; and (3) strengthen the capabilities of existing public television and radio stations to provide public telecommunications services to the public.

**Authorization of Appropriations**

*Sec. 391.* There are authorized to be appropriated \$40,000,000 for each of the fiscal years 1979, 1980, and 1981, \$20,000,000 for fiscal year 1982, \$15,000,000 for fiscal year 1983, and \$12,000,000 for fiscal year 1984, to be used by the Secretary of Commerce to assist in the planning and construction of public telecommunications facilities as provided in this subpart. Sums appropriated under this subpart for any fiscal year shall remain available until expended for payment of grants for projects for which applications approved by the Secretary pursuant to this subpart have been submitted within such fiscal year. Sums appropriated under

\*Sec. 332, relating to private land mobile service, and other portions of title III dealing with maritime uses of radio are omitted. [Ed.]

this subpart may be used by the Secretary to cover the cost of administering the provisions of this subpart.\*

**SUBPART C—CORPORATION FOR PUBLIC BROADCASTING**

**Corporation for Public Broadcasting—Congressional  
Declaration of Policy**

**Sec. 396.** (a) The Congress hereby finds and declares that—

(1) it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes;

(2) it is in the public interest to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications services;

(3) expansion and development of public telecommunications and of diversity of its programming depend on freedom, imagination, and initiative on both local and national levels;

(4) the encouragement and support of public telecommunications, while matters of importance for private and local development, are also of appropriate and important concern to the Federal Government;

(5) it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation;

(6) it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States; and

(7) a private corporation should be created to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control.

**Establishment of Corporation; Application of District  
of Columbia Nonprofit Corporation Act**

(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. The Corporation shall be subject to the provisions of this section, and, to the extent consistent with this section, to the District of Columbia Nonprofit Corporation Act.

\*Sections 392-395 are omitted. [Ed.]



**Board of Directors; Functions, Duties, Etc.**

(c) (1) The Corporation for Public Broadcasting shall have a Board of Directors (hereinafter in this section referred to as the "Board"), consisting of 10 members appointed by the President, by and with the advice and consent of the Senate, and the President of the Corporation. No more than 6 members of the Board appointed by the President may be members of the same political party. The President of the Corporation shall serve as the Chairman of the Board.

(2) The 10 members of the Board appointed by the President (A) shall be selected from among citizens of the United States (not regular full-time employees of the United States) who are eminent in such fields as education, cultural and civic affairs, or the arts, including radio and television; and (B) shall be selected so as to provide as nearly as practicable a broad representation of various regions of the Nation, various professions and occupations, and various kinds of talent and experience appropriate to the functions and responsibilities of the Corporation.

(3) Of the members of the Board appointed by the President under paragraph (1), one member shall be selected from among individuals who represent the licensees and permittees of public television stations, and one member shall be selected from among individuals who represent the licensees and permittees of public radio stations.

(4) The members of the initial Board of Directors shall serve as incorporators and shall take whatever actions are necessary to establish the Corporation under the District of Columbia Nonprofit Corporation Act.

(5) The term of office of each member of the Board appointed by the President shall be 5 years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. No member of the Board shall be eligible to serve in excess of 2 consecutive terms of 5 years each.

(6) Any vacancy in the Board shall not affect its power, but shall be filled in the manner consistent with this Act.

(7) Members of the Board shall attend not less than 50 percent of all duly convened meetings of the Board in any calendar year. A member who fails to meet the requirement of the preceding sentence shall forfeit membership and the President shall appoint a new member to fill such vacancy not later than 30 days after such vacancy is determined by the Chairman of the Board.

**Election of Vice Chairman; Compensation of Board Members**

(d) (1) Members of the Board shall annually elect one or more of their members as a Vice Chairman or Vice Chairmen.

(2) The members of the Board shall not, by reason of such membership, be deemed to be officers or employees of the United States. They shall, while attending meetings of the Board or while engaged in duties related to such meetings or other activities of the Board pursuant to this subpart, be entitled to receive compensation at the rate of \$150 per day, including travel time. No Board member

shall receive compensation of more than \$10,000 in any fiscal year. While away from their homes or regular places of business, Board members shall be allowed travel and actual, reasonable, and necessary expenses.

**Officers and Employees; Term of Office, Compensation, Qualifications, and Removal; Political Party Affiliation, Political Test or Qualification When Taking Personnel Actions**

(e) (1) The Corporation shall have a President, and such other officers as may be named and appointed by the Board for terms and at rates of compensation fixed by the Board. No officer or employee of the Corporation may be compensated by the Corporation at an annual rate of pay which exceeds the rate of basic pay in effect from time to time for level I of the Executive Schedule under section 5312 of title 5, United States Code. No individual other than a citizen of the United States may be an officer of the Corporation. No officer of the corporation, other than a Vice Chairman, may receive any salary or other compensation from any source other than the Corporation for services rendered during the period of his employment by the corporation. All officers shall serve at the pleasure of the Board.

(2) Except as provided in the second sentence of subsection (c) (1) of this section, no political test or qualification shall be used in selecting, appointing, promoting, or taking other personnel actions with respect to officers, agents, and employees of the Corporation.

**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; Powers under the District of Columbia Nonprofit Corporation Act**

(g) (1) 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 public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made available to public telecommunications entities, 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 interconnection systems to be used for the distribution of public telecommuni-

cations services so that all public telecommunications entities may disseminate such services at times chosen by the entities;

(C) assist in the establishment and development of one or more systems of public telecommunications entities throughout the United States; and

(D) carry out its purposes and functions and engage in its activities in ways that will most effectively assure the maximum freedom of the public telecommunications entities and systems from interference with, or control of, program content or other activities.

(2) In order to carry out the purposes set forth in subsection (a) of this section, the Corporation is authorized to—

(A) obtain grants from and make contracts with individuals and with private, State, and Federal agencies, organizations, and institutions;

(B) contract with or make grants to public telecommunications entities, national, regional, and other systems of public telecommunications entities, and independent producers and production entities, for the production or acquisition of public telecommunications services to be made available for use by public telecommunications entities, except that—

(i) to the extent practicable, proposals for the provision of assistance by the Corporation in the production or acquisition of programs or series of programs shall be evaluated on the basis of comparative merit by panels of outside experts, representing diverse interests and perspectives, appointed by the Corporation; and

(ii) nothing in this subparagraph shall be construed to prohibit the exercise by the Corporation of its prudent business judgment with respect to any contract or grant to assist in the production or acquisition of any program or series of programs recommended by any such panel;

(C) make payments to existing and new public telecommunications entities to aid in financing the production or acquisition of public telecommunications services by such entities, particularly innovative approaches to such services, and other costs of operation of such entities;

(D) establish and maintain, or contribute to, a library and archives of noncommercial educational and cultural radio and television programs and related materials and develop public awareness of, and disseminate information about, public telecommunications services by various means, including the publication of a journal;

(E) arrange, by grant to or contract with appropriate public or private agencies, organizations, or institutions, for interconnection facilities suitable for distribution and transmission of public telecommunications services to public telecommunications entities;

(F) hire or accept the voluntary services of consultants, experts, advisory boards, and panels to aid the Corporation in carrying out the purposes of this subpart;

(G) conduct (directly or through grants or contracts) research, demonstrations, or training in matters related to public television or radio broad-

casting and the use of nonbroadcast communications technologies for the dissemination of noncommercial educational and cultural television or radio programs;

(H) make grants or contracts for the use of nonbroadcast telecommunications technologies for the dissemination to the public of public telecommunications services; and

(I) take such other actions as may be necessary to accomplish the purposes set forth in subsection (a) of this section.

Nothing contained in this paragraph shall be construed to commit the Federal Government to provide any sums for the payment of any obligation of the Corporation which exceeds amounts provided in advance in appropriation Acts.

(3) To carry out the foregoing purposes and engage in the foregoing activities, the Corporation shall have the usual powers conferred upon a nonprofit corporation by the District of Columbia Nonprofit Corporation Act, except that the Corporation is prohibited from—

(A) owning or operating any television or radio broadcast station, system, or network, community antenna television system, interconnection system or facility, program production facility, or any public telecommunications entity, system, or network; and

(B) producing programs, scheduling programs for dissemination, or disseminating programs to the public.

(4) All meetings of the Board of Directors of the Corporation, including any committee of the Board, shall be open to the public under such terms, conditions, and exceptions as are set forth in subsection (k) (4) of this section.

(5) The Corporation, in consultation with interested parties, shall create a 5-year plan for the development of public telecommunications services. Such plan shall be updated annually by the Corporation.

**Free or Reduced Rate Interconnection Service;  
Access to Facilities**

(h) (1) Nothing in this Act, or in any other provision of law, shall be construed to prevent United States communications common carriers from rendering free or reduced rate communications interconnection services for public television or radio services, subject to such rules and regulations as the Commission may prescribe.

(2) Subject to such terms and conditions as may be established by public telecommunications entities receiving space satellite interconnection facilities or services purchased or arranged for, in whole or in part, with funds authorized under this part, other public telecommunications entities shall have reasonable access to such facilities or services for the distribution of educational and cultural programs to public telecommunications entities. Any remaining capacity shall be made available to other persons for the transmission of noncommercial educational and cultural programs and program information relating to such programs, to public telecommunications entities, at a charge or charges comparable to the charge or charges, if any, imposed upon a public telecommunications entity for the distri-

bution of noncommercial educational and cultural programs to public telecommunications entities. No such person shall be denied such access whenever sufficient capacity is available.

#### **Report to Congress**

(i) (1) The Corporation shall submit an annual report for the preceding fiscal year ending September 30 to the President for transmittal to the Congress on or before the 15th day of May of each year. The report shall include—

(A) a comprehensive and detailed report of the Corporation's operations, activities, financial condition, and accomplishments under this subpart and such recommendations as the Corporation deems appropriate;

(B) a comprehensive and detailed inventory of funds distributed by Federal agencies to public telecommunications entities during the preceding fiscal year; and

(C) the summary of the annual report provided to the Secretary pursuant to section 398(b)(4) of this Act.

(2) The officers and directors of the Corporation shall be available to testify before appropriate committees of the Congress with respect to such report, the report of any audit made by the Comptroller General pursuant to subsection (l) of this section, or any other matter which such committees may determine.

#### **Repeal, Alteration, or Amendment**

(j) The right to repeal, alter, or amend this section at any time is expressly reserved.

#### **Financing Restrictions**

(k) (1) (A) There is hereby established in the Treasury a fund which shall be known as the Public Broadcasting Fund (hereinafter in this subsection referred to as the "Fund"), to be administered by the Secretary of the Treasury.

(B) There is authorized to be appropriated to the Fund, for each of the fiscal years 1978, 1979, and 1980, an amount equal to 40 percent 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 \$121,000,000 for fiscal year 1978, \$140,000,000 for fiscal year 1979, and \$160,000,000 for fiscal year 1980.

(C) There is authorized to be appropriated to the Fund, for each of the fiscal years 1981, 1982, 1983, 1984, 1985, and 1986, an amount equal to 50 percent 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 \$180,000,000 for fiscal year 1981, \$200,000,000 for fiscal year 1982, \$220,000,000 for fiscal year 1983, and \$130,000,000 for each of the fiscal years 1984, 1985, and 1986.

(D) Funds appropriated under this subsection shall remain available until expended.

(2) (A) The funds authorized to be appropriated by this subsection shall be used by the Corporation, in a prudent and financially responsible manner, solely for its grants, contracts, and administrative costs, except that the Corporation may not use any funds appropriated under this subpart for purposes of conducting any reception, or providing any other entertainment, for any officer or employee of the Federal Government or any State or local government. The Corporation shall determine the amount of non-Federal financial support received by public broadcasting entities during each of the fiscal years referred to in paragraph (1) for the purpose of determining the amount of each authorization, and shall certify such amount to the Secretary of the Treasury, except that the Corporation may include in its certification non-Federal financial support received by a public broadcasting entity during its most recent fiscal year ending before September 30 of the year for which certification is made. Upon receipt of such certification, the Secretary of the Treasury shall make available to the Corporation, from such funds as may be appropriated to the Fund, the amount authorized for each of the fiscal years pursuant to the provisions of this subsection.

(B) Funds appropriated and made available under this subsection shall be disbursed by the Secretary of the Treasury on a fiscal year basis.

(3) (A) (i) The Corporation shall establish an annual budget for use in allocating amounts from the Fund. Of the amounts appropriated into the Fund available for allocation for any fiscal year—

(I) not more than 5 percent of such amounts shall be available for the administrative expenses of the Corporation;

(II) not less than 5 percent of such amounts shall be available for other expenses incurred by the Corporation, including research, training, technical assistance, engineering, instructional support, payment of interest on indebtedness, capital costs relating to telecommunications satellites, the payment of programming royalties and other fees, and the costs of interconnection facilities and operations (as provided in clause (iv) (I)), except that the total amount available for obligation for any fiscal year under this subclause and subclause (I) shall not exceed 10 percent of the amounts appropriated into the Fund available for allocation for such fiscal year;

(III) 75 percent of the remainder (after allocations are made under subclause (I) and subclause (II)) shall be allocated in accordance with clause (ii) (I); and

(IV) 25 percent of such remainder shall be allocated in accordance with clause (iii).

(ii) Of the amounts allocated under clause (i) (III) for any fiscal year—

(I) 75 percent of such amounts shall be available for distribution among the licensees and permittees of public television stations pursuant to paragraph (6) (B); and

(II) 25 percent of such amounts shall be available for distribution under subparagraph (B) (i) for public television programming.

(iii) Of the amounts allocated under clause (i) (IV) for any fiscal year—

(I) not less than 50 percent of such amounts (as determined under paragraph (6) (A), shall be available for distribution among the licensees and permittees of public radio stations pursuant to paragraph (6) (B); and

(II) not more than 50 percent of such amounts (as determined under paragraph (6) (A), shall be available for distribution under subparagraph (B) (i) for public radio.

(iv) (I) Subject to the provisions of clause (v), the Corporation shall defray an amount equal to 50 percent of the total costs of interconnection facilities and operations to facilitate the availability of public television and radio programs among public broadcast stations.

(II) Of the amounts received as the result of any contract, lease agreement, or any other arrangement under which the Corporation directly or indirectly makes available interconnection facilities, 50 percent of such amounts shall be distributed to the licensees and permittees of public television stations and public radio stations. The Corporation shall not have any authority to establish any requirements, guidelines, or limitations with respect to the use of such amounts by such licensees and permittees.

(v) If the expenses incurred by the Corporation under clause (i) (II) for any fiscal year for—

(I) capital costs relating to telecommunications satellites;

(II) the payment of programming royalties and other fees; and

(III) the costs of interconnection facilities and operations (as provided in clause (iv) );

exceed 6 percent of the amounts appropriated into the Fund available for allocation for such fiscal year, then 75 percent of such excess costs shall be defrayed by the licensees and permittees of public television stations from amounts available to such licensees and permittees under clause (ii) (I) and 25 percent of such excess costs shall be defrayed by the licensees and permittees of public radio stations from amounts available to such licensees and permittees under clause (iii) (I).

(B) (i) The Corporation shall utilize the funds allocated pursuant to subparagraph (A) (ii) (II) and subparagraph (A) (iii) (II), and a significant portion of such other funds as may be available to the Corporation, to make grants and contracts for production of public television or radio programs by independent producers and production entities and public telecommunications entities, and for acquisition of such programs by public telecommunications entities. Of the funds utilized pursuant to this clause, a substantial amount shall be reserved for distri-

bution to independent producers and production entities for the production of programs.

(ii) All funds available for distribution under clause (i) shall be distributed to entities outside the Corporation and shall not be used for the general administrative costs of the Corporation, the salaries or related expenses of Corporation personnel and members of the Board, or for expenses of consultants and advisers to the Corporation.

(C) In fiscal year 1981, the Corporation may expend an amount equal to not more than 5 percent of the funds made available by the Secretary of the Treasury during such fiscal year pursuant to paragraph (2) (A) for those activities authorized under subsection (g) (2) of this section which are not among those grant activities described in subparagraph (B).

(D) In fiscal years 1982 and 1983, the amount which the Corporation may expend for activities authorized under subsection (g) (2) of this section which are not among those grant activities described in subparagraph (B) shall be 105 percent of the amount derived for the preceding fiscal year.

(4) Funds may not be distributed pursuant to this subsection to the Public Broadcasting Service or National Public Radio (or any successor organization), or to the licensee or permittee of any public broadcast station, unless the governing body of any such organization, any committee of such governing body, or any advisory body of any such organization, holds open meetings preceded by reasonable notice to the public. All persons shall be permitted to attend any meeting of the board, or of any such committee or body, and no person shall be required, as a condition to attendance at any such meeting, to register such person's name or to provide any other information. Nothing contained in this paragraph shall be construed to prevent any such board, committee, or body from holding closed sessions to consider matters relating to individual employees, proprietary information, litigation and other matters requiring the confidential advice of counsel, commercial or financial information obtained from a person on a privileged or confidential basis, or the purchase of property or services whenever the premature exposure of such purchase would compromise the business interests of any such organization. If any such meeting is closed pursuant to the provisions of this paragraph, the organization involved shall thereafter (within a reasonable period of time) make available to the public a written statement containing an explanation of the reasons for closing the meeting.

(5) Funds may not be distributed pursuant to this subsection to any public telecommunications entity that does not maintain for public examination copies of the annual financial and audit reports, or other information regarding finances, submitted to the Corporation pursuant to subsection (1) (3) (B) of this section.

(6) (A) The Corporation, in consultation with public radio stations and with National Public Radio (or any successor organization), shall determine the percentage of funds allocated under subclause (I) and subclause (II) of paragraph (3) (A) (iii) for each fiscal year. The Corporation, on consultation with such



organizations, also shall conduct an annual review of the criteria and conditions applicable to such allocations.

(B) The Corporation shall make a basic grant from the portion reserved for television stations under paragraph (3) (A) (ii) (I) to each licensee and permittee of a public television station that is on the air. The balance of the portion reserved for television stations and the total portion reserved for radio stations under paragraph (3) (A) (iii) (I) shall be distributed to licensees and permittees of such stations in accordance with eligibility criteria that promote the public interest in public broadcasting, and on the basis of a formula designed to—

(i) provide for the financial needs 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 public radio station receives a basic grant.

(7) The funds distributed pursuant to paragraph (3) (A) may be used at the discretion of the recipient for purposes related primarily to the production or acquisition of programming.

(8) Any public telecommunications entity which—

(A) receives any funds pursuant to this subpart for any fiscal year; and

(B) during such fiscal year has filed or was required to file a return with the Internal Revenue Service declaring unrelated business income related to station operations under sections 501, 511, and 512 of the Internal Revenue Code of 1954;

shall refund to the Corporation an amount equal to the amount of unrelated business income tax paid as stated in such filed return.

(9) (A) Funds may not be distributed pursuant to this subpart to any public broadcast station (other than any station which is owned and operated by a State, a political or special purpose subdivision of a State, or public agency) unless such station establishes a community advisory board. Any such station shall undertake good faith efforts to assure that (i) its advisory board meets at regular intervals; (ii) the members of its advisory board regularly attend the meetings of the advisory board; and (iii) the composition of its advisory board [is] reasonably representative of the diverse needs and interests of the communities served by such station.

(B) The board shall be permitted to review the programming goals established by the station, the service provided by the station, and the significant policy decisions rendered by the station. The board may also be delegated any other responsibilities, as determined by the governing body of the station. The board shall advise the governing body of the station with respect to whether the programming and other policies of such station are meeting the specialized edu-

cational and cultural needs of the communities served by the station, and may make such recommendations as it considers appropriate to meet such needs.

(C) The role of the board shall be solely advisory in nature, except to the extent other responsibilities are delegated to the board by the governing body of the station. In no case shall the board have any authority to exercise any control over the daily management or operation of the station.

(D) In the case of any public broadcast station (other than any station which is owned and operated by a State, a political or special purpose subdivision of a State, or a public agency) in existence on the effective date of this paragraph, such station shall comply with the requirements of this paragraph with respect to the establishment of a community advisory board not later than 180 days after such effective date.

(E) The provision of subparagraph (A) prohibiting the distribution of funds to any public broadcast station (other than any station which is owned and operated by a State, a political or special purpose subdivision of a State, or a public agency) unless such station establishes a community advisory board shall be the exclusive remedy for the enforcement of the provisions of this paragraph.

(10) Funds may not be distributed pursuant to this subsection to the Public Broadcasting Service or National Public Radio (or any successor organization) unless assurances are provided to the Corporation that no officer or employee of the Public Broadcasting Service or National Public Radio (or any successor organization), as the case may be, will be compensated at an annual rate of pay which exceeds the rate of basic pay in effect from time to time for level I of the Executive Schedule under section 5312 of title 5, United States Code.

#### **Financial Management and Records**

(1) (A) The accounts of the Corporation shall be audited annually in accordance with generally accepted auditing standards by independent certified public accountants or independent licensed public accountants certified or licensed by a regulatory authority of a State or other political subdivision of the United States, except that such requirement shall not preclude shared auditing arrangements between any public telecommunications entity and its licensee where such licensee is a public or private institution. The audits shall be conducted at the place or places where the accounts of the Corporation are normally kept. All books, accounts, financial records, reports, files, and all other papers, things, or property belonging to or in use by the Corporation and necessary to facilitate the audits shall be made available to the person or persons conducting the audits; and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents and custodians shall be afforded to such person or persons.

(B) The report of each such independent audit shall be included in the annual report required by subsection (i) of this section. The audit report shall set forth the scope of the audit and include such statements as are necessary to present fairly the Corporation's assets and liabilities, surplus or deficit, with an

analysis of the changes therein during the year, supplemented [in] reasonable detail by a statement of the Corporation's income and expenses during the year, and a statement of the sources and application of funds, together with the independent auditor's opinion of those statements.

(2) (A) The financial transactions of the Corporation for any fiscal year during which Federal funds are available to finance any portion of its operations may be audited by the General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General of the United States. Any such audit shall be conducted at the place or places where accounts of the Corporation are normally kept. The representative of the General Accounting Office shall have access to all books, accounts, records, reports, files, and all other papers, things, or property belonging to or in use by the Corporation pertaining to its financial transactions and necessary to facilitate the audit, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, records, reports, files, papers and property of the Corporation shall remain in possession and custody of the Corporation.

(B) A report of each such audit shall be made by the Comptroller General to the Congress. The report to the Congress shall contain such comments and information as the Comptroller General may deem necessary to inform Congress of the financial operations and condition of the Corporation, together with such recommendations with respect thereto as he may deem advisable. The report shall also show specifically any program, expenditure, or other financial transaction or undertaking observed in the course of the audit, which, in the opinion of the Comptroller General, has been carried on or made without authority of law. A copy of each report shall be furnished to the President, to the Secretary, and to the Corporation at the time submitted to the Congress.

(3) (A) Not later than 1 year after November 1978, the Corporation, in consultation with the Comptroller General, and as appropriate with others, shall develop accounting principles which shall be used uniformly by all public telecommunications entities receiving funds under this subpart, taking into account organizational differences among various categories of such entities. Such principles shall be designed to account fully for all funds received and expended for public telecommunications purposes by such entities.

(B) Each public telecommunications entity receiving funds under this subpart shall be required—

(i) to keep its books, records, and accounts in such form as may be required by the Corporation;

(ii) to undergo a biannual audit by independent certified public accountants or independent licensed public accountants certified or licensed by a regulatory authority of a State, which audit shall be in accordance with auditing standards developed by the Corporation, in consultation with the Comptroller General; and

(iii) to furnish biannually to the Corporation a copy of the audit report required pursuant to clause (ii), as well as such other information regarding finances (including an annual financial report) as the Corporation may require.

(C) Any recipient of assistance by grant or contract under this section, other than a fixed price contract awarded pursuant to competitive bidding procedures, shall keep such records as may be reasonably necessary to disclose fully the amount and the disposition by such recipient of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(D) The Corporation or any of its duly authorized representatives shall have access to any books, documents, papers, and records of any recipient of assistance for the purpose of auditing and examining all funds received or expended for public telecommunications purposes by the recipient. The Comptroller General of the United States or any of his duly authorized representatives also shall have access to such books, documents, papers, and records for the purpose of auditing and examining all funds received or expended for public telecommunications purposes during any fiscal year for which Federal funds are available to the Corporation.

#### SUBPART D—GENERAL PROVISIONS

##### Definitions

*Sec. 397.* For the purposes of this part—

(1) The term “construction” (as applied to public telecommunications facilities) means acquisition (including acquisition by lease), installation, and modernization of public telecommunications facilities and planning and preparatory steps incidental to any such acquisition, installation, or modernization.

(2) The term “Corporation” means the Corporation for Public Broadcasting authorized to be established in subpart C.

(3) The term “interconnection” means the use of microwave equipment, boosters, translators, repeaters, communication space satellites, or other apparatus or equipment for the transmission and distribution of television or radio programs to public telecommunications entities.

(4) The term “interconnection system” means any system of interconnection facilities used for the distribution of programs to public telecommunications entities.

(5) The term “meeting” means the deliberations of at least the number of members of a governing or advisory body, or any committee thereof, required to take action on behalf of such body or committee where such deliberations

determine or result in the joint conduct or disposition of the governing or advisory body's business, or the committee's business, as the case may be, but only to the extent that such deliberations relate to public broadcasting.

(6) The terms "noncommercial educational broadcast station" and "public broadcast station" mean a television or radio broadcast station which—

(A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be 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 education purposes.

(7) The term "noncommercial telecommunications entity" means any enterprise which—

(A) is owned and operated by a State, a political or special purpose subdivision of a State, a public agency, or a nonprofit private foundation, corporation, or association; and

(B) has been organized primarily for the purpose of disseminating audio or video noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast station, including, but not limited to, coaxial cable, optical fiber, broadcast translators, cassettes, discs, microwave, or laser transmission through the atmosphere.

(8) The term "nonprofit" (as applied to any foundation, corporation, or association) means a foundation, corporation, or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(9) The term "non-Federal financial support" means the total value of cash and the fair market value of property and services (including, to the extent provided in the second sentence of this paragraph, the personal services of volunteers) received—

(A) as gifts, grants, bequests, donations, or other contributions for the construction or operation of noncommercial educational broadcast stations, or for the production, acquisition, distribution, or dissemination of educational television or radio programs, and related activities, from any source other than (i) the United States or any agency or instrumentality of the United States; or (ii) any public broadcasting entity; or

(B) as gifts, grants, donations, contributions or payments from any State, or any educational institution, for the construction or operation of noncommercial educational broadcast stations or for the production, acquisition, distribution, or dissemination of educational television or radio programs, or payments in exchange for services or materials with respect to the provision of educational or instructional television or radio programs.

Such term includes the fair market value of personal services of volunteers, as computed using the valuation standards established by the Corporation and ap-

proved by the Comptroller General pursuant to section 396(g)(5) of this Act, but only with respect to such services provided to public telecommunications entities after such standards are approved by the Comptroller General and only, with respect to such an entity in a fiscal year, to the extent that the value of the services does not exceed 5 percent of the total non-Federal financial support of the entity in such fiscal year.

(10) The term "preoperational expenses" means all nonconstruction costs incurred by new telecommunications entities before the date on which they begin providing service to the public, and all nonconstruction costs associated with expansion of existing entities before the date on which such expanded capacity is activated, except that such expenses shall not include any portion of the salaries of any personnel employed by an operating public telecommunications entity.

(11) The term "public broadcasting entity" means the Corporation, any licensee or permittee of a public broadcast station, or any nonprofit institution engaged primarily in the production, acquisition, distribution, or dissemination of educational and cultural television or radio programs.

(12) The term "public telecommunications entity" means any enterprise which—

(A) is a public broadcast station or a noncommercial telecommunications entity; and

(B) disseminates public telecommunications services to the public.

(13) The term "public telecommunications facilities" means apparatus necessary for production, interconnection, captioning, broadcast, or other distribution of programming, including, but not limited to, studio equipment, cameras, microphones, audio and video storage or reproduction equipment, or both, signal processors and switchers, towers, antennas, transmitters, translators, microwave equipment, mobile equipment, satellite communications equipment, instructional television fixed service equipment, subsidiary communications authorization transmitting and receiving equipment, cable television equipment, video and audio cassettes and discs, optical fiber communications equipment, and other means of transmitting, emitting, storing, and receiving images and sounds, or intelligence, except that such term does not include the buildings to house such apparatus (other than small equipment shelters which are part of satellite earth stations, translators, microwave interconnection facilities, and similar facilities).

(14) The term "public telecommunications services" means noncommercial educational and cultural radio and television programs, and related noncommercial instructional or informational material that may be transmitted by means of electronic communications.

(15) The term "Secretary" means the Secretary of Commerce when such term is used in subpart A, and the Secretary of Health and Human Services when such term is used in subpart B, subpart C, and this subpart.

(16) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(17) The term "system of public telecommunications entities" means any combination of public telecommunications entities acting cooperatively to produce, acquire, or distribute programs, or to undertake related activities.

#### **Federal Interference or Control—Prohibition**

**Sec. 398.** (a) Nothing contained in this part shall be deemed (1) to amend any other provision of, or requirement under, this Act; or (2) except to the extent authorized in subsection (b) of this section, to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over public telecommunications, or over the Corporation or any of its grantees or contractors, or over the charter or bylaws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or public telecommunications entity.

#### **Equal Opportunity Employment**

(b) (1) Equal opportunity in employment shall be afforded to all persons by the Public Broadcasting Service and National Public Radio (or any successor organization) and by all public telecommunications entities receiving funds pursuant to subpart C (hereinafter in this subsection referred to as "recipients"), and no person shall be subjected to discrimination in employment by any recipient on the grounds of race, color, religion, national origin, or sex.

(2) (A) The Secretary is authorized and directed to enforce this subsection and to prescribe such rules and regulations as may be necessary to carry out the functions of the Secretary under this subsection.

(B) The Secretary shall provide for close coordination with the Commission in the administration of the responsibilities of the Secretary under this subsection which are of interest to or affect the functions of the Commission so that, to the maximum extent possible consistent with the enforcement responsibilities of each, the reporting requirements of public telecommunications entities shall be uniformly based upon consistent definitions and categories of information.

(3) (A) The Corporation shall incorporate into each grant agreement or contract with any recipient entered into on or after the effective date of the rules and regulations prescribed by the Secretary pursuant to paragraph (2) (A), a statement indicating that, as a material part of the terms and conditions of the grant agreement or contract, the recipient will comply with the provisions of paragraph (1) and the rules and regulations prescribed pursuant to paragraph (2) (A). Any person which desires to be a recipient (within the meaning of paragraph (1)) of funds under subpart C shall, before receiving any such funds, provide to the Corporation any information which the Corporation may require to satisfy itself that such person is affording equal opportunity in employment in accordance with the requirements of this subsection. Determinations made by the Corporation in accordance with the preceding sentence shall be based upon guidelines relating to equal opportunity in employment which shall be established by rule by the Secretary.

(B) If the Corporation is not satisfied that any such person is affording equal opportunity in employment in accordance with the requirements of this subsection, the Corporation shall notify the Secretary, and the Secretary shall review the matter and make a final determination regarding whether such person is affording equal opportunity in employment. In any case in which the Secretary conducts a review under the preceding sentence, the Corporation shall make funds available to the person involved pursuant to the grant application of such person (if the Corporation would have approved such application but for the finding of the Corporation under this paragraph) pending a final determination of the Secretary upon completion of such review. The Corporation shall monitor the equal employment opportunity practices of each recipient throughout the duration of the grant or contract.

(C) The provisions of subparagraph (A) and subparagraph (B) shall take effect on the effective date of the rules and regulations prescribed by the Secretary pursuant to paragraph (2) (A).

(4) Based upon its responsibilities under paragraph (3), the Corporation shall provide an annual report for the preceding fiscal year ending September 30 to the Secretary on or before the 15th day of February of each year. The report shall contain information in the form required by the Secretary. The Corporation shall submit a summary of such report to the President and the Congress as part of the report required in section 396 (i) of this title. The Corporation shall provide other information in the form which the Secretary may require in order to carry out the functions of the Secretary under this subsection.

(5) Whenever the Secretary makes a final determination, pursuant to the rules and regulations which the Secretary shall prescribe, that a recipient is not in compliance with paragraph (1), the Secretary shall, within 10 days after such determination, notify the recipient in writing of such determination and request the recipient to secure compliance. Unless the recipient within 120 days after receipt of such written notice—

(A) demonstrates to the Secretary that the violation has been corrected; or

(B) enters into a compliance agreement approved by the Secretary;

the Secretary shall direct the Corporation to reduce or suspend any further payments of funds under this part to the recipient and the Corporation shall comply with such directive. Resumption of payments shall take place only when the Secretary certifies to the Corporation that the recipient has entered into a compliance agreement approved by the Secretary. A recipient whose funds have been reduced or suspended under this paragraph may apply at any time to the Secretary for such certification.

#### **Control Over Content or Distribution of Programs**

(c) Nothing in this section shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, super-



vision, or control over the content or distribution of public telecommunications programs and services, or over the curriculum or program of instruction of any educational institution or school system.

**Editorializing and Support of Political Candidates  
Prohibited**

**Sec. 399.** No noncommercial educational broadcasting station which receives a grant from the Corporation under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office.\*

**Use of Business or Institutional Logograms—Definition**

**Sec. 399A.** (a) For purposes of this section, the term “business or institutional logogram” means any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization, and which is not used for the purpose of promoting the products, services, or facilities of such corporation, company, or other organization.

**Permitted Uses**

(b) Each public television station and each public radio station shall be authorized to broadcast announcements which include the use of any business or institutional logogram and which include a reference to the location of the corporation, company, or other organization involved, except that such announcements may not interrupt regular programming.

**Authority of Commission Not Limited**

(c) The provisions of this section shall not be construed to limit the authority of the Commission to prescribe regulations relating to the manner in which logograms may be used to identify corporations, companies, or other organizations.

**Offering of Certain Services, Facilities, or Products  
by Public Broadcast Stations—Definition**

**Sec. 399B.** (a) For purposes of this section, the term “advertisement” means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended—

\*The ban on editorializing was held to be unconstitutional as violative of the First Amendment by a federal district court in 1982. *League of Women Voters v. FCC*, 547 F.Supp. 379 (C.D. Cal. 1982). The Justice Department’s appeal to the Supreme Court was pending while this volume was being prepared. [Ed.]

- (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;
- (2) to express the views of any person with respect to any matter of public importance or interest; or
- (3) to support or oppose any candidate for political office.

**Offering of Services, Facilities, or Products Permitted;  
Advertisements Prohibited**

- (b) (1) Except as provided in paragraph (2), each public broadcast station shall be authorized to engage in the offering of services, facilities, or products in exchange for remuneration.
- (2) No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

**Use of Funds from Offering Services, etc.**

- (c) Any public broadcast station which engages in any offering specified in subsection (b) (1) of this section may not use any funds distributed by the Corporation under section 396(k) of this Act to defray any costs associated with such offering. Any such offering by a public broadcast station shall not interfere with the provision of public telecommunications services by such station.

**Development of Accounting System**

- (d) Each public broadcast station which engages in the activity specified in subsection (b) (1) of this section shall, in consultation with the Corporation, develop an accounting system which is designed to identify any amounts received as remuneration for, or costs related to, such activities under this section, and to account for such amounts separately from any other amounts received by such station from any source.

**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. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

#### **Proceedings to Enjoin, Set Aside, Annul, or Suspend Orders of the Commission**

**Sec. 402.** (a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code.

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the applicant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.

(e) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 10(e) of the Administrative Procedure Act.

(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of the title 28 of the United States Code, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

#### **Inquiry by Commission on its Own Motion**

*Sec. 403.* The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

#### **Reports of Investigations**

*Sec. 404.* Whenever an investigation shall be made by the Commission it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirements in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

#### **Reconsiderations**

*Sec. 405.* After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(d) (1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(d) (1), in its discretion, to grant such reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any

order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b) in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

## TITLE V

### PENAL PROVISIONS—FORFEITURES

#### General Penalty

*Sec. 501.* Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully or knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this Act, by a fine of not more than \$10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this Act punishable under this section, shall be punished by a fine of not more than \$10,000 or by imprisonment for a term not exceeding two years, or both.

*Sec. 502.* Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by

any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than \$500 for each and every day during which such offense occurs.

**Sec. 503.** (a) Any person who shall deliver messages for interstate or foreign transmission to any carrier, or for whom, as sender or receiver, any such carrier shall transmit any interstate or foreign wire or radio communication, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transmission of such messages as fixed by the schedules of charges provided for in this Act, shall in addition to any other penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and in the trial of said action all such rebates or other considerations so received or accepted, for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

(b) (1) 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, certificate, 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 508(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; except that this subsection shall not apply to any conduct which is subject to forfeiture under title II, part II or III of title III, or section 506 of 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).

The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(3) (A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of title 5, United States Code. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a) of this Act.

(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until—

(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

(B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this Act.

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or



other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required, or is a cable system operator. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

(6) No forfeiture penalty shall be determined or imposed against any person under this subsection if—

(A) such person holds a broadcast station license issued under title III of this Act and if the violation charged occurred—

(i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

(ii) prior to the date of commencement of the current term of such license,

whichever is earlier so long as such violation occurred within 3 years prior to the date of issuance of such required notice; or

(B) such person does not hold a broadcast station license issued under title III of this Act and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.

#### **Recovery of Forfeitures; Remission and Mitigation; Use of Notice of Apparent Liability**

**Sec. 504.** (a) The forfeitures provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b) (3) of this Act, in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: *Provided*, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this Act shall be a trial de novo: *Provided further*, That in the case of forfeiture by a ship, said forfeiture may also be recoverable by way of libel in any district in which such ship shall arrive or depart. Such forfeitures shall be in addition to any other general or specific penalties provided in this Act. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this Act. The costs and expenses of such prosecutions shall be paid from the appropriation for the expenses of the courts of the United States.

(b) The forfeitures imposed by title II, parts II and III of title III, and sections 503(b) and 506 of this Act shall be subject to remission or mitigation by the Commission under such regulations and methods of ascertaining the facts as may seem to it advisable, and, if suit has been instituted, the Attorney General, upon request of the Commission, shall direct the discontinuance of any prosecution to recover such forfeitures: *Provided, however,* That no forfeiture shall be remitted or mitigated after determination by a court of competent jurisdiction.

(c) In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this Act, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

#### Venue of Offenses

*Sec. 505.* The trial of any offense under this Act shall be in the district in which it is committed; or if the offense is committed upon the high seas, or out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender may be found or into which he shall be first brought. Whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.\*

#### Disclosure of Certain Payments

*Sec. 507.* (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 infor-

\*Section 506, treating violation of the Great Lakes Agreement and related FCC rules, is omitted. [Ed.]

mation 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. 508.* (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.

## TITLE VI

### MISCELLANEOUS PROVISIONS

#### Unauthorized Publication or Use of Communications

*Sec. 605.* Except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the

benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships in distress, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

#### War Emergency—Powers of President

**Sec. 606.** (a) During the continuance of a war in which the United States is engaged, the President is authorized, if he finds it necessary for the national defense and security, to direct that such communications as in his judgment may be essential to the national defense and security shall have preference or priority with any carrier subject to this Act. He may give these directions at and for such times as he may determine, and may modify, change, suspend, or annul them and for any such purpose he is hereby authorized to issue orders directly, or through such person or persons as he designates for the purpose, or through the Commission. Any carrier complying with any such order or direction for preference or priority herein authorized shall be exempt from any and all provisions in existing law imposing civil or criminal penalties, obligations, or liabilities upon carriers by reason of giving preference or priority in compliance with such order or direction.

(b) It shall be unlawful for any person during any way in which the United States is engaged to knowingly or willfully, by physical force or intimidation by threats of physical force, obstruct or retard or aid in obstructing or retarding interstate or foreign communication by radio or wire. The President is hereby authorized, whenever in his judgment the public interest requires, to employ the armed forces of the United States to prevent any such obstruction or retardation of communication: *Provided*, That nothing in this section shall be construed to repeal, modify, or affect either section 6 or section 20 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914.

(c) Upon proclamation by the President that there exists war or a threat of war, or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President, if he deems it necessary in the interest of national security, or defense, may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations or devices capable of emitting electromagnetic radiations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication, or any device capable of emitting electromagnetic radiations between 10 kilocycles and 100,000 megacycles, which is suitable for use as a navigational aid beyond five miles, and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station or device and/or its apparatus and equipment, by any department of the Government under such regulations as he may prescribe upon just compensation to the owners. The authority granted to the President, under this subsection, to cause the closing

of any station or device and the removal therefrom of its apparatus and equipment, or to authorize the use or control of any station or device and/or its apparatus and equipment, may be exercised in the Canal Zone.

(d) Upon proclamation by the President that there exists a state or threat of war involving the United States, the President, if he deems it necessary in the interest of the national security and defense, may, during a period ending not later than six months after the termination of such state or threat of war and not later than such earlier date as the Congress by concurrent resolution may designate, (1) suspend or amend the rules and regulations applicable to any or all facilities or stations for wire communication within the jurisdiction of the United States as prescribed by the Commission, (2) cause the closing of any facility or station for wire communication and the removal therefrom of its apparatus and equipment, or (3) authorize the use or control of any such facility or station and its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners.

(e) The President shall ascertain the just compensation for such use or control and certify the amount ascertained to Congress for appropriation and payment to the person entitled thereto. If the amount so certified is unsatisfactory to the person entitled thereto, such person shall be paid only 75 per centum of the amount and shall be entitled to sue the United States to recover such further sum as added to such payment of 75 per centum will make such amount as will be just compensation for the use and control. Such suit shall be brought in the manner provided by paragraph 20 of section 24, or by section 145, of the Judicial Code, as amended.

(f) Nothing in subsection (c) or (d) shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by any communication system or systems.

(g) Nothing in subsection (c) or (d) shall be construed to authorize the President to make any amendment to the rules and regulations of the Commission which the Commission would not be authorized by law to make; and nothing in subsection (d) shall be construed to authorize the President to take any action the force and effect of which shall continue beyond the date after which taking of such action would not have been authorized.

(h) Any person who willfully does or causes or suffers to be done any act prohibited pursuant to the exercise of the President's authority under this section, or who willfully fails to do any act which he is required to do pursuant to the exercise of the President's authority under this section, or who willfully causes or suffers such failure, shall, upon conviction thereof, be punished for such offense by a fine of not more than \$1,000 or by imprisonment for not more than one year, or both, and, if a firm, partnership, association, or corporation, by fine of not more than \$5,000, except that any person who commits such an offense with intent to injure the United States, or with intent to secure an advantage to any foreign

nation, shall, upon conviction thereof, be punished by a fine of not more than \$20,000 or by imprisonment for not more than 20 years, or both.

*Sec. 608.* If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

### MIND PROBES

1. If the Communications Act were to be overhauled by Congress, what specific recommendations for change would you make? What arguments would you present in support of enactment of your recommended amendments?

2. The public interest standard has been with us for more than a half-century despite its lack of definition in the Act itself, its vagueness, and the emergence of electronic media unforeseen at the time(s) of enactment that fell within the FCC's jurisdiction. To what can the standard's remarkable durability be attributed?

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# The Criminal Code

## Title 18, United States Code

These selected sections of the U.S. Criminal Code pertaining to broadcasting supplement the provisions of the Communications Act of 1934 as amended. Section 1464 of the Code was originally incorporated in the Communications Act itself as part of Section 326; see Section 29 of the Radio Act of 1927 (Document 9) for the exact wording of the ban as it existed until 1948.

Section 1304 of the Code was also part of the Communications Act (Section 316) prior to 1948. The spread of state-sponsored lotteries prompted passage of Section 1307 of the Criminal Code which, as of January 2, 1975, makes Section 1304 inapplicable to "an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under authority of State law . . . broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery. . . ."

### Broadcasting Lottery Information

*Sec. 1304.* Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.  
(Codified June 25, 1948, Ch. 645, 62 Stat. 763.)

### Fraud by Wire, Radio, or Television

*Sec. 1343.* Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

(Codified July 16, 1952, Ch. 879, sec. 18(a), 66 Stat. 722; amended July 11, 1956, Ch. 561, 70 Stat. 523.)

### Broadcasting Obscene Language

*Sec. 1464.* Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

(Codified June 25, 1948, Ch. 645, 62 Stat. 769.)

### *MIND PROBES*

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1. Would a pictorially lurid telecast of a wordless sexual orgy be actionable under § 1464? Why?
2. What distinguishes state-conducted lotteries from legal lotteries held by others so as to permit matter to be broadcast about the former but not the latter?

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FRANK J. KAHN, EDITOR

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