RADIO NETWORKS
and the
FEDERAL GOVERNMENT

By THOMAS PORTER ROBINSON

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY, IN THE FACULTY OF POLITICAL SCIENCE, COLUMBIA UNIVERSITY

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To
C. P. D. R.

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T. P. R.

Washington, D. C.
February 10, 1943

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✕ *Chapter 1* ✕

THE PROBLEM AND ITS SETTING

IT WAS in November, 1920, that the first regular broadcast of sound took place—the transmission of radio waves traveling at the speed of light and carrying the human voice and the notes of music to the far corners of the earth. Within this short period a flourishing industry has developed which is bringing free into the homes of about 100,000,000 people in the United States programs made possible by this scientific miracle.

The importance of sound broadcasting can be realized only when we stop and think what our life would be without it, particularly under the exigencies of national emergency. Most of us depend upon it for news, or for entertainment, or for leadership. Broadcasting is part of our daily existence. The social implications of this means of simultaneous mass communication, the invention of which ranks with the invention of the printing press, cannot, therefore, be exaggerated.

In most other countries radio broadcasting is either under the aegis of the government or in its complete control. The achievement of our broadcasting system has been accomplished in the American way—private initiative, private capital, and the managerial and engineering abilities of the individual in an economy of free enterprise. And the system that has been devised is largely a network system of program distribution. Hence, any situation which focuses attention upon the problem of network broadcasting and which involves the determination of long-term governmental policy regarding it, is of concern to all.

The Federal Communications Commission in 1941 came to the conclusion, after a three-year investigation, that in certain important respects our present system of network broadcasting is contrary to the public interest. Furthermore, two of the eight regulations which were promulgated by the Commission and which have

been challenged in the courts are aimed exclusively at the National Broadcasting Company, the oldest organization in the industry. In short, we are confronted here with a significant and conflicting relationship between a business enterprise, using a public franchise for private profit, and the government, aiming to insure that the broadcasting lanes through the ether, which belong to the people, will not be commercially exploited in a manner inconsistent with the public welfare.

In its more particular aspects, therefore, this book is the story of the relationship between the Federal Communications Commission and the National Broadcasting Company. From the broader standpoint, however, it is the story of the relationship between the Federal government and the network industry. And implicit within this relationship are all of the past mistakes and accomplishments, the present problems, and the future potentialities of radio broadcasting. The controversy merely serves to mirror the basic questions inherent in a role of public service for this dynamic science.

Because of its instrument of political law and because within its borders it is endowed with force, the state, of which the government is an agency, is of all associations the most powerful and pervasive. In addition, only the state in a complex society can establish and maintain the necessary framework of order in which the members both collectively and individually seek fulfillment. The establishment and maintenance of this framework is a primary function of government. But "the state cannot fulfill its clear and inevitable function of maintaining order without involving itself in the further and infinitely harder task of securing justice." [1] And this attempt to plot an equitable path between individual and group "rights" and the public interest precipitates conflicts far more bitter and intense than the state's function of maintaining order, as the government-network relationship bears witness.

How far the state, in its attempt to secure justice, should and can go in regulating individuals and other associations is a question of vital concern. As we know, the government during recent years has gone further and further in this direction. The traditional policy of laissez faire is in conflict with reform. The untrammeled posses-

[1] Robert M. MacIver, *Society: Its Structure and Changes*, p. 199.

sion and use of private property are now regarded not so much as "rights" but more as "privileges" granted by the state.

Economic associations, particularly those of a public utility character, have naturally been the principal objectives of this attitude. The Public Utility Holding Company Act, the Securities Exchange Commission, and the Federal Communications Commission are typical examples of the state's growing encroachment on the domain of private capitalism. Taxation, as a means of regulation, is also an ever more potent instrument in the hands of the state. And with the war, a situation of almost complete governmental regulation and control of the sphere of economic enterprise has developed, and much of this domination will undoubtedly persist after the war. It seems likely that the principal political struggle of the future will not be as to whether there should be governmental controls but rather who shall run the controls and for what purpose.

We shall examine how far the Federal Communications Commission has attempted to go in controlling the radio network industry, and an appraisal of the wave of reform in terms of the public interest will be made. The attempt to regulate on the part of the government and the opposition to this regulation on the part of industry characterize the controversy inherent in the business-government relationship under review.

Men are the life blood of these associations that are in conflict. Furthermore, the men of government, owing to the entrenched position which they have achieved, the enormous resources at their command, and their years of appointive privilege, have the power to put their philosophies into practice to a degree which has been unknown before.

Nevertheless, there are limitations. The government is not only limited by the instruments which it must employ but also by the resistance offered to political action by the mores of the community. There are degrees of change and reform which—granted that democratic processes continue to be effective—will not be accepted by the general will of the people. The failure of passage of the Judiciary Bill in 1937 is a case in point. Though we may have faith that public opinion will continue to exercise such a final control, it is certain, however, that the area of administrative initiative and re-

form has been greatly enlarged. In this sense the government has become more a matter of men than of law.

An understanding of the men in the relationship to be studied, therefore, particularly of the government representatives who hold the reins of power—a comprehension of what they believe and of what they plan—is most germane. From the standpoint of the network industry, it would seem that such an understanding is almost tantamount to survival, since in a dispute with a stronger opponent only through understanding can adjustments essential to continued existence be made.

Certainly, we cannot hope to solve the problems of this industry —to reach a sound long-term policy—until we comprehend the issues between the government and the networks and how these issues arose. Then, too, there are other questions, more basic than the specific issues in the dispute, which must be considered and which vitally impinge upon the future of broadcasting.

We shall attempt an answer to some of these basic questions. Aside from a strictly legal settlement, it comes down fundamentally to the issue: what *use* do we want to make of the *means* of broadcasting and in what manner can this be accomplished most efficiently in the public interest? Essentially involved in the determination of these questions is a choice between democratic and totalitarian principles.

Commercially financed network broadcasting and the entertainment which it provides have already been exploited to a large degree in the United States. Many of the cultural, educational, and social possibilities of this medium, however, have not been realized. The future policy for broadcasting must be shaped in terms of all of these functions if its potentialities are to be fulfilled. Broadcasting as an instrument of social change, broadcasting as a means of cultural and educational diffusion, broadcasting as a tool in achieving a greater world-wide ethnological homogeneity—these are some of the vistas that open up when we look forward. It all depends upon how we *use* this *means*. It is frightening to conjure up the results of unscrupulous use; but it is equally heartening to contemplate the possibilities of wise and enlightened use.

⋇ *Chapter 2* ⋇

EARLY HISTORY OF BROADCASTING

The Radio Corporation of America

THE RADIO CORPORATION of America, of which the National Broadcasting Company is a 100-percent-owned subsidiary, was formed on October 17, 1919. At that time the use of wireless was primarily limited to point-to-point and ship-to-shore communication. These messages were transmitted in Morse code. Most of this business in the United States was carried on by the Marconi Wireless Telegraph Company of America, a subsidiary of a British concern, the Marconi Wireless Telegraph Company, Ltd. A number of domestically owned corporations, however, such as General Electric, Westinghouse Electric, and Western Electric Company, the manufacturing subsidiary of the American Telephone and Telegraph Company, were conducting research in the field of radio transmission.

As these research activities yielded important results, exclusive patents were taken out and these in turn served as formidable obstacles to the creation of a national system of radio broadcasting. Each company needed the patented inventions of the others. Not only was there no cross-licensing of patents but these pioneers were continually subject to patent infringement suits.

The declaration of war by this country in April, 1917, temporarily solved this problem, because under its war powers the government combined the patents and scientific resources of all the electrical manufacturing companies. These assets were put into a common pool for the production of radio apparatus for the United States forces. This combining of what was known at that time regarding radio transmission proved to be fortunate. Out of it came the invention and improvement of many of the vital devices which underlie our system of radio broadcasting today.

With the end of the war the situation reverted to exclusive pat-

ents. Confusion and a serious threat to the development of the science were the inevitable results. Furthermore, the British Marconi Company continued to own the principal transmission facilities in this country. It was recognized that foreign control of American radio communications was decidedly not in the national interest and that some arrangement should be worked out whereby the exclusive patents of the individual companies could be shared.

The Radio Corporation of America was born of these two problems. The General Electric Company had developed and patented the Alexanderson alternator, a device then regarded as of prime importance in long-distance radio transmission, and in 1919 G.E. was carrying on negotiations for the sale of the exclusive rights on this invention to the British Marconi Company. There was an outcry of opposition to this contemplated action—the transfer of a vital patent to foreign control.

As a result, General Electric reconsidered and formulated a comprehensive plan whereby a new corporation, the Radio Corporation of America, would be formed and would purchase the British stock interest in the American Marconi Company. The plan further provided that the patents held exclusively by General Electric, the American Marconi Company, and certain other companies in the field would be made available to R.C.A., in which General Electric was to receive a large stock interest.

This pooling of exclusive patents was enlarged in 1920 and 1921 when the American Telephone and Telegraph Company and Westinghouse Electric were admitted to the combine. According to these later cross-licensing agreements, General Electric and Westinghouse Electric were granted the exclusive right to manufacture radio receiving sets; the Radio Corporation of America was given the exclusive right to sell radio receiving sets, which were to be purchased from General Electric and Westinghouse Electric; and American Telephone and Telegraph received the exclusive right to make, lease, and sell broadcasting transmitters.

Both American Telephone and Westinghouse Electric were also given large stock interests in the Radio Corporation of America. Although by January 18, 1923, A.T.T. had disposed of its stock, Westinghouse and General Electric continued to occupy a domi-

nating position in the affairs of R.C.A. until 1932. As a result of an antitrust action brought by the Department of Justice, the Supreme Court in that year granted a consent decree forcing General Electric and Westinghouse Electric to divest themselves of their R.C.A. holdings. This, as we shall see later, marked the culmination of the problem of radio patent monopoly.[1] It is interesting to note that whereas in the early days of broadcasting the government gave its blessing to the patent pool, later on this pool was condemned as a monopoly in restraint of trade, and the Federal authorities felt obliged in the public interest to break it up.

The Radio Corporation of America has flourished. Today it is a great sprawling enterprise sitting astride the American radio industry. In its early days, before the inception of regular broadcasting, the operations of R.C.A. were largely confined to providing radio apparatus for ships, to maintaining ship-to-shore and point-to-point communication service, and to supplying amateurs and experimenters with parts used in assembling radio sets.

With the advent in 1920 of regular broadcasting as contrasted to sending messages in code, the activities of R.C.A. expanded prodigiously. In 1921 the company's gross sales of radio receiving sets were $1,468,920. The next year they were $11,286,489, and by 1924 they totaled about $50,000,000. The president of the company testified at the F.C.C. hearings in 1938 that R.C.A. had become by 1926 the largest distributor of radio receiving sets in the world.

By virtue of an agreement with General Electric and Westinghouse Electric in 1930, the Radio Corporation of America received the additional right to manufacture receiving sets. It now commands a dominant position in this field. It also secured permission from American Telephone in 1932 to manufacture, lease, and sell broadcast transmitting equipment, in which activity it occupies a prominent place at the present time.

In addition R.C.A. plays a major role in the other phases of radio manufacturing and selling. Until 1922 the company had almost complete control of the manufacture, sale, and use of all types of

[1] On August 7, 1942, Thurman Arnold, head of the antitrust division of the Department of Justice, sought to have the 1932 consent decree vacated and indicated that new antitrust suits would be filed against the Radio Corporation of America, General Electric, American Telephone and Telegraph, and others.

radio tubes, and since the expiration of basic patents in that year it has continued to retain a substantial portion of the business. Through Radio-Keith-Orpheum, a company operating a chain of vaudeville and motion picture theaters, R.C.A. gained and still holds an important foothold in the motion picture industry, which of course has a direct relationship to television and its future development. From the competitive standpoint, the motion picture industry is perhaps the most vulnerable to this new type of radio transmission. Finally, the Radio Corporation of America, through its subsidiary, R.C.A.–Victor Company, is entrenched in the business of manufacturing phonograph records and electrical transcriptions for broadcasting purposes.

In 1940 R.C.A. reported net sales of approximately $128,000,000 and net profits of about $9,200,000. At the end of that year the corporation had total tangible assets of approximately $95,000,000, and its 13,881,000 shares of common stock were in the hands of about 250,000 persons. The fact that no holder owned more than one half of one percent of the total stock outstanding in that year is stressed by the management as indicating the wide public support of the corporation. It should be noted that this dilution of ownership also increases the powers of the management enormously. There is no substantial individual block of stock which could be voted in opposition. Furthermore, in view of the disinterest of the average small stockholder in company affairs, any opposing combination of stock is unlikely.

In summary, the Radio Corporation of America is one of our great industrial enterprises—one that has pioneered in the science of radio transmission, has made important contributions to the art through research, and from the beginning has taken the leadership in developing our system of network broadcasting. The company occupies a leading position in the whole radio field. The public interest requires, therefore, that its policies and activities be under close Federal scrutiny.

Early Broadcasting

Radio broadcasting of sound has been defined as the transmission of sound from a transmitter using a certain wave length (or fre-

quency) to receivers attuned to the same wave length, without the aid of physical connection by wire. It is the sending of the human voice or the notes of a musical instrument through the ether on radio carrier waves.

Almost from the start, offers from commercial concerns willing to supply program material in return for the opportunity to advertise over the radio were being received and accepted by broadcasting stations. But even the most sanguine in the industry in those early days had no conception of the gold mine that radio advertising was to become.

The technical history of broadcasting dates from November 1, 1920, when the Westinghouse Electric station KDKA in Pittsburgh was placed in regular operation. The studio of this first sound-broadcasting station was the garage adjacent to the home of Dr. Conrad, an engineer associated with the company. The only receiving sets in the hands of the public in those days were confined to amateur telegraph operators. Phonograph records made up the bulk of the program content, and in order to overcome the extremely bad acoustical conditions Dr. Conrad purchased and erected a canvas tent inside his garage which helped to reduce the reverberations.

KDKA inaugurated the first outside pick-up on January 2, 1921, when it broadcast the church service from the Duquesne Club in Pittsburgh. On April 11 the Ray-Dundee fight was put on the air and this represented the first broadcast of a boxing contest. In August the Davis Cup tennis matches were broadcast for the first time, and in the same month a small privileged group of the American public received its first eye-witness account of a baseball game by radio.

On June 1, 1921, Westinghouse Electric opened its second station, WJZ in New York, which, however, did not begin a regular program schedule until the following October. The first full-time announcer, Milton J. Cross, was engaged by WJZ at that time and he is still with the National Broadcasting Company.

In these early days of broadcasting, transmitting conditions were extremely bad, receiving sets were crude, static was present to an almost intolerable degree, and program content was dull. The

novelty of radio broadcasting and reception had caught the public's fancy, but as the typical evening program schedule taken from the WJZ log book of 1921 will indicate, the broadcasting fare was meager and intermittent.

7:55—8:05—Two test records on Edison phonograph.
8:10—8:15—Newark *Sunday Call* news read by Thomas Cowan.
8:15—8:18—Stand by 3 minutes.
All Quiet.
8:20—Sacred selections on Edison phonograph.
8:35—Sacred selections on Edison phonograph.
8:50—Stand by 3 minutes. KZN and WNY.
8:55—Sacred selections on Edison phonograph.
9:15—End of concert.
WJZ signing off.
9:50—Explain Arlington time signals.
9:55—10:00—NAA time signals.
10:05—Weather forecast.
10:10—WJZ signing off.
10:25—Played an Edison record for Walton 2B2H, a local manager, the gentleman who installed Westinghouse receivers.

The first studio at WJZ was on the second floor of the Newark factory. It was one end of the women's cloak room and was divided from the rest of the room by a sliding curtain. The room contained a phonograph, piano, table, and chair, and the phonograph records were broadcast by placing the microphone in front of the phonograph horn. "Electrical pickups with direct connections to amplifiers were unheard of, and the combination of the acoustical recording, mechanical pickup, mica diaphragms, tin horns and carbon microphones produced a form of complex distortion that one can hardly bear to think of today." [2]

In the early part of 1923 R.C.A. acquired exclusive control of WJZ and later in the year the company commenced to operate station WRC in Washington, D.C. In this way R.C.A. entered the broadcasting business directly. With a hook-up between WJZ and General Electric's station WGY in Schenectady, New York, the first network broadcast by R.C.A. took place in December, 1923. It is interesting to note that prior to the formation of the National

[2] O. B. Hanson, at F.C.C. Hearings re Docket 5060, Transcript, p. 671.

Broadcasting Company in 1926 the Radio Corporation of America in its network activities was limited to the use of Postal and Western Union Telegraph lines, since the American Telephone Company kept its own wires for the exclusive use of its own stations or those licensed under A.T.T. patents. Today most network wire facilities are A.T.T. lines, since they are superior in transmission fidelity to telegraph cables.

Early Advertising

The early days of radio advertising are associated with the stations of the American Telephone Company, particularly WEAF, now the key New York station of the N.B.C. Red network. Under the cross-licensing agreements of 1920 and 1921, A.T.T. contended that its exclusive right to make, sell, and lease broadcasting transmitters also included the exclusive right to sell broadcasting time. The successful assertion of this claim gave the American Telephone Company a position of dominant leadership in early radio advertising and, until the time the National Broadcasting Company was organized in 1926, prevented Westinghouse Electric and later the Radio Corporation of America from exploiting their stations commercially. This inability to sell time on the air, combined with the necessity of using the inferior telegraph cables, explains why the broadcasting activities of R.C.A. developed in the beginning far more slowly than those of A.T.T.

Advertising was the fairy godmother of the broadcasting business. The principal problem at first was how to finance the programs which were essential if radio receiving sets were to be sold. The opinion was practically unanimous that, if possible, a government subsidy should be avoided, as being un-American and involving serious dangers to our form of government. Advertising by radio was the answer.

In 1922 when the radio advertising activities of A.T.T. commenced, all stations in the New York area were required to operate on a single frequency. The American Telephone and Telegraph Company was deluged with requests for radio transmitters for broadcasting purposes. According to the testimony given at the F.C.C. hearings by Mr. Hanson, vice-president and chief engineer

of the National Broadcasting Company, who in 1922 was staff engineer with A.T.T., the company refused to sell these transmitters because of the intolerable confusion that would have resulted.

Instead, A.T.T. decided to erect in New York City "a single high quality station, which would be operated as a public 'toll' station." At the First National Radio Conference held in Washington in the early part of 1922, "toll" broadcasting was defined as "broadcasting where a charge is made for the use of the transmitting station." The following recommendations, among others, were made at the conference with regard to "toll" broadcasting:

> It is recommended that subject to public interest and to the reasonable requirements of each type of service the order of priority of the services be Government, Public, Private, Toll.
>
> It is recommended that the degree of public interest attaching to a private or toll broadcasting service be considered in determining its priority in the granting of licenses, in the assignment of wave frequencies, and in the assignment of permissible power and operating time, within the general regulations for these classes of service.
>
> It is recommended that toll broadcasting service be permitted to develop naturally under close observation, with the understanding that its character, quality and value to the public will be considered in determining its privileges under future regulations.

In erecting this first "toll" station American Telephone went on the theory that public interest would be served and that the service could be supplied with maximum economy through making available to those wishing to communicate with the public by radio a single, centrally located station, relatively free from interference. The present sponsored program developed out of this idea of a "toll" broadcasting station.

On July 25, 1922, a limited commercial license was granted to A.T.T. for station WBAY to operate with 500 watts' power and on a wave length of 360 meters. Regular program transmission was started at that time, but because of acoustical difficulties, WBAY was closed and WEAF was opened by the Telephone Company as a "toll" station on August 16, 1922, on the roof of the Western Electric laboratory at 463 West Street, New York City.

Among the regulations promulgated by the radio division of the Department of Commerce in August of 1922 was one which pro-

hibited the use of mechanically operated musical instruments, such as phonographs, for broadcasting purposes. This original taboo on the use of transcriptions is in vivid contrast to the situation today, when electrical recordings play such an important part in the broadcasting industry. The major networks still, however, do not usually permit the use of transcriptions during network time. Although this early dictum provided a convenient precedent for this policy, as we shall see later, the reasons for the current prohibition are entirely different.

The first advertising client to use WEAF was the Queensboro Corporation, a real-estate company which was developing a section of Jackson Heights, Long Island, and this first commercial program, which took place on August 28, 1922, resulted, according to Mr. Hanson, in the sale of two apartments at the price of $32,000 each and brought three additional prospective purchasers. Thus commercial broadcasting financed by the advertising dollar was launched on its highly profitable career.

Station WEAF is distinguished for many "firsts" in the early history of broadcasting. For instance, the first outstanding field broadcast over long lines occurred on October 28, 1922, when the Princeton-Chicago football game at Stagg Field in Chicago was broadcast by WEAF. The first opera broadcast took place on November 11, 1922, the program being *Aïda,* and the first broadcast of a large orchestra took place on November 18. The first of a series of weekly concerts by the Philharmonic Society of New York, then playing in the Great Hall of the College of the City of New York, commenced over the air on November 22.

The WEAF log book for December 25, 1922, reads "WEAF off the air to permit employees to spend Christmas at home." The night before, however, the station broadcast the first Trinity Church Christmas Eve service. With Governor Alfred E. Smith of New York, Haley Fiske, president of the Metropolitan Life Insurance Company, Charles M. Schwab, and Secretary of Commerce Herbert Hoover in attendance, the first broadcast of a banquet was made on January 27, 1923; it consisted of the program for the annual dinner of the Metropolitan Life Insurance Company at the Hotel Astor.

The first presidential address over long lines to be broadcast occurred on June 21, 1923. President Harding spoke from the Coliseum in St. Louis on the subject of the "World Court." This program was brought to WEAF by long-distance telephony. The first presidential broadcast took place seven months earlier over WJZ when President Harding spoke at Madison Square Garden.

November 6, 1923, marked the date of the first broadcast from the House of Representatives when President Coolidge read his initial message to Congress. His address was carried by WEAF, WCAP, WMAF, and WJAR. About three months later the predecessor of the "fireside chat" occurred when President Coolidge spoke for the first time over the radio direct from the White House.

By the end of 1923 radio broadcasting was an established advertising medium. Some of the sponsors of commercial programs over WEAF in that year were Haynes Automobile Company, Colgate Company, Gotham Silk Hosiery, I. Miller Shoes, California Prune and Apricot Growers, Davega Sporting Goods, Lily Cup Company, Gimbel Brothers, Corn Products Company, and Knit Underwear Manufacturers. With regard to the standards of radio advertising at this time it is interesting to cite the following excerpts from a speech given over wire facilities from New York City by W. E. Harkness, manager of broadcasting for the American Telephone Company, at the annual meeting of the Association of National Advertisers, held at the Westchester Biltmore Country Club on November 12, 1923:

> By agreement with the Government, no direct advertising matter is to be broadcast. This restricts the use of the medium to indirect, or what may be called institutional advertising. . . . In considering the presentation by radio of . . . advertising matter our first thought is "what will be the reaction of the public to the matter presented?" If, in our opinion, based on our experiments in presenting other subjects, the proposed presentation will be more than acceptable to the public we will put it on our program. Otherwise, it is rejected or the prospective customer advised how it can be rearranged or an entirely different plan developed to accomplish the results desired. . . .
>
> As has been mentioned the style required for vocal presentation differs from that used when printed copy is employed. It may also be desirable to use either male or female voices in presenting a subject, or, in some cases, more than one person may be required . . .

The subjects presented and the methods employed have been varied so that our experience today covers a rather wide range—from a ten-minute talk to a complete program of high-class entertainment so arranged as to present the name of the firm to the public in the most favorable manner.

We recently sent out 25,000 questionnaires . . . and received back over 45%, completely filled in. . . . The answers to questions on this subject (music) showed that 80% desired symphony or similar types of music, and only 49% desired dance music, 43% popular songs, 60% violin, and 53% piano music.

Two things should be noted with respect to this talk, aside from the general discussion of standards: (1) that radio advertising was limited to the institutional type and that direct appeals for the sale of particular products was prohibited; and (2) that nearly twice as many persons in the listening audience who replied to the questionnaire desired to hear symphony music as those desiring to hear dance bands. Both of these conditions, of course, are in marked contrast to the broadcasting situation today when most of us are exasperatingly annoyed at times by the direct selling appeals of advertisers and when the overwhelming choice of the listening public is for swing.

From 1923 on, radio advertising expanded rapidly and by the time of the formation of the National Broadcasting Company it provided not only the financial support for putting programs on the air but it had also become a very profitable business in itself. Chain broadcasting had developed along with this growth and we must now turn to this subject because radio advertising and networks go hand in hand. Each is the corollary of the other.

Early Networks

It is axiomatic that advertising tries to reach more and more people. Except where a specialized market is desired, the larger the circulation the better. The 130,000,000 people in the United States represent radio's potential circulation, and broadcasting has become the most effective means for mass communication in the history of the world.

Assuming a willingness to listen on the part of the radio audience and the possession of the facilities to do so, there are two methods

by which a broadcasting station can enlarge its potential circulation—by increasing the power used or by linking the station up with others in a chain or network. With the entrance of advertising into radio and under the impetus of the advertiser's main objective to secure as large an audience as possible, the broadcasting industry went in both of these directions. There was a clamor for more power, and the trend toward chain broadcasting was irresistible. The broadcasting system today, as we shall see in detail later, is an unsatisfactory combination of these two elements with the network principle being predominant.

Radio advertising in the absence of unlimited power thus made networks inevitable. This is not to say that the advertising revenue was the sole motive in expanding the simultaneous reception of the same program. Undoubtedly some of the pioneers of early commercial broadcasting realized the tremendous opportunity offered for bringing programs of high quality and importance to the nation as a whole. It seems clear, however, that the plain economics of the situation was the principal determining factor in the development of radio networks with national coverage.

In this connection Mr. Hanson offers a somewhat different explanation for the origination of chain broadcasting. He testified that putting outstanding events on the air by WEAF in 1922 created a great interest on the part of the public.

> Most receivers used earphones and it was not difficult to hear WEAF signals at night at a distance of a thousand miles and many stations in other cities, not having equipment available for pickups of such outstanding events, shut down in order that their audience could tune in on WEAF's signals from New York. The audience's pressure on local stations to attempt to get wire connections to the New York studio of WEAF deluged the Telephone Company with requests that such facilities be provided. . . . The management of WEAF was faced with the ever-increasing cost of the handling of these special broadcasts and it became apparent that if the cost of such pickups could be shared by a number of stations partaking in the program, funds would be available to extend the pickup service to even better and more interesting program material.[3]

According to Mr. Hanson, therefore, American Telephone prepared a special circuit between New York and Boston. On January

[3] F.C.C. Hearings re Docket 5060, Transcript, p. 694.

4, 1923, station WNAC (Shepard's Store, Boston) was connected by a long-line telephone circuit to the studio of WEAF (New York), and a special program was broadcast as a demonstration. Although this was merely an experiment and did not represent the first regular network broadcast, the occasion marked the first time in the history of broadcasting that two transmitters in widely separated cities were connected to a common program by wire lines.

It remained for the son of Hetty Green—the lady of Wall Street fame—to participate in the first regular network broadcast. In the spring of 1923, Colonel Green became interested in broadcasting and erected a Western Electric transmitter on his estate at Salter's Point, South Dartmouth, Massachusetts. The Colonel, however, lacked program material to broadcast and consequently he asked A.T.T. if they would program his station. On July 1, 1923, the first of a series of programs which ran until September 30 was transmitted by wire lines from the WEAF studio in New York to Colonel Green's station, WMAF. This date, July 1, 1923, marks the beginning of regular network broadcasting.

Shortly after this noteworthy event the Telephone Company decided to erect a transmitter in Washington, D.C. This was a duplicate of the WEAF transmitter, and WCAP in Washington was connected by wire lines with WEAF in New York. During the summer of 1923 WCAP, along with Colonel Green's station WMAF, was furnished with program material over long-distance wires from the New York studio. This period marked the inauguration of network sustaining programs because there were times when two programs were transmitted simultaneously from the New York studio, one sustaining program for the two network stations and the other a commercial program going out on the air over WEAF.

By the end of 1923 there were 542 broadcasting stations in operation in the United States. The mortality rate was high, however, because in that year 264 new stations were licensed and 285 stations discontinued operations. The tendency to link stations up into a chain was also very much in evidence. As already noted, at about this time WJZ attempted to organize a network using Western Union Telegraph wires, and the first connection was between WGY in Schenectady and WJZ in New York. On December 11, 1923, WSYR in Syracuse was added. But WEAF, because of its ex-

clusive right to accept sponsored programs, took the lead in the development of network broadcasting. Station WJAR in Providence, Rhode Island, was linked to the New York station on October 19, 1923, and, except for Colonel Green's station, it became the first independently owned station to be permanently connected with the WEAF network.

Expansion from this time on was rapid. The first transcontinental broadcast occurred on February 8, 1924, when seven stations across the country were connected by long-line wire facilities to the studios of WEAF. Havana, Cuba, linked to the chain by submarine cables, also participated in this program, which represented the first network connection outside the continental United States.

By the end of 1924 five new stations, in Worcester and Boston, Massachusetts; Pittsburgh and Philadelphia, Pennsylvania; and Buffalo, New York, had been added to the WEAF network. WJZ had also extended its network by telegraph lines to Washington, D.C., and Westinghouse Electric was experimenting with short-wave transmission across the country to station KFKX in Hastings, Nebraska.

The report of the Third National Radio Conference held in Washington in October, 1924, made the following statement with respect to the rapidly growing network industry:

> The interconnection of stations so as to provide for simultaneous broadcasting has been the most important development of the last 18 months. It has now made possible a wide extension in knowledge of national events. It means a vast improvement in programs. It makes the talent of our great cities available everywhere. It has reached the point where a few stations are now thus interconnected as a matter of routine and regular procedure. There have been very recently several actual demonstrations of the possibility of nationwide simultaneous broadcasting by interconnection. The conference affirmatively finds that simultaneous broadcasting of national events is today practicable over a large portion of the United States. It believes that nationwide broadcasting by interconnection of stations deserves every encouragement and stimulation, and to that end recommends the appointment by the Secretary of Commerce of a continuing committee which will give consideration to the working out of the necessary plans for its full accomplishment.

In keeping with the attitude expressed in the report the Department of Commerce early in 1925 gave WEAF permission to in-

crease its power to 5,000 watts in steps of 500 watts, the full increase not being reached until September 1, 1925. This transmitter remained in operation until 1927, when one with still higher power replaced it.

The evening of July 11, 1925, affords an example of the use of the WEAF network by advertisers. The evening's broadcasting fare consisted of Vincent Lopez' orchestra sponsored by Gimbel Brothers, Jones and Hare sponsored by Happiness Candy, the Ever-ready Quartet sponsored by the National Carbon Company, the Gold Dust Twins sponsored by the Gold Dust Company, and the Fisher Astor Coffee dance orchestra sponsored by Astor House Coffee.

By the end of 1925 there were 26 stations on the WEAF network, which reached as far west as Kansas City. Chain broadcasting financed by the advertiser's dollar had become an important industry in its own right.

✕ *Chapter 3* ✕

THE NATIONAL NETWORK COMPANIES

The National Broadcasting Company

MR. DAVID SARNOFF, now president of the Radio Corporation of America and chairman of the board of the National Broadcasting Company, on June 17, 1922, wrote a letter to Mr. E. W. Rice, then honorary chairman of the board of the General Electric Company, suggesting the organization of such a company as N.B.C. The letter is interesting because it indicates that this leading figure in the business did not even at this relatively late date anticipate the flood of advertising revenue.

In the second place, the letter is noteworthy for its complete recognition of the public responsibility resting on the shoulders of the industry. As we proceed, we shall see how well the National Broadcasting Company has lived up to its role of public service as here outlined by Mr. Sarnoff. The more significant excerpts from his letter to Mr. Rice are as follows:

> Broadcasting represents a job of entertaining, informing and educating the nation and should therefore be distinctly regarded as a public service. . . . It requires expert knowledge of the public's taste. . . . That the manufacturing companies or communication companies are not at present organized and equipped to do this kind of a job in a consistent and successful way, is to my mind . . . clear.
>
> If the foregoing premises be correct, it would seem that the two fundamental problems calling for a solution are:
>
> 1) Who is to pay for broadcasting.
>
> 2) Who is to do the broadcasting job . . .
>
> To my mind none of the suggestions yet made with which I am acquainted are sufficiently comprehensive or capable of withstanding the test of real analysis, and this largely because the major portion of the suggestions thus far offered build a structure on a foundation which calls for voluntary payment by the public for the service rendered through the air.

With respect to problem No. 1 . . . I am of the opinion that the greatest advantages of radio, its universality and generally speaking its ability to reach everybody everywhere, in themselves limit if not completely destroy that element of control essential to any program calling for continued payment by the public.

Stated differently, it seems to me that where failure to make a payment does *not* enable the discontinuance of service, as for example in wire telephony, gas, electric light or water supply, the temptation to discontinue payments on the ground of poor service, and so forth, is too great to make any system of voluntary public subscription sufficiently secure to justify large financial commitments or the creation of an administrative and collection organization necessary to deal with the general public. . . .

For these reasons I am led to the conclusion that the cost of broadcasting must be borne by those who derive profits directly or indirectly from the business resulting from radio broadcasting. This means the manufacturer, the national distributor, the Radio Corporation of America, the wholesale distributor, the retail dealer, the licensee and others associated in one way or another with the business.

As to No. 2, when the novelty of radio will have worn off, and the public no longer is interested in the means by which it is able to receive but rather in the substance and quality of the material received, I think that the task of reasonably meeting the public's expectations and desires will be greater than any so far tackled by any newspaper, theatre, opera, or other public information or entertainment agency. . . . The broadcasting station will ultimately be required to entertain a nation. No such audience has ever before graced the efforts of even the most celebrated artists, or the greatest orator produced by the ages. . . .

With the foregoing in mind, I have attempted to arrive at a solution of both problems, No. 1 and No. 2. . . . Let us organize a separate and distinct company to be known as the Public Service Broadcasting Company, or National Radio Broadcasting Company, or American Radio Broadcasting Company, or some similar name, this company to be controlled by the Radio Corporation of America, but its board of directors and officers to include members of the General Electric Company, Westinghouse Electric, and possibly also a few from the outside, prominent in national and civic affairs. The administrative and operating staff of this company to be composed of those considered best qualified to do the broadcasting job—such company to acquire the existing broadcasting stations of Westinghouse Electric and General Electric as well as the three stations to be erected by the Radio Corporation, to operate such stations and build such additional broadcasting stations as may be determined upon in the future.

Since the proposed company is to pay the cost of broadcasting as well

as the cost of its own administrative operations, it is of course necessary to provide it with a source of income sufficient to defray all of its expenses.

As a means for providing such income, I tentatively suggest that the Radio Corporation pay over to the Broadcasting Company 2% of its gross radio sales, that General Electric and Westinghouse Electric do likewise, and that our proposed licensees be required to do the same.

. . . Once the structure is created opportunities for providing additional sources of income to increase the "pot" will present themselves. For example, if the business expands, the income grows proportionately. Also, we may find it practicable to require our wholesale distributors to pay over to the broadcasting company a reasonable percentage of their gross radio sales, for it will be to their interest to support broadcasting. It is conceivable that the same principle may even be extended in time to the dealers. . . .

Since the broadcasting company is to be organized on the basis of rendering a public service commensurate with its financial ability to do so, it is conceivable that plans may be devised by it whereby it will receive public support, and, in fact, there may even appear on the horizon a public benefactor, who will be willing to contribute a large sum in the form of an endowment. . . .

I feel that with suitable publicity activities, such a company will ultimately be regarded as a public institution of great value in the same sense that a library, for example, is regarded today. . . .

The person who in the future may endow a broadcasting station . . . will be a still greater public benefactor because of the many advantages which a broadcasting service offers to all classes of people, not only in the matter of education, but also in entertainment and health services, etc. Important as the library is, it can only provide the written word and at that it is necessary for people to go to the library in order to avail themselves of its services, whereas in broadcasting the spoken word is projected into the home where all classes of people may remain and listen.

Not until 1926 did Mr. Sarnoff's plan for a separate broadcasting company become a reality. In that year, under a plan for a general readjustment of relations between the American Telephone Company and the so-called radio companies (R.C.A., Westinghouse Electric, and General Electric), A.T.T.'s direct participation in the broadcasting field, where it had pioneered and gained a dominating position, came to a sudden end when it withdrew from the business and transferred all of its broadcasting properties and interests to the "Radio Group."

A subsidiary corporation, the Broadcasting Company of America, had been incorporated by the Telephone Company in May of 1926, and WEAF and the network operations aligned with this station were transferred to this new concern. On November 1, 1926, the Radio Corporation of America purchased for $1,000,000 the assets of the Broadcasting Company of America. This purchase made possible the sale of broadcasting time by R.C.A. As part of the agreement, A.T.T. covenanted not to compete with R.C.A. in the field of radio broadcasting for a period of seven years, under penalty of repaying $800,000 of the $1,000,000 purchase price. Furthermore, the Telephone Company agreed to make its telephone lines available to R.C.A. for network broadcasting, and a stipulation was entered into whereby the latter would use only A.T.T. lines whenever they were available.

The National Broadcasting Company was formed by the Radio Corporation of America on September 9, 1926, to take over its network broadcasting business, including the properties which were to be purchased from the Telephone Company, and until the organization of the Columbia Broadcasting System in 1927 R.C.A. through this subsidiary enjoyed a practical monopoly of network broadcasting, having under its control the only two national networks—the Red (WEAF) and the Blue (WJZ). R.C.A., General Electric, and Westinghouse Electric owned the outstanding capital stock of N.B.C. in the ratio of 50, 30, and 20 percent respectively. On May 23, 1930, however, the Radio Corporation of America acquired the N.B.C. stock owned by General Electric and Westinghouse, the National Broadcasting Company thus becoming a wholly owned subsidiary of R.C.A.

Since its organization the National Broadcasting Company has been an exceedingly successful enterprise. During every year except its first the company has earned a profit. Both the volume of business and earnings increased sharply, as shown by Table 1, taken from the F.C.C. *Report on Chain Broadcasting*.[1]

The authorized capital stock of N.B.C. is fifty thousand shares of no par common, of which thirty-three thousand shares have been issued at a price of $100 per share. The company has never had any bonds or other securities outstanding.

[1] Page 17.

TABLE 1

TIME SALES AND NET INCOME OF THE NATIONAL BROADCASTING COMPANY

Year	*Time Sales (after Discounts; before Agency Commissions)*	*Net Income for the Year before Federal Income Tax*
November 1926—December 1927	$3,384,519	$464,385 [a]
1928	7,256,179	427,239
1929	11,353,120	798,160
1930	15,701,331	2,167,471
1931	20,455,210	2,663,220
1932	20,915,979	1,163,310
1933	18,005,369	594,151
1934	23,535,130	2,436,302
1935	26,679,834	3,656,907
1936	30,148,753	4,266,669
1937	33,690,246	4,429,386
1938	35,611,145	4,137,503
1939	37,747,543	4,103,909
1940	41,683,341	5,834,772

[a] Deficit.

The Columbia Broadcasting System

On January 27, 1927, the United Independent Broadcasters, which later became the Columbia Broadcasting System, was incorporated in New York. The purpose of United was to furnish broadcasting programs, to contract for radio station time, and to sell time to advertisers. In short it was to be a broadcasting "time broker" and a program agency. Before the concern commenced operations, however, the Columbia Phonograph Company became interested in it in April, 1927, through the Columbia Phonograph Broadcasting System, which had been organized to act as the sales unit of the network. The Columbia Phonograph Company and four individuals originally owned the outstanding stock of the Columbia Phonograph Broadcasting System.

The first regular broadcast took place on the United network on September 25, 1927. United contracted to pay $500 per week for

ten specified hours of time to each of the sixteen stations on its original network. However, the company ran into financial difficulties, owing to its inability to sell sufficient time to advertisers to carry out these agreements and heavy losses were experienced. Consequently, the Columbia Phonograph Company and the four individuals withdrew from the venture in the fall of 1927. Following this, United acquired all the outstanding stock of the Columbia Phonograph Broadcasting System and the name of the sales company was changed to the Columbia Broadcasting System. Subsequently, the sales company was dissolved and United assumed its activities and its name in January, 1929. The network has been known as the Columbia Broadcasting System since that time.

In September, 1928, William S. Paley and his family purchased a 50.3 percent stock interest in the network, and the Paley family at the time of the F.C.C. hearings still controlled sufficient stock to elect a majority of the board of directors of fourteen.

TABLE 2

TIME SALES AND NET INCOME OF THE COLUMBIA BROADCASTING SYSTEM

Year	*Time Sales (after Discounts; before Agency Commissions)*	*Net Income (before Provision for Federal Income Tax)*
Apr. 5, 1927 to Dec. 31, 1927	$176,557 [a]	$220,066 [b]
1928	1,409,975 [c]	179,425 [b]
1929	4,453,181	474,203
1930	6,957,190	985,402
1931	10,442,305	2,674,158
1932	11,518,082	1,888,140
1933	9,437,100	1,083,964
1934	13,699,649	2,631,407
1935	16,391,565	3,228,194
1936	21,449,676	4,498,983
1937	25,737,627	5,194,588
1938	25,450,351	4,329,510
1939	30,961,499	6,128,686
1940	35,630,063	7,431,634

[a] Agency commissions have also been deducted from the figure for this short period.
[b] Deficit.
[c] Includes sales of talent and other services.

The Columbia Broadcasting System has been even more profitable than N.B.C. as Table 2, from the F.C.C. *Report on Chain Broadcasting,*[2] indicates.

Like N.B.C., Columbia is engaged in all phases of the broadcasting industry. As early as 1930 it entered the talent business; in 1938 it purchased from Consolidated Film Industries, Inc., the capital stock of the phonograph record company known as the American Record Corporation; and in 1940 Columbia entered the transcription field.

The Mutual Broadcasting System

The Mutual Broadcasting System is different in set-up from National and Columbia. Instead of owning stations, the network is owned by a group of stations. Except for European news broadcasts, Mutual does not produce any programs—sustaining performances are all provided by the individual stations for network distribution, and commercial programs are produced either by the originating outlet or by the advertiser himself. Hence Mutual has no studios or artists' bureau.

On September 29, 1934, the Mutual Broadcasting System was organized. WGN Inc., Bamberger Broadcasting Service, Inc., Kunsky-Trendle Broadcasting Corporation, and Crosley Radio Corporation—who were the licensees of stations WGN in Chicago, WOR in Newark, WXYZ in Detroit, and WLW in Cincinnati, respectively—contracted for wire-line facilities from the American Telephone Company and entered into an agreement among themselves in order to secure contracts with advertisers for network broadcasting of commercial programs. In a supplementary contract on the same date, a new corporation, the Mutual Broadcasting System, Inc., was organized and incorporated in Illinois on October 29, 1934, which was to carry on the business of selling time to advertisers over the four-station network. The ten shares of capital stock of Mutual were originally owned equally by WGN, Inc., a subsidiary of the Chicago *Tribune,* and the Bamberger Broadcasting Service, Inc., a subsidiary of L. Bamberger and Company, which in turn is a subsidiary of R. H. Macy and Company.

[2] Page 24.

The structure of the Mutual network became more complex as the number of outlets increased. There were two member stations, WGN and WOR, holding stock control of Mutual at the time of the F.C.C. hearings in 1939. In addition there were four participating member organizations—the Colonial Network, the United Broadcasting Company, the Don Lee Network, and the Western Ontario Broadcasting Company, Ltd. All other stations associated with Mutual were affiliates.

In January of 1940, however, Mutual issued stock to the four companies mentioned above as well as to the Cincinnati *Times-Star* Co., licensee of WKRC in Cincinnati. After these changes, the issued capital stock of Mutual was 100 shares held as follows: 25, WOR; 25, WGN; 25, Don Lee; 6, Colonial Network; 6, United Broadcasting Company; 6, Cincinnati *Times-Star;* 6, Western Ontario Broadcasting Company, Ltd.; and 1, Fred Weber (qualifying share).

Although the volume of Mutual's business has increased since its formation, its activities are on a far smaller scale than those of Columbia and National as the following figures,[3] showing network time sales after discounts but before commissions, indicate:

1935	$1,108,827
1936	1,884,615
1937	1,650,525
1938	2,272,662
1939	2,610,969
1940	3,600,161

The Blue Network Company

Under pressure from the Federal Communications Commission and in view of the widespread opinion that such action was desirable in the public interest, the Radio Corporation of America took steps to divorce the Red and the Blue networks of the National Broadcasting Company. The actual separation took place on January 9, 1942, when incorporation papers for the Blue Network Company, Inc., a separate, wholly owned subsidiary of R.C.A., were filed. With permission of the F.C.C., the new company continued

[3] F.C.C., *Report on Chain Broadcasting,* p. 28.

to operate the Blue chain and to own and manage stations WJZ in New York City, WENR in Chicago, and KGO in San Francisco. The company also continued to furnish program service to more than 100 stations previously affiliated with the Blue network. Mark Woods and Edgar Kobak, former N.B.C. executives, became president and executive vice-president, respectively, of the new company, and Niles Trammell, president of N.B.C., was made chairman of the executive committee. The separation of the two chains was, therefore, one more in name than in fact.

This was fully recognized by the Commission, despite the fact that Regulation 3.107 had been rescinded. The arrangement was regarded as temporary, pending the finding of an outside purchaser to assume the operation of the Blue network. At a luncheon in Chicago on January 15, 1942, celebrating the formation of the new company, Chairman Fly stated that the Blue network could and should be sold as a going concern under independent management and that the F.C.C. would give every aid to facilitate its transfer to other interests. He declared that the United States has room for four separate national chains and that the potentialities of the Blue network were too great to let it continue as anyone's "little brother."

✕ *Chapter 4* ✕

NETWORKS AND ADVERTISING

Two Basic Considerations

THERE ARE about 900 standard broadcast stations[1] in the United States. Each one is regarded by the Federal authorities as a sovereign, independent unit which must be in a position to broadcast a different program at the same time. This is the fundamental philosophy of the government's licensing policy. As a result, each station of sufficient power or geographical proximity to cause interference with another station is licensed on a different frequency.

A radio transmitter emits two kinds of waves. The ground wave travels near the earth. Where 50 KW, the maximum power now permitted, is used, the ground wave during both the day and the night provides primary service in an area with a radius of about 150 to 200 miles. On the other hand, the sky wave travels upward and is reflected back to earth at night by the ionosphere.[2] It, therefore, renders secondary service during the night hours in far distant places.

Thus when a station is operated on the maximum power at night, a clear channel frequency may be required to avoid program interference. As a result of international agreements, there were in 1942 twenty-five Class I channels available in the standard band for the use of such high-powered (Class I A) stations in this country. In addition, there were available under less rigid engineering standards seven other Class I channels.

Twenty-three of the first group of twenty-five Class I channels

[1] Commercial stations make up the bulk of so-called standard broadcast stations, or those using the standard broadcast band. Frequency modulation and television stations are not included in the standard band. They operate on short-wave and in the part of the radio spectrum designated as the high frequency broadcast band.

[2] Ionized layers of air above the earth and frequently referred to as the Kennelly-Heaviside Layer.

were assigned for the exclusive nighttime use of twenty-three Class I A stations. In contrast, a number of stations were licensed to operate on each of the remaining nine Class I channels at night and these are designated as Class I B stations. According to the testimony of E. K. Jett, chief engineer of the Federal Communications Commission, before the House Committee on Interstate and Foreign Commerce, there were a total of forty-five licensees rendering service in July of 1942 on the thirty-two Class I channels available to the United States.

The primary purpose of Class I A stations—or what are generally referred to as clear channel stations—is to reach out great distances at night and provide service to the rural areas. Later we shall discuss how well this purpose is being achieved in actual practice.

During the daytime an entirely different situation exists with respect to high-powered stations. Granted the geographical separation is sufficient, an exclusive frequency is not required to prevent program interference because sky wave propagation is not effective and because the ground wave gives service at such relatively short distances from the transmitter. Hence, many of the twenty-three Class I A stations, which have the exclusive use of separate frequencies during the night, share these frequencies with other stations during the day. The latter, however, are required to cease broadcasting at sundown.

As a result of the basic licensing philosophy of the Commission that each station must be in a position to broadcast a different program at the same time, the number of stations that can be accommodated on a single frequency without interference is the corollary of the power used or the geographical separation. For instance, station B cannot be licensed to broadcast on the same frequency as station A if it is either located in the primary service area or to a less extent in the secondary service area of the latter, because reception by the listening audience from both stations would be seriously impaired by program interference between the two.

This question of assignment of frequencies for commercial broadcasting in the standard band and the collateral problem of interference between stations have been the subject of intensive investi-

gation by the Commission and by independent engineers for years. Gradually a very complicated system has been developed. The test in each case as to whether a station will be licensed to operate on an exclusive nighttime frequency or will be licensed on a frequency shared by other stations is the avoidance of a designated degree of interference. Today there are, in addition to Class I A and I B stations, so-called regional and local stations. There are fewer regional stations on the same frequency because they generally broadcast with greater power than local stations serving a single community.

In other words, one must think of the commercial broadcasting picture in the standard band as composed of about 900 individual stations, each in a position to broadcast without undue interference from another station a *different* program simultaneously either on an exclusive frequency or on the same frequency. As we shall see later, this philosophy of individual program sovereignty on the part of each station is in fundamental conflict with the essential nature of network broadcasting, which requires that the *same* program be broadcast simultaneously by a group of stations connected in a chain.

One may wonder why there are so few commercial broadcast stations in a country of 300,000,000 square miles and with a population of 130,000,000 people. The answer is not that there is no demand for more stations or that the economic support for more stations is lacking. The real reason is *lack of frequencies,* and this is the second basic consideration which must be borne in mind.

The radio spectrum imposes limitations upon the number of frequencies available for commercial broadcasting, but these limitations have been exaggerated by the government. This alleged extreme deficiency of wave lengths is the most fundamental factor in the conflict between the Federal Communications Commission and the network industry. Later we shall analyze this question at further length, for it both underlies and is accentuated by the policies of the government, and it is the foundation on which the new regulations were based. At this point it is sufficient to recognize that the problem of lack of frequencies has three facets: (1) limitations imposed by nature: (2) limitations imposed by the allocation of the

frequencies available; and (3) limitations imposed by the licensing policy of the Commission.

The Nature of a Network

Section 3 (p) of the Communications Act of 1934 defines chain (or network) broadcasting as "the simultaneous broadcasting of an identical program by two or more connected stations." There are national networks and regional networks, the difference being the amount of area covered. In this study we are concerned only with national networks which can be thought of as those providing service to more than 50 percent of the population or transcontinental in character. In the United States there are four such networks broadcasting "live" programs—the Red and the Blue networks, until 1942 operated by the National Broadcasting Company, the network of the Columbia Broadcasting System and that of the Mutual Broadcasting System. The Columbia network is similar in most respects to the Red and the Blue, but the Mutual Broadcasting System, as we have seen, is different in character. Although this difference is not vital to the principal aspects of a network, Mutual will be largely excluded from this discussion.

From the standpoint of a national network, the definition of chain broadcasting as given in the Communications Act is very broad because it would apply equally to a regional network. However, it emphasizes the two principal characteristics of network broadcasting: (1) two or more stations connected together; and (2) simultaneous broadcasting of the *same* program.

With reference to the first part of the definition—connection of stations—this can be accomplished in three ways, assuming the willingness of the sovereign station to be connected: by wire lines, by short-wave radio beam, and by transcriptions.

As we have already noted, wire lines of the American Telephone Company, which have been increasingly perfected through the years, are used by N.B.C. and C.B.S. to connect the stations together on their respective networks.

Instead of sending the audio wave over wires, however, it could be done and has been done experimentally by short-wave radio beam—that is, modulating the audio wave on a high-frequency

radio wave and transmitting it directly through the ether to the stations on the network. In the future, the author believes, this system will be used at least in part because it would be far more economical than wire lines.

In the present state of the art, such a method of network transmission has its disadvantages, however. The horizon represents about the maximum distance over which this type of beam can be used without a relay transmitter. In addition, once a program is put on the air by means of a radio beam, anyone with the proper equipment in the reception area can receive and rebroadcast it. Although the network companies could undoubtedly take legal steps against this kind of program thievery, the use of radio beams would weaken program exclusivity, which is protected through the use of wire lines and, therefore, the chains are in no hurry to adopt this method of transmission.

When transcriptions are the means employed for connecting individual stations to form a network, the connection is made by having each station on the chain in possession of the same recording to be broadcast at a certain time. Here the common program itself forms the only connecting link as contrasted to the literal physical connection where wire lines are used and to the connection through electrical energy where radio beams are employed. The system of forming a network through the employment of identical electrical recordings is entirely feasible, as the experience of the World Broadcasting Company illustrates.

The second principal characteristic of network broadcasting, except where electrical recordings are used, is the "simultaneous broadcasting of the *same* program." The connection between the stations is a technical matter, but this "same program" simultaneity involves basic questions of governmental licensing policy. The broadcasting of the same program at the same time by all outlets on a chain means that all these stations, since they have program sovereignty, must be *willing* to do just that. The networks secure this willingness in two ways: (1) by ownership or lease of the individual stations themselves; and (2) by affiliation contracts with the outlets.

At this point we will not discuss in any detail these two means of

securing the stations' willingness. They are, however, vital to the conflict between the Federal Communications Commission and the network industry and will be fully analyzed when we review the issues in the controversy. Nevertheless, it should be mentioned here that N.B.C. and C.B.S. found they could not rely on willingness gained through an affiliation contract alone. They required greater certainty with respect to key stations and lucrative advertising markets, such as New York, Washington, Chicago, and San Francisco. In these cities the majority of network commercial and sustaining programs originate. These communities are also the most desirable from the advertiser's standpoint. It was essential that there should be a maximum of assurance that the outlets located in those places would be willing to broadcast a commercial program at a specified hour, and therefore the two major network organizations purchased or leased those stations.

Tables 3 and 4, taken from the F.C.C. *Report on Chain Broadcasting*,[3] show the stations as of 1941 which were licensed to the National Broadcasting Company and the Columbia Broadcasting System:

TABLE 3

STATIONS LICENSED TO THE NATIONAL BROADCASTING COMPANY

N.B.C. Stations	*Location*	*Power (Watts)*	*Date of Acquisition*
WEAF	New York	50,000	1926
WJZ	New York	50,000	1922 [a]
WRC	Washington	5,000	1923 [a]
WMAL	Washington	5,000	1933
WTAM	Cleveland	50,000	1930
WMAQ	Chicago	50,000	1931
WENR	Chicago	50,000	1931
KOA	Denver	50,000	1930
KPO	San Francisco	50,000	1932
KGO	San Francisco	7,500	1930

[a] Date of acquisition by R.C.A.; title transferred to N.B.C. in 1930.

[3] Pages 16 and 23.

TABLE 4

STATIONS LICENSED TO THE COLUMBIA BROADCASTING SYSTEM

C.B.S. Stations	*Location*	*Power (Watts)*	*Date of Acquisition*
WABC	New York	50,000	1928
WJSV	Washington	50,000	1932
WBT	Charlotte, N.C.	50,000	1929
WEEI	Boston	5,000	1936
WBBM	Chicago	50,000	1929
WCCO	Minneapolis	50,000	1931
KMOX	St. Louis	50,000	1931
KNX	Los Angeles	50,000	1936

All of these stations, with the exception of WENR, were operating in 1941 on unlimited time.

The great majority of the stations on a network are simply affiliated with the network organization through contractual arrangements. N.B.C. had only 19 stations and C.B.S. only 15 stations when the two major national network companies were first organized in 1926 and 1927, respectively. The number of regular affiliates grew rapidly, however. On January 1, 1941, National had 214 outlets. In contrast, on the same date the Columbia Broadcasting System had 121 stations and the Mutual Broadcasting System had 160 stations. The tremendous growth in national network outlets is illustrated by Table 5.[4]

A network provides two sorts of programs—commercial and sustaining. Commercial programs are sponsored and paid for by an advertiser; sustaining programs are usually produced by the network organization itself and made available to an individual outlet at times when it is not broadcasting a commercial network program or when it is not putting some local community event or local advertising program on the air.

In the early days of network broadcasting no sustaining program service was provided. When it was first originated by N.B.C. a charge

[4] Compiled from figures taken from the F.C.C. *Report on Chain Broadcasting*, pp. 15 and 23.

TABLE 5

GROWTH IN NATIONAL NETWORK OUTLETS

Date (End of Year)	Number of Outlets			Approximate Percentage of Outlets to Total Number of Stations		
	N.B.C.[a]	C.B.S.	M.B.S.[b]	N.B.C.	C.B.S.	M.B.S.
1923	2			0.3		
1924	7			1.3		
1925	15			2.6		
1926[c]	19			2.6		
1927	48	15		6.9	2.2	
1928	56	28		8.3	4.1	
1929	69	47		11.2	7.6	
1930	72	69		11.9	11.4	
1931	83	82		13.8	13.6	
1932	85	92		14.2	15.4	
1933	85	92		14.6	15.8	
1934	86	97	4	14.7	16.6	0.7
1935	87	97	3	14.1	15.7	0.5
1936	103	93	39	15.9	14.4	6.0
1937	138	110	80	20.0	16.0	11.6
1938[d]	161	113	107[f]	22.3	15.7	14.8
1940[e]	178	117	116	23.3	15.3	15.2
1940	214	121	160	25.8	14.6	19.3

[a] Figures prior to November 1, 1926, are for the American Telephone Company network.

[b] Station CKLW, Windsor, Ontario, Canada, is not included.

[c] November 1.

[d] November 30 for N.B.C.

[e] February 1.

[f] January 17, 1939.

of $90 per hour was made to the affiliate; this eventually was reduced to $45 per hour. A distinction between night and day sustaining charges then developed so that by 1929 an affiliate was paying only $22.50 per hour during the daytime for this service.

In 1930 the charges were $25 per evening hour and $15 per daytime hour. Shortly after this a flat rate of $1,500 per month for sustaining service was instituted. This arrangement continued until 1935, when the company adopted its new form of contracts with its affiliates by which the network organization agreed to furnish to its affiliated stations a minimum of 200 "unit" hours[5] of net-

[5] A "unit" hour is one evening clock hour from 6:00 P. M. to 11:00 P. M. It takes on

work sustaining and commercial programs combined during each twenty-eight-day period.

The Columbia Broadcasting System, on the other hand, guarantees to its outlets sixty clock hours a week of program service. The standard affiliation contract which was adopted in 1929 and was in effect in 1943, requires that the affiliated station waive compensation for the first five "commercial" or "converted" hours per week in payment for sustaining program service. The term, "commercial" or "converted" hour, is defined as including only evening hours, and it takes about two daytime hours and about three early morning hours to equal a "converted" hour.

Does a network in negotiating an advertising contract sell time on all the stations for any particular commercial program? No. A network is divided between so-called basic stations and supplementary stations. The main determinants as to whether a station will be included in the basic network are two: (1) Does it represent a basic market in terms of population and purchasing power; and (2) is it contiguous to the fundamental basic area? If the answers are in the affirmative, the station will be made a part of the basic network. Most basic stations are therefore in major cities east of the Mississippi River and are concentrated in the northeastern quarter of the United States.

During the most desirable evening hours an advertiser is required to purchase the entire basic network. He then fills out the type and extension of further coverage he wishes through supplementary stations which he can choose at his own discretion. During the daytime the requirements are less rigid and an advertiser, although he has to buy time on a certain number of basic stations, does not have to take them all.

Table 6, introduced by Chairman Fly at the Senate Interstate Commerce Committee Hearings,[6] compares the number of stations on the basic networks of C.B.S. and N.B.C. as of May 1, 1941, and shows the network rate for each station.

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week days two clock hours between 8:00 A. M. and 6:00 P. M. and 11:00 P. M. and 12:00 midnight, and three clock hours between 12:00 midnight and 8:00 A. M. to equal a "unit" hour. On Sunday the clock hours from 12:00 noon to 6:00 P. M. are equal to three fourths of a "unit" hour.

[6] Transcript, p. 127.

TABLE

NUMBER OF STATIONS AND NETWORK RATES FOR COMPANY AND THE COLUMBIA

C.B.S.

Location	*Call Letters*	*Network Rate (1 Hour 1 Time)*
Akron, Ohio	WADC	$190
Baltimore, Md.	WCAO	300
Boston, Mass.	WEEI	475
Bridgeport, Conn.		
Buffalo, N.Y.	WGR-WKBW	350
Cedar Rapids, Iowa	WMT	250
Chicago, Ill.	WBBM	825
Cincinnati, Ohio	WCKY	425
Cleveland, Ohio	WGAR	350
Davenport, Iowa		
Des Moines, Iowa	KRNT	220
Detroit, Mich.	WJR	700
Fort Wayne, Ind.		
Hartford, Conn.	WDRC	190
Indianapolis, Ind.	WFBM	225
Kansas City, Mo.	KMBC	325
Lincoln, Nebr.	KFAB	200
Louisville, Ky.	WHAS	475
Milwaukee, Wis.		
Minneapolis, Minn.		
New York, N.Y.	WABC	1,350
Omaha, Nebr.	KOIL	175
Philadelphia, Pa.	WCAU	600
Pittsburgh, Pa.	WJAS	375
Portland, Maine		
Providence, R.I.	WPRO	240
Rochester, N.Y.		
Schenectady, N.Y.		
Springfield, Mass.		
St. Louis, Mo.	KMOX	575
Syracuse, N.Y.	WFBL	220
Toledo, Ohio		
Washington, D.C.	WJSV	375
Wilmington, Del.		
Worcester, Mass.		
Total		$9,410

6

BASIC NETWORKS OF THE NATIONAL BROADCASTING BROADCASTING SYSTEM

N.B.C. (Red)		N.B.C. (Blue)	
Call Letters	*Network Rate (1 Hour 1 Time)*	*Call Letters*	*Network Rate (1 Hour 1 Time)*
		WAKR	$140
WFBR	$260	WBAL	320
WNAC	440	WBZ	480
		WICC	160
WBEN	320	WEBR	120
WMAQ	800	WENR-WLS	720
WLW-WSAI [a]	1,080	WLW-WSAI [a]	1,080
WTAM	520	WHK	340
		WOC	120
WHO	520	KSO	180
WWJ	420	WXYZ	360
		WOWO	220
WTIC	400		
WIRE	220		
WDAF	380	WREN	240
WAVE	200		
WTMJ	340		
KSTP	400	WTCN	180
WEAF	1,400	WJZ	1,200
WOW	340		
KYW	480	WFIL	400
WCAE	380	KDKA	480
WCSH	160		
WJAR	200	WEAN	200
		WHAM	380
WGY	400		
		WBZA	160
KSD	360	KXO-KFRU	340
		WSYR	220
WSPD	220		
WRC	240	WMAL	200
WDEL	120		
WTAG	180		
	$10,780		$8,240

[a] $840 less if WSAI is used.

It will be noticed that there were 23 communities represented on the basic networks of C.B.S. and N.B.C. (Blue) and 26 on the N.B.C. (Red). In 1941 the basic network of C.B.S. cost $9,410 for a typical evening program of one hour, the Blue basic cost $8,240, and the Red basic $10,780.

What allows the network advertiser to have such a general flexibility in choosing his particular combination of stations? The answer is an intricate system of wire lines which connect the individual outlets into a chain. This system has been developed by the American Telephone Company in response to the demand by the networks for such service and in reflection of the profit possibilities of providing it. For instance, N.B.C.'s wire line expenses in 1940 aggregated in excess of $3,600,000 according to an affidavit filed by the president of the company on October 31, 1941. The Telephone Company owns the wires; the network organization leases them—some on a permanent basis and others on a temporary basis.

Mr. B. F. McClancy, manager of the Traffic Department of N.B.C., testified at the F.C.C. hearings that intricate switching of various combinations of stations on short notice had been possible only since about 1933. The company has an exclusive telegraph circuit to all of its outlets, and about 100,000 telegraph messages between the network and the stations are handled a month.

The following testimony of Mr. McClancy gives the general gist of switching operations on a network:

> For the purpose of operation, our network is broken up into approximately 100 units. We use various combinations of these units to get the desired network for any program. . . . Mechanically, I think, out of the 100 units there are something in excess of a million possible combinations.

Pointing out that only about 700 combinations were actually used in any one week and probably not more than 7,000 in any one year, Mr. McClancy continued:

> In the course of the day in getting the total of these 700 combinations a week, there are approximately 6,000 switches made on the network each day in order to do that. For this purpose the Traffic Department issues what we call a program transmission audit sheet which lists in

detail where those switches are to be made, on what cue they are to be made, and if possible when.

These program transmission audits are issued once every hour and only three hours in advance of actual program time . . . They are issued to A.T.T., the operating points which we operate ourselves and also to any stations which may be involved in the direct operation of a particular program.[7]

It is clear that the trend in wire connections between stations to form a network has been one of constantly developing flexibility with a corresponding complexity. The American Telephone Company does not contract to furnish a physical pair of wires or a program circuit over any given route. Rather it is a point-to-point service that is provided.

A network is like a water system. The water is in the pipes at all times and one can get it at any particular place on the circuit by opening the tap. In the same manner, network programs are continually on the wire lines and if the individual station is broadcasting the program it merely taps the line.

Network Advertising

There is a direct correlation between the growth of chain broadcasting and the expansion of network advertising. Although he does pick his markets and attempts to secure just the coverage that he believes will suit his particular requirements, the advertiser who uses a radio network is anxious to reach the maximum audience, the only limitations being a potential interest in the product itself, the economic ability of the listener to purchase it, and the distributional ability on the part of the advertiser to make the product available. And the last two limitations are temporary. Where there is actual or potential interest, an advertiser desires to have those persons hear about his product, and if the demand is there the distributional facilities will be provided. Hence, we must think of network broadcasting financed by advertising as essentially an attempt to win a larger and larger mass audience.

In this connection, a chain organization likes to believe that the audience generally is loyal to the station irrespective of the program being broadcast. The evidence indicates that much of this belief

[7] F.C.C. Hearings re Docket 5060, Transcript, pp. 917–18.

is wishful thinking, but it makes an excellent sales talk for the prospective purchaser of network time and circulation. The choice of the radio listener should be, and is primarily, made in terms of program content and not in terms of particular stations. A person approaching the dial is sovereign and has complete independence; he listens to the program of his own choice.

Although the number of advertising customers for a national network is fairly restricted—it is estimated that there were in 1942 about 300 whose products lent themselves to mass appeal—they are big customers. Futhermore, as has been mentioned, all advertisers, where the product has any kind of general attraction, are potential customers for a national network. But today the number of companies which can afford the chain broadcasting rates, whose products are compatible with nation-wide selling, and which have national distributional facilities, is far smaller than the number of customers of other businesses.

Notwithstanding, the growth of network advertising has been tremendous. This is illustrated by the records of the National Broadcasting Company and the Columbia Broadcasting System. The former company between November, 1926, and December, 1927, showed total time sales of $3,384,519. In 1940 the figure for network programs alone, after discounts but before commissions, was $37,118,130. There has been a similar trend in the affairs of C.B.S. Total time sales in 1928 for Columbia were $1,409,975, whereas in 1940 time sales for network programs alone, after discounts but before commissions, had reached a total of $31,181,444.

Today a network company in selling time deals with the advertiser or more frequently with advertising agencies, depending on the circumstances. Sometimes the advertiser gives the agency *carte blanche* in arranging the program; other times he does not. The advertising agency plans and produces, in collaboration with the network organization, most of the commercial programs. When chain broadcasting as an advertising medium was first being used this was not the case. In the early days the advertising agencies were skeptical of radio. They considered radio something new and untried. The chains, therefore, dealt more with the advertiser directly.

Gradually, however, they won the agencies over to radio and from then on the production of network commercial shows became a joint effort—an effort increasingly expanding and exceedingly profitable to the two parties concerned.

✕ *Chapter 5* ✕

FEDERAL REGULATION DURING PATENT PERIOD

THE HISTORY of governmental regulation of radio can be conveniently divided into two periods—1910 to 1934, which can be called the patent period of regulation; and 1934 to date, which can be called the network period of regulation. We shall discuss in this Chapter the first of these two periods. The second, dating from the passage of the Communications Act on which the professed powers of the present Commission are based, will be dealt with later.

The first period, as implied by the terminology used, was principally identified by patent controversies between the government and the radio industry. It was the period when the patented control of the technical means of radio, as contrasted to the manner in which these means are organized and used for broadcasting purposes, was in dispute and culminated in the successful conclusion of the government's anti-trust suit against the Radio Corporation of America in 1932, which forced the breakup of that company's so-called monopoly of patents.

Professor Harry Shulman of Yale University, writing in the *Encyclopaedia of the Social Sciences,* states in this connection:

> Probably more than any other industry radio has been built on patents. Thousands of patents on basic instruments or improvements have been issued to diverse persons. The manufacture or use of radio apparatus has consequently been involved in a maze of patent litigation. . . . The handmaiden of the patent, monopoly, was found to be the logical means of resolving the struggle for patent supremacy. . . . In the United States the concentration of patents in the Radio Corporation of America, coupled with devices which required patent licensees to purchase certain unpatented parts from the corporation, was alleged to have created a virtual monopoly in radio manufacturing. Enforcement of these license

provisions was finally enjoined as violative of the Clayton Act . . . and a government prosecution of the corporation under the Federal antitrust laws resulted in the entry of a consent decree calculated to break up the concentration.[1]

This case against R.C.A. gave the modern answer to the question whether a patent is a franchise to be exercised for the public good or whether it is property which may be used only in ways stipulated by the owner. Until 1896, under the Jeffersonian doctrine that the "will and convenience of society" were paramount in the use to which patents could be put, the Federal authorities and the courts emphasized the former of these principles. The "button-fastener case" was decided in 1896, however, and this precipitated a long line of decisions which regarded a patent as property and allowed the owner to fix prices, territorial markets, outputs, and even the source of material that had to be acquired for use with a patented machine or process.

Becoming concerned with the consequences of such a liberal interpretation of the rights pertaining to a patent, the courts during recent years have been attempting to minimize the privileges granted to patentees, and the consent decree granted by the Supreme Court in the R.C.A. case in 1932 illustrates this trend whereby the holder of a patent is considered subject to the Sherman and Clayton laws.

It is important to bear in mind that patent problems are the most characteristic of the first period of regulation. On the other hand, this early period also includes certain matters pertinent to the regulatory problem, the more significant being: the early regulation of broadcasting before the Radio Act of 1927, the Radio Act of 1927 itself (the most noteworthy parts of which were carried over into the Communications Act of 1934), and important court decisions defining and clarifying the scope of governmental authority over broadcasting.

Early Regulation before the Radio Act of 1927

The earliest legislation dealing directly with the regulation of radio communication was passed by Congress on June 24, 1910. It

[1] XIII, 65.

was known as "An Act to Require Apparatus and Operators for Radio Communication on Certain Ocean Steamers" and provided:

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 50 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 100 miles, day or night.

This first legislative enactment dealing with radio transmission was limited to ship-to-shore communication and simply required the presence of the apparatus and enunciated few regulations as to its use. Of course, broadcasting in these early days was entirely carried on in Morse code, although it is reported that as early as 1909, three years after Lee De Forest invented the vacuum grid tube, music from phonograph records was successfully broadcast from the Eiffel Tower in Paris and received 300 miles away. If true, this would represent the first broadcast of sound in the history of radio.

Not until the Radio Act of August 13, 1912, did Congress attempt to deal with radio communication in any comprehensive manner. Remember this was eight years before the first regular broadcast took place over station KDKA in Pittsburgh. Incorporating the regulations of the London International Radio Telegraph Convention of 1912, this Act was aimed primarily at regulating wireless telegraphy in Morse code. It inaugurated the Federal licensing of commercial broadcast stations, and prohibited radio transmission without such a license from the Secretary of Commerce and Labor.

Section 1 of the Radio Act of 1912 reads:

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.

The complete authority over radio broadcasting granted to the Secretary of Commerce and Labor by this Act—an authority which was not terminated until a ruling of the Attorney General in 1926—is further indicated by the following excerpts from Sections 2 and 4:

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 for the purpose of preventing or minimizing interference with communication between stations . . . 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 . . . 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 precursor of the present-day prohibition against a transfer of a broadcasting license without the written consent of the Federal Communications Commission is found in the Radio Act of 1912 in these words:

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 . . . 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 . . .

Under the Communications Act of 1934, the President of the United States is authorized in time of war to take over "upon just compensation to the owners" for the use of the government the entire broadcasting industry, if in his judgment such action is required in the national interest. A similar provision is to be found in the Radio Act of 1912.

The Secretary of Commerce and Labor, under the broad powers granted to him, attempted to keep abreast of the rapid development which took place in the art of radio broadcasting. He held radio conferences; he assigned frequencies to stations; he refused to grant licenses to those whom he did not consider qualified; and he specified the time during which an individual broadcasting station could operate. It was, however, an era characterized by self-regulation. The leading executives and engineers attended the annual conferences in Washington, made suggestions for the rapidly expanding business, which were in turn usually adopted by the Secretary in the form of regulations. This regulatory period prior to the Radio Act of 1927 was marked by a rapprochement between the government and the radio industry. To a large extent the Federal authorities maintained a hands-off attitude and the principle of laissez faire predominated.

The following quotation from the address delivered by Herbert Hoover, then Secretary of Commerce, at the Third National Radio Conference held in Washington, D.C., in October, 1924, will indicate the spirit of coöperation which existed at that time:

> In conclusion, I can only repeat what I have said on these occasions before—that it is our duty as public officials, it is our duty as men engaged in the industry, and it is our duty as a great listening public to assure the future conduct of this industry with the single view to public interest. The voluntary imposition of its own rules and a high sense of service will go far to make further legislation or administrative intervention unnecessary. Indeed, it will contribute enormously to the development of the art if in this stage of its infancy we can annually secure such adjustments by voluntary action as will protect public interest. We shall then have evolved a unique chapter in the development of public utilities.
>
> The two past conferences have been successful in these purposes, and with only slight modifications made necessary by changing conditions the department has been able to follow their recommendations in the performance of its duties, and the industry has supported and conformed to these recommendations cheerfully and uncomplainingly although at some self-sacrifice. It is my ideal and yours that this new great implement which science has placed at the disposal of our people shall be developed and expanded in such fashion as to bring the maximum good, and that we may avoid any complaint from our successors that on one hand we sacrifice public interest or on the other we in any way dim

that fine sense of initiative and enterprise in our people that is fundamental to all advancement in our Nation.

I congratulate the conference on the spirit shown in the past, and I know you will enter upon your new deliberations in the same attitude.

Two Lower Federal Court decisions and an opinion by the Attorney General in 1926, which held that the Secretary of Commerce had no right to refuse licenses or to forbid broadcasting on frequencies or at times not expressly prohibited by the Radio Act of 1912, brought this era of one-man regulation to an abrupt end. Bedlam followed. There was a scramble for frequencies; intolerable interference and "wave jumping" resulted. There were 732 broadcasting stations at this time, operating in a situation of extreme confusion. As Judge Wilkerson declared in 1929, in the United States *v.* American Bond and Mortgage Company case:

When the Attorney General ruled that the Act did not give the Secretary of Commerce authority to assign channels, fix hours of operation, limit use of power, or grant licenses of limited duration, there resulted a condition of general confusion. There was a scramble for preferred channels. The Secretary was required to issue licenses to all. . . . It is apparent from the description of radio broadcasting which has been given heretofore that, if its benefits are to be enjoyed at all, it must be subjected to national regulation.[2]

The Radio Act of 1927

Out of this chaos the Radio Act of 1927 emerged. It was recognized and admitted on all sides that a traffic policeman was necessary if there was to be any acceptable radio broadcasting service. The necessary constitutional basis for this Federal power to bring order into the radio spectrum was found in the Interstate Commerce clause. The American Bond and Mortgage Company case already cited set the pattern of such Federal authority. Judge Wilkerson asserted in his opinion granting an injunction against broadcasting by the defendant company without a Federal license:

It does not seem to be open to question that radio transmission and reception among the stations are interstate commerce. To be sure it is a new species of commerce. Nothing visible and tangible is transported. There is not even a wire over which "ideas, wishes, orders and

[2] 31 Fed. 2d. 448; Off. 52 F. 2d. 318; Cert. denied 28521. S. 538; 52 Sup. Ct. 311.

intelligence" are carried. A device in one state produces energy which reaches every part, however small, of the space affected by its power. Other devices in that space respond to the energy thus transmitted. The joint action of the transmitter owned by one person and the receiver owned by another is essential to the result. But that result is the transmission of intelligence, ideas, and entertainment. It is intercourse, and that intercourse is commerce . . .

The necessary limitation upon the number of stations, the interference resulting from uncontrolled broadcasting in the same channel and the interests of the receiving public require that stations shall be classified, the nature of the service rendered by each class prescribed, wave lengths assigned, the location of stations determined, apparatus supervised—in short, that transmission be brought under a control which, instead of permitting the benefit to the public to be destroyed by conflict and confusion, will make it as great as possible.

The Radio Act of 1912 dealt almost exclusively with technical aspects of wireless telegraphy. In the fifteen years following its enactment, regular sound broadcasting had been inaugurated and had experienced an enormous expansion. As we have seen, radio networks were on the threshold of their spectacular growth. In other words, the country had become broadcasting conscious. In Congress there was evident an increasing concern lest the limited supply of radio frequencies fall under the control of fewer and fewer persons. Free speech over the air and competition had to be protected. The question of monopoly became an acute issue, and Federal regulations dealing with monopolistic practices in radio broadcasting appeared for the first time in the Radio Act of 1927 and subsequently were incorporated in the Communications Act of 1934.

The Federal Radio Commission established by the Act of 1927 consisted of five members appointed by the President for six-year terms. The Commission was authorized to carry out the provisions of the Act. The preamble states 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 . . .

This language which was substantially repeated in the later Act of 1934 contains the antecedents of three important elements in the present regulatory philosophy of the government: the enunciation that the United States shall maintain control over all broadcasting channels, that licenses are to be granted for only limited periods of time, and that a license does not represent ownership of an allocated frequency. "The radio is the most potent of all instruments for the projection of speech to the millions. . . . It is clear beyond peradventure that possession—indeed trusteeship—of the frequency involves more of duty than of right. The right is that claimed by the one person, the duty is owed to the millions." [3]

The phrase "public convenience, interest, or necessity," well known in public utility legislation, was applied to radio broadcasting and is repeated many times throughout the Radio Act of 1927. At the time the legislation was passed this language was made and still remains the basis of the government's licensing policy. For instance, Section 4 of the 1927 Act states, "Except as otherwise provided in this Act, the Commission, from time to time, *as public convenience, interest, or necessity requires,* shall . . ." [4] and then lists a number of duties incumbent upon the Commission, such as classifying radio stations, prescribing the nature of the service to be rendered by each, assigning bands of frequencies, determining the location of stations, and regulating the kind of apparatus to be used. Among the remaining duties listed in this Section are two of great significance. Sub-Section (f) of Section 4 authorizes the Commission to: "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.*" And Sub-Section (h) of Section 4 states that the Commission shall: "Have authority *to make special regulations applicable to radio stations engaged in chain broadcasting.*"

[3] James L. Fly, chairman of the F.C.C., "New Horizons in Radio," *Annals of the American Academy of Political and Social Science,* CCXIII (January, 1941), 100.

[4] Here and in other quotations on this page and on the following pages, the italics are added.

This same language, which was carried over into the Communications Act of 1934 and is found in Section 303 (f) and (i), forms one of the cornerstones of the present Commission's claim of adequate authority to promulgate and enforce the new regulations.

Three other citations from the Radio Act of 1927 which are repeated in the later statute will indicate the importance of the phrase "public convenience, interest, and necessity."

Section 9, which appears as Section 307 (a) in the Communications Act of 1934, states, "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."

Section 11, which appears as Section 309 (a) in the Communications Act of 1934, states, "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 convenience, interest, or necessity* would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding."

And finally in discussing the necessity of securing a permit from the licensing authority for the construction of a station, Section 21, which appears as Section 319 (a) of the Communications Act of 1934, states, "The licensing authority may grant such permit if *public convenience, interest, or necessity* will be served by the construction of the station."

While the general standard of "public convenience, interest, or necessity" can be feasibly applied to traditional public utilities where the type of service rendered is specific—gas, water, or electricity—when its application is made to radio broadcasting the problem becomes extremely difficult. The types of radio service are comparatively unlimited; programs are of an infinite variety; and each type of service or broadcasting function has its enthusiastic supporters. The licensing authority must decide, therefore, not simply whether any one particular applicant will serve the public convenience, interest, or necessity, but whether he will do so above all other competing applicants.

The Radio Act of 1927 contained specific provisions with respect

to the problem of monopoly. These provisions, which were also carried over into the Communications Act of 1934, should be emphasized because the Commission relies upon them and the allied powers granted under Section 303 (f) and (i) in defending the legality of its regulations. As we shall see, the industry claims that the Commission lacks the jurisdiction to determine monopolistic practices and that the new rules go beyond its statutory authority.

Sections 13 and 15 of the Radio Act of 1927 which deal with monopoly in radio broadcasting and which are substantially repeated as Sections 311 and 313, respectively, in the Communications Act of 1934 read as follows:

Section 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 person, 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.

Section 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 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.

The other provisions of the Radio Act of 1927 which are significantly involved in the dispute between the government and the network industry deal with the questions: the previous use of a frequency as a basis for claim on future use; length of the license period and the transfer of the license; the use of radio facilities by political candidates; and censorship. The specific provisions regarding these subjects are as follows:

Section 5 (h), which is repeated in Section 304 of the Communications Act of 1934, provides, "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 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."

Section 9 forbids the granting of a license for the operation of a broadcasting station for a longer term than three years. The same limitation is contained in Section 307 (d) of the Communications Act of 1934.

Section 12, which was substantially incorporated in the later statute but was reinforced to prohibit the transfer, assignment or disposition "indirectly by transfer of control of any corporation holding such license," states in part: "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."

The history of the last twenty years in many instances shows a trend toward totalitarianism when the state controls the means of communication by radio. Germany, Italy, Japan, and Russia have gone down that road. The very basis of democracy rests upon freedom of debate and discussion. Consequently, it is important to the perpetuation of our form of government that radio broadcasting

facilities be made available to all candidates for public office, and once one party has been granted the privilege of uncensored speech over the air, that the others should also have that privilege. Only in this way can all sides of public issues be heard and the people be in a position to exercise their sovereign will. How to secure such a balanced discussion of public questions by political candidates, how to avoid the dangers of governmental control of broadcasting facilities on the one hand and the political abuse of such control in private hands on the other is one of the most difficult questions in the whole problem of broadcasting.

The Radio Act of 1927 and the Communications Act of 1934 remain on the fence with respect to this issue. The statutes provide that if one candidate is allowed to speak all other candidates for the same office must be given equal opportunities, but no original obligation is imposed to permit any of them to speak. Section 18 of the earlier law, which appears as Section 315 in the Act of 1934, requires:

> 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.

Both laws—Section 29 of the Radio Act and Section 326 of the Communications Act—in substantially identical language state unequivocally that no power of censorship is given to the Commission.

> 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.

Thus we can see that wide powers were given to the Federal Radio Commission and its successor, the Federal Communications Commission, to regulate broadcasting. Particularly as they applied to networks, most of these powers, except in the technical field of frequency assignment, remained dormant. Licenses were granted and renewed with regularity; applications for increased signal strength were favorably acted upon; while chain broadcasting became a more and more dominant factor in the radio scene. Little was done about it—that is, little was done until the investigation of the network industry which the F.C.C. undertook in the fall of 1938 and on which the new regulations were based.

Two Court Decisions

Before concluding this discussion of the patent period of regulation two court decisions, one limiting and the other reinforcing these dormant powers of the Federal licensing authority, should be mentioned.

We have already noted that prior use of a frequency constitutes no claim on future use. However, prior use represents prior investment, usually of a substantial amount, and this factor of invested capital has been given weight in determining the question of renewal of a license. In the case of General Electric *v.* the Federal Radio Commission, the Court of Appeals of the District of Columbia decided on February 25, 1929, in favor of the company, which was seeking a renewal of its license to operate station WGY on the same terms as in the past.[5] The language of the court is significant:

> It appears that station WGY represents a large investment of capital, said to be $1,500,000, adventured in part during the pioneer stages of broadcasting, and that the station has been one of the most important development stations in the country.

Closely associated with this factor of prior investment is the claim which has been made by a licensee seeking renewal that if the renewal is not granted it will represent deprivation of property without just compensation, contrary to the Fifth Amendment. The Supreme Court in 1933 in the case of the Federal Radio Commis-

[5] 281 U.S. 464; 50 Sup. Ct. 389.

sion *v.* Nelson Brothers Bond and Mortgage Company [6] ruled that the Congress had the power to give this authority to delete stations, in view of the limited radio facilities available, and that the confusion which would result from interference is not open to question. Those who operate broadcasting stations have no right superior to the exercise of this power of regulation. They necessarily made their investment and their contracts in the light of and subject to this paramount authority.

[6] 289 U.S. 266 (1933); 53 Sup. Ct. 627.

⋇ *Chapter 6* ⋇

FEDERAL REGULATION DURING NETWORK PERIOD

A COMPREHENSIVE examination of the regulatory history of broadcasting since the enactment of the Communications Act is unnecessary. Nevertheless, in order to understand the issues between the government and the networks, it is desirable to review briefly certain significant developments which directly relate to the controversy.

Communications Act of 1934

The title of the Act is a misnomer. The Communications Act in its most important sections, which deal with radio broadcasting, is little more than a repetition of the Radio Act of 1927. The industry in 1942 was therefore operating under a fifteen-year-old statute. This fact alone constitutes a strong argument in favor of a new Federal law, because during this time the complexion of the business drastically changed. To the writer the 1934 Act does not seem realistically adaptable to the modern problems of network broadcasting in the public interest.

This piece of legislation, however, did represent a constructive step forward in that it placed the regulation of all "interstate and foreign commerce in communication by wire and radio" in the hands of a single agency. The jurisdiction of the Federal Radio Commission was limited to radio communication.

The 1934 Act also made a noteworthy distinction with respect to "common carriers." Whereas telegraph and telephone companies were, of course, included in this category, radio broadcasting was exempted. The concept—strongly reinforced by the Supreme Court in 1940 in the Sanders Brothers case—of broadcasting as a domain of free competition and as not being appropriately susceptible to the grant of a governmental monopoly was, therefore,

given statutory enunciation. This exemption of radio broadcasting from the classification of "common carriers" is provided in Section 3 (h) of the Communications Act:

"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 in so far as such person is so engaged, be deemed a common carrier.

The Federal Communications Commission, established by the 1934 Act, is composed of seven commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President designates as chairman. James Lawrence Fly, mainspring of the government's attempt to reform the network industry, was chairman of the Commission in 1943 and was appointed in 1939 to succeed Chairman McNinch.

The Act further provides that each member of the Commission shall be a citizen of the United States, that his tenure of office shall be seven years, and that each commissioner shall receive an annual salary of $10,000. The office of the Commission is in Washington, D.C., and the more significant powers granted to the F.C.C. are defined as follows:

Section 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.

Section 4 (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.

Engineering Report of the Federal Communications Commission

The *Report on Chain Broadcasting,* resulting from the investigation and issued in May, 1941, temporarily climaxed the exercise of the broad powers allegedly granted to the F.C.C. by the Communications Act in the social and economic domains, as contrasted to the engineering field previously regarded as demarcating the proper scope of the Commission's jurisdiction. Such presumed latitude of authority, however, was intimated in the *Report on Social and Economic Data on Broadcasting* rendered by the Engineering Department of the F.C.C. on July 1, 1937.

This Engineering Report was based on the evidence produced at informal hearings on the subject of "Allocation Improvements in the Standard Broadcast Band 550–1600 KC." At the hearings, which commenced on October 5, 1936, a considerable amount of data bearing on social and economic factors in radio broadcasting were introduced in response to the notice of the hearings stating that "The broadcast division of the Commission desires to obtain the most complete information available with respect to this broad subject of allocation, not only in its engineering but also in its corollary social and economic phases . . ." [1]

Despite the fact that the preliminary report issued on January 11, 1937, declared that recommendations covering social and economic factors were not within the proper province of the Engineering Department, the final Report made these significant statements:

> The Engineering Department has not attempted to delve into all the problematical policy discussions involving the application of radio broadcasting to the service of the public. We have felt that it was unnecessary for us at this late date to discuss whether broadcasting is a service to the people. We have accepted broadcasting as one of the greatest agencies of mass communication yet devised by the genius of man. We have felt that broadcasting has demonstrated commendable service to the public with potentiality for still greater service. Whether this potentiality is developed depends, in our opinion, upon the wisdom and foresight of the governmental regulatory authority and the actions of those who are regulated. . . .
>
> The evidence at the October hearing led to the inescapable conclu-

[1] F.C.C. Engineering Report, Docket 4063, p. 1.

sion that since, under the law, the regulatory functions of the Federal Government are aimed at the maximum of service to the greatest number of people in accord with their interest, convenience, and necessity, the social and economic aspects of broadcasting must be considered concurrently with its engineering phases.[2]

Here is the intimation of the investigation to come, for the *Report on Chain Broadcasting* and the regulations contained therein represent an attempt by the Federal Communications Commission to solve the social and economic problems of network broadcasting. Whereas previously the Commission had largely restricted itself to engineering matters in the exercise of its regulatory functions—to being the allocation policeman of the air waves—it embarked, properly or otherwise, on an aggressive reform program. The two major network companies claim not only that the Commission in following such a line of action exceeded its authority, but also that the regulations themselves are arbitrary and capricious and constitute an illegal invasion of the domain of private business.

The F.C.C. Hearings on Chain Broadcasting

On March 18, 1938, the Federal Communications Commission adopted Order No. 37 which stated in part that

> *Whereas* under the provisions of Section 303 of the Communications Act of 1934, as amended, "The Commission, from time to time, as public convenience, interest, or necessity requires, shall—(1) have authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and *Whereas* the Commission has not at this time sufficient information in fact upon which to base regulations regarding contractual relationships between chain companies and network stations . . . now therefore It Is *Ordered* That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity. . . .

The Order further required that hearings be held at which evidence should be presented by the network organizations and other interested parties with respect to certain subjects, such as the contractual rights and obligations of stations engaged in chain broad-

[2] *Ibid.*, pp. 2 and 3.

casting; the extent of the control of programs, advertising contracts, and other matters exercised and practiced by stations engaged in chain broadcasting; contract provisions in network agreements providing for exclusive affiliation; the number and location of stations licensed to or affiliated with networks; competitive practices of stations engaged in chain broadcasting; the effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization; practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting; and the extent and effects of concentration of control of stations by means of chain or network contracts.

The hearings were open to the public and all interested persons and organizations were permitted to appear and present evidence. The three national networks—N.B.C., C.B.S., and M.B.S.—regional networks, station licensees, and electrical transcription companies were directed by the Commission to testify and to produce evidence with respect to twenty specific aspects of the broadcasting industry.

A committee composed of Commissioners Sykes, Brown, Walker and Chairman McNinch was authorized on April 6, 1938, to supervise and direct the investigation and to hold hearings in connection therewith. Originally scheduled for October 24, 1938, the hearings did not actually commence until November 14, 1938, and continued through May 19, 1939. Ninety-six witnesses were heard on 73 days during the six-month period. The evidence presented covers 8,713 pages of transcript, and 707 exhibits were introduced.

The original impetus for the investigation did not come from either the Federal Communications Commission or the industry, but from Congress. Senator Wheeler, chairman of the Senate Interstate Commerce Committee, declared that at the time "Both the industry and the Commission opposed an investigation." [3]

In 1937 three resolutions were introduced in the House and one in the Senate calling for an investigation of monopolistic control over radio broadcasting. House Resolution 61, introduced by Representative Connery on January 13, 1937, read in part, "There is reason to believe that contrary to the intent and the spirit, as well as the language of laws in force, a monopoly exists in radio

[3] Senate Interstate Commerce Committee Hearings, Transcript, p. 11.

broadcasting, which radio broadcasting monopoly is believed to be profiting illegally at the expense and to the detriment of the people through the monopolistic control and operation of all clear-channel and other highly desirable radio broadcasting stations."

Senator White of Maine stated in a speech before the upper House on March 17, 1937: "The Congress at the time the 1927 Act was passed while perhaps not fully appreciating the growth of the chain system, did recognize the possibilities of the situation and wrote into this early Act the authority to make special regulations applicable to radio stations engaged in chain broadcasting. This provision was contained in the 1934 Act. The regulating body has seemed indifferent to the problem or without definite views concerning it." And later in that year Senate Resolution 149, introduced by Senator White on July 6, 1937, called for "A thorough and complete investigation of the broadcasting industry in the United States and of broadcasting, and the acts, rules, regulations, and policies of the Federal Communications Commission with respect to broadcasting," and charged that "With the approval of the Commission there has come about a monopolistic concentration of ownership or control of stations in the chain companies of the United States."

Chairman Fly declared before the Senate Interstate Commerce Committee in June of 1941: "It was in the midst of this Congressional atmosphere and in the midst of widespread concern in many quarters over the growing monopoly and concentration of control in radio broadcasting that the Commission on March 18, 1938, by Order No. 37, authorized an investigation . . . [which] originated up here and in effect was delegated to the Commission. . . . I want to say that, although I was not with the Commission at the time, that the Commission itself did not give birth to this investigation. . . . The Congress afforded all the motivating forces for the investigation. I say with some degree of reticence that that was done only under the compulsion of both Houses of Congress . . ." [4]

Chairman McNinch in opening the hearings on November 14, 1938, asserted that "Cross examination of witnesses generally will

[4] Transcript, p. 15.

be by the Committee and by its staff . . . [the] Committee will not permit this hearing to be used as a sounding board for any person or organization. We are after facts and intend to get them. . . . On the basis of the facts developed in the course of the investigation, appropriate rules and regulations dealing with such matters will be promulgated by the Commission, and if such facts demonstrate the necessity therefor, legislative recommendations made to the Congress by the Commission." [5]

The F.C.C. Report on Chain Broadcasting

Having concluded the hearings on May 19, 1939, the Federal Communications Commission, after more than a year of study of the record, issued its preliminary report on June 12, 1940. Thereafter briefs were filed by the national networks and oral arguments were presented before the Commission on December 2 and 3. Five months elapsed before the issuance of the final majority report on May 2, 1941, in which five of the commissioners concurred. At the same time Commissioners Craven and Case made public their minority report, opposing the views of the majority. Eight regulations, which were to become effective in ninety days, were adopted as part of the majority report.

The Commission postponed the effective date of the regulations with respect to existing contracts and network station licenses successively on June 13, July 27, and August 28, 1941. The Mutual Broadcasting System on August 14, 1941, petitioned the Commission to amend two of the regulations. Briefs were filed, oral arguments heard, and as a result the Commission on September 12, 1941, issued its *Supplemental Report on Chain Broadcasting* with Commissioners Case and Craven again dissenting. In this Supplemental Report, the Commission amended three of its original regulations, but declared that they should become effective immediately,

Provided, That with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided Further,* That the effective date of Regulation 3.106 [dealing with network ownership

[5] F.C.C. Hearings re Docket 5060, Transcript, pp. 13 and 14.

of stations] with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided Further,* That the effective date of Regulation 3.107 [dealing with two networks being operated by the same organization] shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.[6]

With respect to the immediate enforcement of the new regulations, the F.C.C. on October 31, 1941, issued a Minute in an attempt to quiet the industry's accusations that the Commission's procedure in carrying out the regulations was arbitrary and irreparably damaging to the network business of N.B.C. and C.B.S. This Minute stated that if a station wished to contest the validity of the new rules, its license would be set for hearing and until a final determination of the issues raised at such hearing the Commission would continue the station's license. Furthermore, if the validity of the regulations is sustained by the courts, the Commission would grant a renewal to the licensee without prejudice, the only stipulation being that the station conform to the new rules.

The Sanders Brothers Case

The Sanders case [7] was decided by the Supreme Court on March 25, 1940, upholding the concept that radio broadcasting constitutes a domain of free competition and that therefore the principles of the "common carrier" are not applicable to it. The opinion also reinforces the doctrine that the granting of a license carries no property rights in the frequency assigned and gives definite enunciation to the dictum that economic injury to a competitor is not proper grounds for refusing a license to an applicant.

Briefly, the facts of the case were these. Station WKBB at East Dubuque, Illinois, had been operated for some years by the Sanders brothers. On May 14, 1936, they applied for a permit from the Federal Communications Commission to move the transmitter and studios to Dubuque, Iowa, which was directly across the Mississippi

[6] F.C.C. Supplemental Report, September 12, 1941.

[7] Federal Communications Commission *v.* Sanders Brothers Radio Station, 309 U.S., 470 (1940).

River from East Dubuque, and to install their station there. Previous to the filing of this application, the *Telegraph Herald,* a newspaper published in Dubuque, had sought permission from the Commission on January 20, 1936, to erect a broadcasting station in that city.

Claiming that there was not sufficient advertising revenue or talent in Dubuque to support two stations, that Dubuque was already being rendered adequate service by station WKBB, and that the granting of the *Telegraph Herald* application would not serve the public interest, convenience, and necessity, the Sanders brothers on August 18, 1936, intervened in the *Telegraph Herald* proceeding. Both parties presented evidence before the F.C.C. to support their respective applications. The Sanders brothers showed that station WKBB had been operated at a loss and that the station proposed by the *Telegraph Herald* would serve the same area and would have to rely on the same group of advertisers.

As a result, the examiner recommended that the application of the *Telegraph Herald* be denied and that of the Sanders brothers be granted. However, after oral arguments, each application was granted as being in the public interest, convenience, and necessity. The broadcasting division of the F.C.C. in taking this action pointed out that both applicants were legally, technically, and financially qualified to undertake the proposed construction and operation. Furthermore, it was stressed that there would be no electrical interference between the two stations and that Dubuque and the surrounding territory needed the services of both.

The Sanders brothers appealed to the Court of Appeals for the District of Columbia. Pointing out in its decision that one of the factors which the Federal Communications Commission should have taken into account in granting both applications was the alleged economic injury to WKBB by the establishment of another station in Dubuque, the Court of Appeals, in the absence of such consideration, set aside as arbitrary and capricious the permit which had been granted to the *Telegraph Herald.*

The case was then appealed to the Supreme Court. The F.C.C. argued that economic injury to a competitor is not proper grounds for refusing a broadcasting license under the Communications Act.

With Mr. Justice Roberts delivering the opinion, the Supreme Court on March 25, 1940, handed down its decision, reversing the judgment of the Court of Appeals and upholding the contentions of the government.

The more significant excerpts from this decision which deal with economic injury as a basis for denying a license and the question of property rights involved in the broadcasting franchise are as follows:

> We hold that resulting economic injury to a rival 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. 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. . . .
>
> 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.

The Sanders case decision, however, is most noteworthy because of its discussion of the role of competition in the broadcasting field. The government in its controversy with the networks relies on that part of the language which stresses the competitive nature of broadcasting, whereas the industry goes to those portions of the opinion which emphasize that the Communications Act gives no supervisory control over the businesses of the chain organizations. The following are the more important portions of the opinion in these two connections:

> In contradiction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly . . . the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. *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 railroads in respect of which regulation involves the operation 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. . . .
>
> Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave com-

petition and 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. . . .

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. [Italics added.]

The White Resolution

On May 13, 1941, Senator White of Maine introduced in the Upper House the White Resolution, which provided for a comprehensive study by the Senate Interstate Commerce Committee of the new regulations promulgated by the Federal Communications Commission; "of the probable effects of these upon the broadcast system of the United States and in particular upon the network organizations and licensees affiliated with said organizations"; of whether the regulations confer upon the Commission supervisory control of programs, business management, or policies of network organizations and broadcast licensees; of whether the regulations constitute a threat to the freedom of speech by radio in the United States or will contribute to government ownership and operation of broadcast stations; of whether the new regulations are an attempt by the Commission to define monopolistic practices in broadcasting and on the basis of such definition to find a licensee guilty thereof, resulting in a denial of a license to an applicant because of such finding; of any problem of radio broadcasting which is raised or is affected by said regulations; and finally of the principles and policies which should be declared and made effective in legislation for the regulation and control of the radio industry. The Resolution requested the F.C.C. to postpone the effective date of the regulations until sixty days after the Committee had reported to the Senate.

The National Broadcasting Company and the Columbia Broadcasting System, along with the National Association of Broadcasters, which was holding its convention in May of 1941, strenuously sup-

ported the White Resolution. The Mutual Broadcasting System and the Federal Communications Commission just as strenuously opposed it. The Senate Interstate Commerce Committee, under the chairmanship of Senator Burton K. Wheeler, held hearings on the Resolution from June 2 through June 20, 1941. Nearly 400,000 words of testimony were given. The regulations and their effects, the Commission's power to promulgate and enforce them, and the basic issues in the controversy were discussed and argued from all points of view. The war situation and the fact that far more urgent legislation was pressing for attention worked against the passage of the Resolution from the beginning. Furthermore Chairman Wheeler took the position that Congress could not review all acts of executive agencies and pointed out the interminable delay that would be involved in such a procedure. Consequently, on June 20 the Resolution died in Committee when Senator Carl McFarland of Arizona, temporarily in the chairman's seat, announced a recess. That recess is still in progress as far as the White Resolution is concerned.

Other Highlights

Reference has been made to the injunction suit brought by N.B.C. and C.B.S. against the F.C.C. to enjoin the Commission from enforcing the new rules. The suit was brought in the District Court of the United States for the Southern District of New York in November, 1941. The Mutual Broadcasting System was a party to the proceedings, having intervened in December on the side of the Commission. Briefs were filed and on January 12 and 13, 1942, oral arguments were heard by a statutory court comprised of Judge Learned Hand of the Circuit Court of Appeals, and Federal District Judges John Bright and Henry W. Goddard.

A two-to-one decision was rendered by the court on February 20, 1942.[8] Characterizing the new regulations as being in effect "no more than the declaration of the conditions upon which the Commission will in the future issue licenses" to radio stations and hence beyond the power of the court to rule on, the majority opinion, written by Judge Hand and concurred in by Judge Goddard, denied

[8] 44 Fed. Supp. 688.

the temporary injunction on jurisdictional grounds. However, in the course of their remarks, the majority made this statement:

They [the networks] allege—and there seems to be no question about it—that their interests will be adversely affected by the enforcement of the regulations.

Judge Bright in dissenting agreed with the majority that damage would be done through enforcement and declared further that the court had jurisdiction to enjoin.

The particular agreements prohibited are presently contained in most of the affiliation contracts of the two complaining networks. They state those provisions are essential to the proper and successful conduct of their business, and in deciding the question of jurisdiction, I believe we must assume this to be true. It is also shown by them, without contradiction, that between the time the regulations were promulgated and the commencements of these actions, not less than 24 broadcasting stations having affiliation contracts with N.B.C. have cancelled their contracts as a result of the order in question, and not less than 24 others having such contracts, have served notice that they do not intend to abide by the terms of such contracts unless they are conformed to the Commission's order. . . . There is thus a present injury . . .

There is no question in my mind that the order sought to be refused is one which . . . we have jurisdiction to enjoin . . . Must these networks await the idle ceremony of a denial of a license before any relief can be sought when it is perfectly obvious that no relief will be given? And what relief could they get if they did wait? The networks are not to be licensed, only the individual stations who make application. But it is said the networks could intervene and be heard. All that might be said or urged in their behalf has doubtless been communicated to the Commission in the three years between March 18, 1938, and May 2, 1941, when the investigation was going on. Must they march up the hill and down again, with the probability of being met with the statement that the Commission has given the matter due consideration and has done what it intends to abide by, as it has definitely said in its report?

An appeal to the Supreme Court from this decision was immediately taken by N.B.C. and C.B.S. The two companies also sought a stay from the Southern District Court of New York and this was granted on March 2, 1942, by Judges Hand, Goddard, and Bright. In a supplemental opinion the majority explained its reasons for granting the stay in the following language:

In deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. If so, the plaintiffs will not be adequately protected. . . . Considering on the one hand that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and on the other that the Commission itself gave no evidence before these actions were commenced that the proposed changes were of such immediately pressing importance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiffs' favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the Supreme Court or the first day of May, 1942, whichever comes first.

On March 16 the Supreme Court agreed to review the decision of the Lower Court. Oral arguments were presented in the early part of May. By a five-to-three decision, with Justice Black not participating, the Supreme Court on June 1, 1942, ruled that N.B.C. and C.B.S. were entitled to a judicial review of the new regulations.[9] Justice Stone in presenting the majority opinion declared that all "the elements prerequisite to judicial review are present" and that "the threat of irreparable injury to the business" of the broadcasting chains had been established. On the other hand, Justice Frankfurter, who wrote the dissenting opinion, asserted that Congress did not authorize resort to Federal courts "merely because someone feels aggrieved, however deeply" by an F.C.C. action and asserted that "even irreparable loss" did not justify the review.

The National Broadcasting Company and the Columbia Broadcasting System then sought a permanent injunction, thereby testing the authority of the Federal Communications Commission to promulgate and enforce the regulations.[10] In this connection, Chairman Fly had no doubt that the Supreme Court would uphold the power of the Commission. When asked by Senator Johnson of Colorado at the Senate hearings whether he believed the Commission had the authority to approve or disapprove affiliation contracts, Mr. Fly replied, "I would say yes; I think we have ample power to do just

[9] 62 Sup. Ct. 1214; 86 L. Ed. 1088; 316 U.S. Sup. Ct. 407, 447.

[10] On November 17, 1942, the District Court of the United States for the Southern District of New York dismissed the complaints of N.B.C. and C.B.S.

this. I have no doubt, gentlemen, that the Supreme Court ultimately will uphold these regulations. Frankly, I have no substantial doubt of it." [11]

The injunction suit of N.B.C. and C.B.S. was not the only litigation in progress in the field of network broadcasting in 1942. The Department of Justice on December 31, 1941, commenced antitrust suits against these two companies, charging that they "have been engaged . . . in a wrongful and unlawful combination and conspiracy in restraint of . . . interstate commerce and in a wrongful and unlawful combination and conspiracy to attempt to monopolize the . . . interstate commerce in radio broadcasting in violation of Section 1 and 2" of the Sherman Act. On January 10, 1942, the Mutual Broadcasting System filed suit against the Radio Corporation of America and the National Broadcasting Company for $10,275,000, alleging that these two companies are engaged in "an unlawful combination and conspiracy among themselves and with third persons to injure plaintiffs by hindering and restricting Mutual freely and fairly to compete in the transmission in interstate commerce of nation-wide network programs."

[11] Transcript, p. 90.

⋇ *Chapter 7* ⋇

RADIO CENSORSHIP AND FREE SPEECH

FREEDOM of expression is essential to the preservation of democratic institutions. Any acceptable solution of the broadcasting problem, therefore, must protect free speech over the air to whatever extent is possible within the medium's peculiar limitations. Furthermore, the antithesis of free speech—censorship—must be largely self-imposed if our liberties are to be preserved.

Censorship

The power of censorship over radio programs can be lodged in three places—the government, the industry (including labor, stockholders, and advertisers), and the general public. Our present system unavoidably entails censorship by all three, although in the last analysis the listening audience, as it should, determines what is broadcast. This democratic control of program content is strongly reinforced by the advertiser's main desire to attempt to please all people and if possible to offend none.

The Communications Act specifically states in Section 326 that the Federal Communications Commission is to have no power of censorship. Furthermore, any claim to such power has been publicly renounced on many occasions by the Commission. "I am unalterably opposed to Government censorship of broadcasting in any manner, shape or form. The Government should neither directly nor indirectly dictate what shall or shall not be said or who shall or who shall not speak over the air," asserted former Chairman McNinch in a 1939 press release. In commenting on this declaration Commissioner Thompson said, "I am in hearty sympathy with the Chairman's statement, and from my association here I really believe the Chairman speaks for the other members of the Commission." [1] And the present chairman, Mr. Fly, testified at the

[1] F.C.C. Hearings re Docket 5060, Transcript, p. 8573.

Senate hearings, "Of course, we are not radical enough to try to tell them what programs they shall carry." [2]

Although the Commission disclaims any authority for dictating what shall be heard on the air, it has as a matter of fact a very considerable power of censorship which is exercised indirectly through its licensing function. The awarding of licenses on the basis of the public interest standard, combined with the present lack of frequencies, obviously involves censorship because a great many applications for a broadcasting franchise are and must be turned down. It is as much censorship to tell a man he cannot speak as to tell him what he must or must not say.

Regulation of the broadcasting industry by Federal authority, however, should not be confused with governmental censorship of program content. Although it is true that if regulation is carried too far, censorship will result, there is a valid distinction between them and a *modus operandi* should be possible which will avoid direct censorship on the one hand and which will permit the government to exercise the necessary degree of jurisdiction over broadcasting on the other.

Mr. Sarnoff declared at the F.C.C. hearings:

> The guarantee of freedom of speech . . . provided by the Constitution gives the broadcaster, as I understand it, the right to have programs of his own selection over his station after that station is licensed. All broadcasting stations should endeavor to produce and adopt a voluntary code of conduct which would produce the maximum of free speech . . . but on a voluntary basis, not on a basis of regulation of programs by law.[3]

And that is what the industry has done. By slow degrees it has evolved a self-imposed code of ethics for radio broadcasting. "Obviously, the power of censorship and selection must be lodged somewhere and the broadcaster is the one to exercise this power and answer to the public for the manner in which he exercises it," declared Chairman McNinch in a radio broadcast on November 12, 1938.

The Communications Act specifically prohibits the broadcasting of "any obscene, indecent, or profane language." The network

[2] Senate Interstate Commerce Committee Hearings, Transcript, p. 138.
[3] F.C.C. Hearings re Docket 5060, Transcript, p. 8600.

companies have gone considerably beyond these restricted prohibitions in elaborating a censorship code. The reader's own experience will answer the question of how well the industry is living up to its self-imposed standards. Nevertheless, whatever conclusion is drawn, it must be remembered that much of the criticism of radio program content should be aimed at the listening audience whose tastes and wishes essentially determine what is heard.

An unpopular sponsored program will not last long. This is democratic commercially financed radio in action. However much we might like to see the cultural and educational level of the average commercial program raised, the great bulk of the people want the "soap operas," the swing bands and the scandal dramas. The children give rapt attention to mystery thrillers and crime episodes, and because parents have not voiced their disapproval in sufficient numbers the period of horror around supper time continues.

The general "standards of good taste," accepted in theory at least by the radio broadcasting industry, are expressed in the Code adopted by the Seventeenth Annual Convention of the National Association of Broadcasters in July of 1939 and amended in May of 1941. The Code states that programs designed for children require the closest supervision and should avoid "sequences involving horror or torture . . . or any other material which might . . . overstimulate the child listener or be prejudicial to sound character development"; that networks shall provide equal time for the presentation of public and controversial questions and that such time shall not be sold except for political broadcasts; that broadcasters will endeavor to improve radio as an educational adjunct; that news broadcasts are to be presented with fairness and accuracy and shall not be of an editorial nature; and that all attacks on race or religion are strictly prohibited.

These are admirable phrases. They are so vague, however, and the infractions of them are so many in actual practice that they represent only the early ethical growing pains of a new industry. Furthermore, although N.B.C., for example, has adopted a set of standards for program content more strict and more specific than those adopted by the National Association of Broadcasters, the company has shown the same struggling evolutionary process in

attempting to arrive at an enlightened program policy which will meet the realistic requirements of the advertiser and at the same time will be in the public interest. This avowed recognition by N.B.C. of its social and cultural responsibilities has naturally been beset with conflict and with profits.

Excerpts from an interoffice memorandum written in 1936 by Mr. Witmer, vice-president of N.B.C. in charge of sales, is significant. It indicates, for instance, the reluctance with which the network organization assumed its censorship responsibilities.

> Radio as a medium is under somewhat greater obligation than are the printed media for the reason that radio is answerable to the Federal Communications Commission which holds that radio should be extra careful of its custodianship because it deals in the spoken word and therefore reaches and motivates the illiterate as well as the educated, the very young and the very old, as well as all ages in between.[4]

The extreme vagueness in the company's former standards of censorship is brought out by the following colloquy between Mr. Royal, another N.B.C. vice-president, and Mr. Dempsey, counsel for the Commission, at the F.C.C. hearings:

> MR. DEMPSEY—I am asking you to describe as briefly as you can just what factors you think important in determining whether a particular script is fit for broadcasting consumption.
> MR. ROYAL—Clean, wholesome amusement and good judgment and good taste.
> MR. DEMPSEY—What are the factors that influence your judgment in such matters?
> MR. ROYAL—Clean, wholesome amusement and good taste.
> MR. DEMPSEY—They are the only guides you use?
> MR. ROYAL—You can't chart that . . .
> MR. DEMPSEY—The only instructions to your subordinates then would be, be sure that it is clean, wholesome, amusing and in good taste?
> MR. ROYAL—That is right.
> MR. DEMPSEY—Again going back to good taste, those are the only two words that you use? You don't break them down at all? . . .
> MR. ROYAL—Yes.
> MR. DEMPSEY—How do you break it down?
> MR. ROYAL—We don't want anything that would be offensive. We don't want anything improper, that couldn't be heard in the home.[5]

[4] N.B.C. Exhibit No. 179, F.C.C. Hearings re Docket 5060.
[5] Hearings re Docket 5060, Transcript, pp. 602–3.

"Good taste," of course, to a commercially financed network organization, if it is entirely subservient to the advertiser's wishes, will represent the undiscriminating taste of the general listening audience. Under the impetus of the investigation, however, a new set of program standards was formulated by N.B.C., which constitutes both a reiteration and reorientation of former policies as well as a more specific enunciation of self-imposed program ethics.

The more important announced policies of the new Code, supposedly applicable to all programs, provide that the use of the Deity's name is permissible only when used reverently; that statements or suggestions which are offensive to religious views and racial characteristics must not appear; that all material dependent "upon physical imperfections, such as blindness, deafness or lameness for humorous effect will not be accepted"; that "sacrilegious, profane, salacious, obscene, vulgar or indecent material is not acceptable" nor language of "doubtful propriety"; that "the introduction of murder or suicide is definitely discouraged at all times, and the methods employed must not be described in detail"; that criminal or antisocial practices and the details of the techniques employed must be minimized; that emphasis on drunkenness will not be allowed; that the appearance of or reference to persons involved in criminal or "morbidly sensational news stories" will not be permitted except as part of a factual news statement; and finally, the catch-all, that "false and misleading statements and all other forms of misrepresentation must be avoided." [6]

Observe that the "introduction of murder or suicide" is only discouraged and that "criminal or anti-social practices and the details of the techniques employed" must only be minimized. Here of course is the loophole which as a matter of stated policy, irrespective of how well that policy is adhered to in practice, permits the type of children's program so strenuously objected to by many persons.

With respect to the fields of religion, controversial issues, and politics, the 1939 Code makes this general statement, "Freedom of the air is not to be construed as synonymous with freedom of the press or freedom of speech." The Code further declares that the company will not sell time for religious programs, since this might

[6] *Broadcasting in the Public Interest,* pp. 33–35.

result in a disproportionate representation, and will not permit attacks upon religious faiths or upon racial groups; that the company will not accept dramatic presentations of political issues and, in keeping with the Communications Act, will sell time during an election only to legally qualified candidates for public office or their representatives; and that the company will attempt at all times as far as possible to give equal representation to opposite sides of every controversial question, although no guarantee is made in the case of a sustaining program that equal opportunity will be granted to the opposition for a reply. An advertising sponsor may, however, be required to yield time for such a reply.

The more important specific standards adopted by N.B.C. in 1939 with respect to children's programs are as follows:

All scripts for children's programs must be carefully written, having in mind the particular audience for which they are intended.

All stories must reflect respect for law and order, adult authority, good morals and clean living.

Adventure stories may be accepted subject to the following prohibitions: no torture or suggestion of torture; no horror—present or impending; no use of the supernatural or of superstition likely to arouse fear; no profanity or vulgarity; no kidnapping or threats of kidnapping; in order that children will not be emotionally upset, no program or episode shall end with an incident which will create in their minds morbid suspense or hysteria; dramatic action should not be overaccentuated through gun play or through other methods of violence.

Advice "to be sure to tell mother" or "ask mother to buy" must be limited to twice in the program.

The child is more credulous, as a general thing, than the adult. Therefore the greatest possible care must be used to see that no misleading or extravagant statements be made in commercial copy on children's programs.

Contests and offers which encourage children to enter strange places and to converse with strangers in an effort to collect box-tops or wrappers may present a definite element of danger to the children. Therefore, such contests and offers are not acceptable.

No appeal may be made to the child to help characters in the story by sending in box-tops or wrappers, nor may any actor remain in character and, in the commercial copy, address the child, urging him to purchase the product in order to keep the program on the air, or make similar appeals.

The formation of clubs is often introduced on children's programs.

Sometimes initiation requirements and other rules of such clubs are disseminated in code form. Full details concerning the organization of a children's secret society or code must be submitted to the National Broadcasting Company at least ten business days before its introduction on the air.

A network organization, as we have seen, is faced with a difficult conflict of interests in trying to devise censorship standards consistent with its public responsibility and the business requirements of the advertiser. Some progress is being made as the adoption of the 1939 Code of the National Broadcasting Company illustrates. However, a great many people believe that the present situation is most undesirable and that the air continues to be filled with program material demoralizing in its effect. Chairman Wheeler belongs in this group, as the following statement he made at the Senate hearings indicates: "Referring to the soap company and the soap dramas and 'operas' that they put on, I happened to turn on my radio this morning as I came down in the car and of all the cheap trash I ever heard upon a broadcast—dime novel stuff, that was what it was. This sort of stuff is nothing more nor less than a dime novel thriller. . . . One could hardly turn on any radio broadcasting station without hearing a dime novel plot, or something about someone getting a divorce, or someone getting mixed up in some sort of scandal."

Then Mr. Paley, president of the Columbia Broadcasting System, pointed out to Senator Wheeler that "of course the networks have to cater to all of the public," and the colloquy continued:

CHAIRMAN WHEELER—I agree with you, and realize there are a lot of people who like dime novels, the Jesse James in the Wilderness trash . . . But if there are people who like that sort of stuff they have the privilege of going into a book store and buying it. . . . Here we have a means of communication that is entirely different from that of a person going into a book store and buying the books he may desire, or paying admission into a theater. Here you send programs into the homes of the American people. It is true that one can turn off the dial or switch off a program. But the radio is a part of the home nowadays and with children growing up and with the opportunity for them to hear these programs, the situation is vastly different.

Some may say that you have to cater to those who prefer the dime

novel level of art and trash of that kind. . . . I am not a purist or anything of that kind, but I do feel that a great deal of trash is going into the homes of America over chain broadcasting stations that should not be allowed to go out over the air. . . . I am not attempting to lecture the radio industry, but am very definitely making an appeal to them to cut out gangster plays, dime novel dirt, and other filth of that kind which the child in the home has an opportunity to listen to and which, from his mistaken standpoint, may appeal to him. . . . I do not think that kind of trash has any merit, and regardless of who may like it, I do not believe it is a good thing to go into American homes.

MR. PALEY—I agree with you.

CHAIRMAN WHEELER—This great radio art that has been developed, and is being further developed, might better be used toward moral uplift to young boys and girls in the homes of the country. . . . After all, you have a great opportunity to help raise the cultural and moral standards. . . . You should make an effort to present programs that appeal to the higher and better things of life.[7]

Free Speech

In the traditional sense, there is no such thing as free speech in radio today. Furthermore it is unlikely that there ever can be. Even though science will continue to enlarge the usable spectrum and even though a reorientation of the Commission's allocation and licensing policies occurs, it will probably always remain impossible to provide equal broadcasting facilities for every person in the United States. Certainly it will always be impossible from the standpoint of each individual being able to reach a national audience. Hence any discussion of free speech in radio must start with a recognition of this basic limitation of the medium itself. And once the premise of a limited supply of wave lengths is accepted, the following conclusion seems inescapable. If every person cannot be in possession of the means for expressing himself over the air, particularly from the national viewpoint, there will be more potential speakers than there are facilities. Accommodating each person—to say nothing of accommodating each one with an equal opportunity—is, therefore, an impossibility under the most ideal circumstances that science and governmental policy may be able to create in the future. Of course, at the present time, there is an extreme scarcity

[7] Senate Interstate Commerce Committee Hearings, Transcript, pp. 410–12.

of frequencies and any thought of free speech in the traditional sense is even more impossible.

In contrast, a person in his own right may mount a soap box and —short of inciting to riot or uttering obscene or blasphemous language—express his thoughts to his heart's content. The individual's vocal cords are his own facilities and he is at liberty to use them at will. Free speech in this sense is limited only by the number desiring to speak.

Although mechanical equipment and varying amounts of capital are required, freedom of the press is much the same. There is no maximum to the number of newspapers that can be published.

The First Amendment protects the rights of the individual to express himself either vocally or in print. But men would not be willing to die to preserve these rights if they merely granted a prerogative to be exercised in isolation. Their value to the human spirit—the fact that they have been fought for and cherished by free peoples—lies not so much in their individual aspect as in their collective aspect. In short, these rights are directed at others—an audience is involved. One usually insists upon the right to speak or write in order to persuade, to inform, or to convince; the principal objective is to mold or change public opinion. Consequently, an analysis of the free speech issue in radio must approach the question from two standpoints—that of the individual desiring to speak over the air, and that of the audience who will listen to what is said.

The Speaker

In handling the grave and difficult problem of who should be granted the opportunity to speak, the network industry claims that its policy is based on five premises: (1) that since frequencies and broadcasting time are limited and since the chains have been granted a public franchise within this scarce supply, they should have no editorial opinions; (2) that, except in political campaigns, time should not be sold for the primary purpose of opinion expression on matters of national import because of the great disparity among individuals and groups in their ability to purchase such time; (3) that when editorial opinions on important issues are expressed during a commercial program, the advertiser should provide an equal op-

portunity for an answer; (4) that only bona fide representatives of substantial groups should be given the privilege of speaking on the network; and (5) that in the event time is accorded free, both sides of controversial subjects should be represented. There are, of course, practical reasons why a network organization does not wish to grant the opportunity of speaking to anyone who desires to do so. In the first place, such a procedure would be poor programming. In the second place, the cost would be prohibitive.

The genesis and defense of this policy of placing definite restrictions upon who will be permitted the use of network facilities are indicated by the following colloquy between Mr. Dempsey and Mr. Lohr, then president of N.B.C., at the F.C.C. hearings:

MR. DEMPSEY—Do you consider that you have the absolute right to refuse anybody time over your station?
MR. LOHR—Yes.
MR. DEMPSEY—That no person can assert any right to talk at any time?
MR. LOHR—That is correct.
MR. DEMPSEY—But if you once permit a person to talk, having given that permission, letting him come in and stand before the microphone, he has some inherent right to say what he feels like saying?
MR. LOHR—That is my definition of freedom of the air . . . [We would have the right, however, to cut him off] in those things which in our judgment would be offensive to a large group of people . . .
MR. DEMPSEY—Now where in . . . that picture is there any freedom, Mr. Lohr?
MR. LOHR—The freedom of a group that has a question of interest to the public, to express that to the public, with no limitations on our part except that which would offend good taste, because radio goes into the home as a personal guest and therefore good taste must govern . . .
MR. DEMPSEY—Where do you draw the line between the group that has the right to speak and the group that hasn't the right to speak?
MR. LOHR—It is purely a question of using the best judgment that we have.
MR. DEMPSEY—I have some difficulty in reconciling the notion that the rights of any group are dependent upon the exercise of the judgment on the part of the broadcaster; they either have a legal right or they haven't a legal right to speak.
MR. LOHR—I don't think they have any legal right to speak, but if we go back to the genesis of broadcasting, the reason that this policy of equal opportunity was instituted was because of the limitation of frequencies. For instance in freedom of the press, if a publisher or an editor

was biased politically, he may print editorials. . . . If there is a group within that town who does not agree with him, they can buy a printing press . . . and turn out a paper. . . . That is not possible in radio. If the broadcaster took an editorial slant . . . it might not be possible for those with opposing views to acquire a broadcasting station . . . simply because the frequency was not available. . . . Therefore, broadcasters realize that the limitation of frequencies imposes a special obligation upon broadcasting and they themselves were the ones that put the obligation on that they would not have editorial opinions of their own, and as far as I know the National Broadcasting Company has never taken sides in a controversy or expressed an editorial opinion of its own. . . .
MR. DEMPSEY—Then I am not overstating your position: you think that because there are only a relatively limited number of frequencies available, and a limited amount of time available, since everyone in the United States just can't be given an opportunity to say what he pleases, that no one has the right to say anything that he feels like saying, even a licensee. As far as public interest is concerned, then, there isn't any such thing as freedom of the air in the sense that there is freedom of the press and freedom of speech?
MR. LOHR—I make an entirely separate distinction and personally I object to people saying freedom of speech over the air. I don't think there is any such thing.
MR. DEMPSEY—I don't myself.[8]

The Audience

What is there then, if there is no free speech in radio? Free hearing. This means two things. First, that the individual is sovereign in deciding what he will listen to. With a flip of the hand he can turn off presidents, dictators, and kings. In the second place, it implies that what the individual wants to hear is on the air. This is essentially a question of program variety. In the political domain it takes the form that all sides of a controversial issue should be presented and be available to the listener. However, the same principle is true for all other types of programs if we are really to achieve free hearing and the fulfillment of all the functions of radio broadcasting.

With respect to public questions, Mr. Fly correctly stresses the second aspect of free hearing. "Without access to the information and exchange of ideas which are necessary to the exercise of intelligent judgment, there can be no genuine democracy. The right of

[8] F.C.C. Hearings re Docket 5060, Transcript, pp. 12–14, 27, 28–30.

the people to have radio used for the purpose of communication of information and the exchange of ideas, fairly and objectively presented, seems to me to be inherent in the concept of free speech," the Chairman declared in an address which he deliverd in the Town Hall in New York City on October 17, 1940. And again before the American Civil Liberties Union on February 12, 1941, Mr. Fly stated, "Democracy, which is another name for self-government, can work if and only if citizens have adequate knowledge of the issues which confront them, and make their decisions in the light of that knowledge. . . . Depriving radio listeners of their right to decide for themselves strikes at the very roots of democracy and self-government."

Chairman Fly is very apprehensive, however, lest the restraint on editorial expression and the general impartiality of opinion distribution which he admits the national networks have shown in the past may change. In his prepared statement before the Senate hearings Mr. Fly asserted, "It is more imperative today than ever before that our channels of communication remain as open and free as we can make them. We cannot tolerate having those channels dominated by small management groups. I do not think it is an answer to say that there have been no significant abuses. We may well assume this." [9]

Good stewardship in the past might be expected to earn some confidence for the future. But not to Mr. Fly. The chairman raises up a specter of network monopoly and a concomitant corruption and undermining of the American people by sly propaganda. "The fact remains that concentration of power is here far too dangerous, however well intentioned the wielders of power may be. The great danger of monopoly here is not the economic oppression of small elements in the industry or overcharging and poor service to the public. These things or most of them may result from monopoly in broadcasting. But the vital matter is the grasp on the means of influencing public opinion. This is a matter which goes to the vitals of democracy." [10]

[9] Prepared Statement at the Senate Interstate Commerce Committee Hearings, p. 22.

[10] Mr. Fly's Prepared Statement, at the Senate Interstate Commerce Committee Hearings, p. 22.

The following reply was made to this accusation by Mr. Paley:

> The real heart of this charge of domination is the implication that the networks either can or do somehow manipulate public opinion to serve their own industry or the industry of favored persons or causes. This whole charge is false. It was built up by the Commission's Chairman by ignoring publicly proclaimed and long established network practices. I am going to refute it here and now. . . . The kind of danger to which Mr. Fly points is simply non-existent. Radio broadcasting in the last analysis is controlled by the public and by no one else. . . . The idea . . . that the networks, even if they did not follow their present publicly promulgated policies, of which Mr. Fly himself has expressed approval, could dominate and control public opinion in America amounts to no more than a deliberate attempt to create a synthetic scare.[11]

Aside from the question, however, of how faithfully the networks have followed their stated premises with regard to free speech in radio and aside from the question of what the future may hold in this respect, the economic realities of chain broadcasting tend to deny Chairman Fly's extreme concern. He seems to forget that the overwhelming content of network programs is entertainment carrying little or no opinion-forming influence, except in the realms of cultural and relaxation tastes, and news which even the government concedes is being disseminated by the chain organizations in a generally impartial manner; that the advertiser's paramount objective is to appeal to the masses and to avoid offense, with the result that treatment of controversial subjects is usually anathema.

[11] Senate Interstate Commerce Committee Hearings, Transcript, pp. 355–56.

✕ *Chapter 8* ✕

THE COMMISSION'S STATUTORY AUTHORITY

THE LEGAL ISSUES in the controversy between the government and the networks largely revolve around the Commission's statutory authority. There is also the question of whether the procedure for appeal from a decision of the Commission is adequate as provided by the Communications Act. This is a highly legalistic matter and need not concern us. Our whole attention, therefore, will be directed to the first problem, namely, whether the Commission exceeded its powers in promulgating and attempting to enforce the new rules for network broadcasting.

These rules are directed at a situation in which the Commission found monopolistic practices to exist. The regulations aim to promote greater competition in the radio broadcasting industry. This the Commission believes is one of its primary duties under the Communications Act. "I should like to comment briefly on the provisions of the Act which make it clear that the Commission, in exercising its licensing powers, should preserve competition as the basis of radio broadcasting and prevent the development of a radio monopoly," states Chairman Fly.[1]

To support the contention that according to the Communications Act it must take considerations of monopoly into account in awarding and renewing licenses, the F.C.C. largely relies on testimony given at the time the Radio Act of 1927 was passed, on specific provisions carried over from this Act to the Act of 1934, and on the language of certain court decisions.

The government's argument points out that during the debate on February 3, 1927, Senator Dill of Washington, sponsor of the

[1] Senate Interstate Commerce Committee Hearings, Transcript, p. 141.

Radio Act of 1927 in the Upper House, stated in reply to a question from Senator Broussard of Louisiana:

In the first place, under this bill [Radio Act of 1912] chain broadcasting today . . . is absolutely without any regulation. We have no law today to handle the situation, and the various radio organizations, including the Radio Corporation of America and the American Telephone and Telegraph Company, are going ahead and building up the chain stations as they desire without let or hindrance or without any restrictions, because the Secretary of Commerce has no power to interfere with them. Unless this proposed legislation shall be enacted they will continue to do so, and they will be able by chain broadcasting methods practically to obliterate the independent small stations. . . . 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.

Senator Dill went on to point out several other ways in which the proposed bill protected the public against monopoly.

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 reject 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 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 . . . the bill contains the 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 that 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.*[2]

In short, so the F.C.C. maintains, it was the original intention of the framers of the Radio Act of 1927 that the Commission should take into consideration the questions of monopoly and competition

[2] Italics added.

in formulating and enforcing its licensing policy. N.B.C. and C.B.S. argue, as we shall see, that inasmuch as Congress expressly authorized the Commission to reject licenses to persons convicted of violation of the antitrust laws, it by implication deprived the Commission of any jurisdiction to consider the questions of competition and monopoly in exercising its licensing authority, unless the applicant or the licensee had already been found guilty by a court of violating these statutes.

The F.C.C., following the lead of Senator Dill, goes to the Communications Act itself to substantiate the claim that it has the authority to deal with the problem of monopoly. Sections 311 and 313, which deal specifically with this matter, are of course cited first. In this connection, however, the government contends that it "does not apply the anti-trust laws as such or undertake to determine whether applicants have violated them. You will search our record and the report in this case in vain for any holding that this is a violation of the anti-trust laws. The Commission did not purport to do any such thing. The Commission, however, does consider questions of competition and monopoly under the statutory public interest standard where those matters are relevant and related to the broadcasting service of the licensee." [3]

This reasoning is further clarified by a colloquy between Chairman Wheeler and Mr. Fly during the Senate Interstate Commerce Committee hearings:

THE CHAIRMAN—Let me ask you this question: I take it to be your idea that the F.C.C. has the right to issue an order saying that a certain thing is a monopolistic practice, and to that extent you have the right to say that practice shall be stopped; is that your contention?
MR. FLY—Yes, sir; pursuant to the duty to make special regulations. This is what you gentlemen have told us to do in the statute, to make special regulations for stations engaged in chain broadcasting; also to use the licensing power in accordance with the public interest, and again I come back to the thought that if we use the licensing power to build up monopolies I do not think any of us could contend that that would be the use of the licensing power in the public interest. Therefore, I think we can adopt these regulations as a means of preventing the creation of

[3] Telford Taylor, general counsel of the F.C.C., Injunction Suit, Oral Arguments, January, 1942, Transcript, p. 229.

such monopolies and restraints of trade and obstruction of service to the public.[4]

The F.C.C. then argues that even if Sections 311 and 313 were not in the Act it could consider a question such as competition in defining and applying the standard of public convenience, interest, or necessity. "Freedom from monopoly and unreasonable restraints is basic to the common law and our ordinary conception of the economic system, except where Congress has made exceptions, such as established quasi-monopoly. I do not think it could be seriously argued the Commission would be foreclosed from reading those principles into the public interest standard." [5]

Louis G. Caldwell, counsel for the Mutual Broadcasting System, gave a succinct summary of the position of the Commission in this respect at the Senate Interstate Commerce Committee hearings:

> The Commission has the power to grant or deny applications; in fact, is instructed to do so, on the standard of "public interest, convenience, or necessity." The whole question is, What does that clause mean? Is it confined to technical or physical factors, or does it mean something more than that, such as economic or social factors, or something else? There is the whole issue between the parties in this case, outside of the effect of Section 311.
>
> Does that standard have these narrow limits or not? I should like to start with the very beginning and say it cannot have.
>
> In the first place, you have instructed the Commission to take the applicant's "financial, technical, and other qualifications" into account. That is enough to show that you have not limited the Commission to physical factors. . . .
>
> Next, could the Commission say that any applicant for all of the 800 radio stations would not be granted a license? If not, we would not have any competition in radio broadcasting. . . .
>
> Let us get down to what the issues seem to be. Where a man who comes before the Commission—and I do not want to characterize these contracts, but let us assume that the man is shown to be so tied up with somebody else that he is not free to operate on his own responsibility, cannot choose as between good and bad programs—can the Commission say that a man tied up in that way cannot have a license? I think it can.[6]

[4] Transcript, p. 77.

[5] Telford Taylor, Injunction Suit, Oral Arguments, January, 1942, Transcript, p. 230.

[6] Transcript, pp. 194–95.

Other sections of the Communications Act which the F.C.C. relies on for its authority to take competition and monopoly into consideration in applying its licensing policy are Section 310 (b), prohibiting the transfer of licenses without the written consent of the Commission, and, of course, Section 303 (i), giving the Commission authority "to make special regulations applicable to radio stations engaged in chain broadcasting." In this latter regard, the government points out that the other provisions of this section are not all technical, citing Subsection (b), dealing with the nature of service to be rendered by each class of licensees, and Subsection (j), requiring stations to keep records.

The final portion of the government's argument is based upon the language of certain court decisions. Reference is made to the Pottsville Broadcasting Company case,[7] in which Justice Frankfurter held that "Congress in enacting that law [Communications Act of 1934] moved under the spirit of a wide-spread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. So, to avert this danger, Congress gave the Commission power to deal with chain broadcasting in clear-cut and unequivocal terms."

And then the Commission turns to the Sanders Brothers case, pointing out that Mr. Justice Roberts in this decision stated that

> The Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. 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. . . . 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 and which Congress would not have contemplated without granting the Commission control over the rates, programs, and other activities of the business of broadcasting.

In other words, the Commission's argument based upon the Sanders case can be summarized as follows: The Commission is not required to take the economic protection of an existing station into

[7] Supreme Court decision rendered January 29, 1940. 309 U.S. 134; 60 Sup. Ct. 437.

account. The spirit and intent of the Communications Act and of Congress were to further competition. When the Supreme Court states that the Commission cannot regulate the business practices of broadcasters, it simply means that it cannot impose common carrier regulations on them. It must formulate its licensing policy in such a way as to stimulate economic rivalry within the industry.

Chairman Wheeler agrees substantially with this position, as is indicated by a significant remark he made during the Senate Interstate Commerce Committee hearings:

> I think there can be no question but what you have the right under this law to refuse a license to a station if you think that by granting that license the station is going to create a monopoly. I do not think there is any question about that at all. . . . The only question in my mind is whether or not, having granted the license, the Commission could afterward say that this is creating a monopoly and, consequently, could refuse to renew the license.[8]

The National Broadcasting Company and the Columbia Broadcasting System in opposing the contentions outlined above follow much the same pattern as the F.C.C. They rely on testimony given at the time the Radio Act of 1927 was passed, particularly that of Senator White, who was then a member of the House of Representatives and who helped draft and promote that statute; they go to the Communications Act of 1934 itself, claiming that the construction placed by the Commission upon the controversial sections is erroneous; and finally they too cite court decisions, the principal one being the Sanders case.

The general tenor of the position of the two major chains is as follows: Even if it were to be assumed that the F.C.C. had the power to consider monopolistic practices in determining whether a license should be granted, it does not follow that the Commission is empowered to enact in the form of regulations its views with respect to unfair contracts and illegal monopolies. The F.C.C. is a licensing agent. As such it sits as a judicial body. But in promulgating the regulations it is acting as a legislator. These two functions cannot rest with the same agency. It does not follow that, because the Commission can perhaps deny an application for a license to a

[8] Transcript, pp. 142–43.

person whose conduct is regarded as monopolistic, it can also enact into regulatory form a prohibition against what it considers to be monopolistic practices.

It is claimed that if such practices are found to exist, it is the duty of the Commission to refer the matter to the Department of Justice or directly to Congress. The Commission should not enlarge its powers indirectly, either through relying on a licensing authority which is strictly limited or through reference to an obscure public interest standard which in its setting clearly indicates that the F.C.C. cannot regulate the business of a network.

In going back to the statements made at the time the Radio Act of 1927 was being considered by Congress, a significant remark made by Senator Dill is emphasized. "The bill does not attempt to make the Commission the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court." [9]

Senator White, however, is the industry's greatest bulwark. In speaking about the situation at the time the Radio Act of 1927 was being debated, the Senator asserted: "The Congress went on and, I think, consistently and persistently got away from the idea that an individual or a commission had the right to determine this question of guilt of monopoly. . . . They could revoke these licenses for monopoly when a court had found a person guilty. I think the Commission has just assumed in the first instance rights which it was never in the mind of Congress they should exercise—that is the right to define monopoly and next the right to try for monopoly. . . . If they have a right to define monopolistic acts, if they have a right to try me for a monopolistic act, then, of course, the rest follows." [10]

At another point during the hearings Senator White was even more emphatic. He declared, "It was never intended and I will say this definitely, regardless of what anybody else may say, and I think I know as much with respect to this statute as anybody else; I am saying to you, Mr. Fly, that it was never the intent of Congress that the F.C.C. should decide for itself what was a breach of the penal

[9] Footnote, F.C.C. Brief, December, 1941, p. 50.
[10] Senate Interstate Commerce Committee Hearings, Transcript, p. 255.

statutes of the United States. . . . I will stand on that proposition; I do not care who may take a contrary view." [11]

It is clear from the above that the central legal issue is whether the Commission has the power under the Communications Act to consider questions of monopoly and competition in formulating and enforcing its licensing policy, or whether the determination of such matters is the proper function of the courts. The Federal Communications Commission argues the first; the two major network organizations, the second.

Like the government, the networks next go to the Communications Act itself for justification of their stand. With respect to the public interest standard reiterated throughout the statute, it is contended that, when this is read in the light of Sections 311 and 313, the power of the Commission to decide what business practices are in restraint of competition must be denied. It is also stressed that, although the antitrust laws are made applicable to radio broadcasting, Section 313 provides that when any licensee has been found guilty of violating these, the court so finding is authorized to revoke the license. Furthermore, Section 311 only requires the Commission to deny a license to any person whose license has been revoked by a court and simply authorizes the Commission to refuse a license to any person "finally adjudged guilty" by a Federal Court of monopoly or of an attempt to monopolize under Section 313.

"This order in effect denies that meaning to the words 'finally adjudged guilty' by substituting the Commission's judgment for that of the Court. The particular treatment of this subject in the statute negativing the Commission's power in this regard governs, we feel, over the general provisions relied on in the assertion of power by the Commission. This is all confirmed by the Sanders case . . . where Justice Roberts said that the Commission has no control over the business practices of radio broadcasters, and where the Supreme Court went on to say that Congress enacted the Act intending to leave competition in the business of broadcasting where it found it." [12]

[11] *Ibid.*, pp. 79–80.

[12] John T. Cahill, counsel for N.B.C., Injunction Suit, Oral Arguments, January, 1942, Transcript, p. 74.

Then the industry cites Section 602 (d) of the Communications Act and claims that this gives the power to the Commission to enforce the Clayton Act provisions only as they regulate common carriers. Section 4 (h), however, specifically states that broadcasters are not to be deemed common carriers.

When Section 303 (i), giving authority to the Commission to "make special regulations applicable to radio stations engaged in chain broadcasting," is considered, it is contended that this whole section refers exclusively to technical problems of radio broadcasting. "I say that to seize upon this subdivision in a technical section to reorganize, via a fifteen-year-old statute, the business which has grown up alongside this statute, is clutching at straws." [13]

And Senator White tends to support Mr. Cahill's claim. The Senator stated at the Interstate Commerce Committee hearings:

> I suppose if any one person is responsible for certain of the Sections in this Act, then I am. I think I may say with complete truth that I am responsible for the drafting of Section 303 (i); that I am responsible for the drafting of Section 311; that I am responsible for the drafting of Section 313. . . . I do not wish to undertake to say precisely what we meant by Section 303 (i), although I have some notions about it. I am a little more definite as to what we did not mean by it. I am as certain as I can be of anything human that we never intended by Section 303 (i) to give to the Federal Communications Commission authority to write an anti-trust statute of its own, by regulation or otherwise—to determine what constitutes a breach of the anti-trust statutes of the United States. . . . We specifically conferred upon the courts authority to determine whether any person or corporation was guilty of monopolies, of monopolistic practices.[14]

Commissioner Thomas A. M. Craven of the F.C.C. in testifying at the Senate hearings also supported the industry argument. To him the principal fault is that the Commission in its regulations has set forth acts and practices which are deemed to be either in restraint of competition or monopolistic. Having given its own definitions of these acts, the Commission then proceeds to try the licensee to determine whether he is guilty of monopoly. "If they have that right, I think everyone would agree that it is in the public interest

[13] Injunction Suit, Oral Arguments, January, 1942, Transcript, p. 77.
[14] *Ibid.*, pp. 78–79.

that they should not continue the license to a guilty party. But they have just reversed this thing. They have declared that this, that, and the other thing are monopolistic acts, and then, without any of the safeguards which the law generally throws around a person judged with violation of a statute, they proceed to try the issues and determine whether I am guilty of monopoly, that is monopoly as defined by themselves—not by law, but as defined by themselves." [15]

The networks next appeal to Section 326 of the Communications Act, which states that no power of censorship is given to the Commission and that no regulation shall be promulgated which shall "interfere with the right of free speech by the means of radio communication." The assertion is made that the Commission's claim to adequate statutory authority to promulgate and to enforce the new regulations must be denied as an interference with the right of free speech by radio and as an infringement of the First Amendment of the Constitution.

Finally, the Sanders case above all others is referred to as supporting the industry argument. Whereas the government relies on the language of this decision, which reinforces the concept that radio broadcasting is a domain of free competition, the two major chain organizations stress that portion of the opinion which states, "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." N.B.C. and C.B.S., of course, insist that the enforcement of the rules would constitute regulation of the business of the licensee and supervisory control of programs, business management, and of policy.

[15] *Ibid.*, p. 254.

✕ *Chapter 9* ✕

SOME SPECIAL PROBLEMS

Amount of Advertising Continuity

SINCE NETWORK BROADCASTING in this country is financed by advertising, a certain amount of advertising continuity in a commercial program must be expected and accepted. On the other hand, as we know, there is advertising and advertising—both as to length and quality. Everyone at times has been irked by long drawn-out selling blurbs which are out of harmony with the rest of the program and which are so lacking in finesse and entertainment value that one reaches for the dial and turns to another station.

The networks and the advertiser realize this. There is today an encouraging trend toward shorter and more interesting advertising continuity in commercial programs. This is easier to achieve in so-called institutional advertising; more difficult when a particular product is being sold, for then the temptations of high-flown praise and bargain price are hard to resist. Nevertheless, the advertiser is gradually coming to realize that long, insistent selling efforts hurt rather than help him.

The Columbia Broadcasting System and the National Broadcasting Company until recently followed different policies with respect to this question. Columbia has always thought of the advertising portion of a program as something set apart from the rest of the show. Advertising continuity is one thing; the program proper, another. As a result of this approach, C.B.S. as early as 1935 set specific limitations on the amount of advertising continuity. In the daytime, the sponsor's sales talk shall not be over 15 percent of the total broadcast period, with 40 seconds additional allowed on a 15-minute program. During the evening the following restrictions are prescribed by C.B.S.:

Length of Program	*Maximum Time for Commercial Appeal*
One hour	6 minutes
Three quarters of an hour	4 minutes, 30 seconds
One half hour	3 minutes
One quarter hour	2 minutes, 10 seconds

Instead of thinking of advertising continuity as something dissimilar to the rest of the script, N.B.C. accepted the fact that advertising can be woven into the program itself—becoming a part of it—and formulated its policy accordingly. N.B.C., in 1938, imposed no limitation on the amount of sales efforts permitted. The alleged justification of this position is that one cannot differentiate clearly between what is advertising and what is program, granted the two are combined skillfully. The following exchange between Mr. Royal and Mr. Dempsey during the F.C.C. hearings will illustrate this attitude:

MR. DEMPSEY—I think you stated the other day that there was no fixed policy with respect to the amount of advertising continuity that would be permitted by N.B.C. for any given program?
MR. ROYAL—At the moment, there is none.
MR. DEMPSEY—I think you stated further that one of the reasons why no such policy had been adopted was the growing practice of weaving the advertising continuity into the program itself?
MR. ROYAL—That is correct. . . . They are more skillful in their way of inserting advertising at the moment. . . . They make it humorous. They make advertising entertaining.
MR. DEMPSEY—Somewhat the same trend that you see in the comic strips in the newspapers where they advertise, having Tom Mix ride a horse.
MR. ROYAL—I don't think there is any similarity between radio and comic strips. . . .
MR. DEMPSEY—The whole program, from the standpoint of the advertiser, is an advertisement, isn't it?
MR. ROYAL—No, I wouldn't say that. I think their whole program may be made up so that part of it would be to get listeners so that they can get their message over. . . .
MR. DEMPSEY—The practice of weaving advertising continuity into the part of the program which would ordinarily be headed entertainment or designated or described as entertainment, you think is an appropriate and proper practice?

MR. ROYAL—If it is well done and if it is entertaining. There is no stigma on advertising in the program, if it is well done.[1]

It is difficult to decide how much advertising continuity should be allowed. On the one hand, the sales appeal, to be effective and not objectionable to the listener, must be interesting, display dexterity and finesse, be not too long, and be as unobtrusive as possible. The audience should be sold without knowing it. If skillfully handled, the "weaving" method is obviously the most successful way of accomplishing this.

But once you completely open the door to "weaving"—the moment you do not require that the advertising continuity be distinct from the show itself—you run the risk, as Mr. Dempsey put it, of the "program becoming an advertisement all the way through." Consequently, it appears to be more in the best interests of the listening public to place some limitation on the extent of commercial appeals.

N.B.C. apparently now accepts such a conclusion, at least in part, because in the pamphlet, entitled *Broadcasting in the Public Interest* and published in 1939, the company modified its former nonrestrictive policy. In this publication National states, "In order to maintain good balance between the program content and the commercial copy, it is believed that, on a 15-minute daytime program, the formal advertising message is most satisfactory when it occupies less than 3 minutes of the entire period. . . . In evening programs, standards of good radio balance indicate confining the formal advertising message to less than 15 per cent of the period of a quarter hour program, and less than 10 per cent of longer program periods."

Commercial versus Sustaining Programs

We have already noted that network programs are divided between commercial and sustaining. The former are paid for by an advertising sponsor and are produced by the network, by an advertising agency, or, infrequently, by the advertiser himself. Sustaining programs, on the other hand, are not paid for by an ad-

[1] F.C.C. Hearings re Docket 5060, Transcript, pp. 579–81.

vertiser. In the case of N.B.C. and C.B.S., they are financed by the companies themselves.

N.B.C. and C.B.S. produce the majority of their sustaining programs. The remainder, except for certain special events, are paid for by the network but are secured by outside pick-ups and represent such features as the New York Philharmonic concerts and the Metropolitan Opera. In contrast, the Mutual Broadcasting System does not produce sustaining programs itself; this job is left to the outlets, Mutual simply selecting for general distribution the sustaining program which it considers most suitable for any particular hour.

The early history of broadcasting indicates that it was the ideal of some pioneers in the business to bring outstanding cultural and educational events into the homes of the whole nation. Here was a new means for public enlightenment which in these potentialities presented a challenging opportunity to those engaged in the industry. The potentialities are still there but to a large extent they remain unfulfilled. Why? Because the economics of our present system of chain broadcasting work against their fulfillment.

In the first place, a network organization is in business to make a profit and in doing so is almost entirely dependent upon the demands and wishes of the advertiser. Hence, unless the management possesses an unusual sense of public responsibility and unless the natural desire for maximum profits is resisted, there will not be present the freedom of decision and non-commercial attitude necessary to insure a sufficiently wide variety of program content to do justice to these functions.

Successful show business does demand variety not only as between programs on the same chain—commercial or sustaining—but also as between networks. This variety, however, is basically limited to the advertiser's appeal. Remember that the great majority of sustaining programs are either build-ups for commercials —to increase the size of the listening audience in favor of the advertiser—or "try-out" programs which it is hoped will eventually be sold to a sponsor. In this latter connection it was testified that every N.B.C. sustaining program, with the exception of the Symphony

Orchestra when it was under the baton of Toscanini and of certain special events, was for sale.

The advertiser is not interested in cultural and educational enlightenment because the public is not. His primary aim is to sell his product and in attempting to do so he must try not to offend. He must appeal to the mass of the people and he must cater to their tastes. The great bulk of the listening public do not desire to hear Beethoven, Sibelius, Wagner, and Verdi; lectures by eminent statesmen, educators and scientists. They wish to be entertained or kept abreast of events—not educated or uplifted. Such studies as Dr. Paul Lazarsfeld's *Radio and the Printed Page* provide convincing evidence that as one goes down the economic and cultural scale, there is more and more radio listening but less and less serious and discriminating listening. Hence the soap operas, swing bands, and news summaries.

In the field of entertainment the American network industry has done a good job. The people of this country probably enjoy the finest radio entertainment in the world. The provision of such relaxation and enjoyment—particularly under the stress and strain of war—is a noteworthy contribution. Furthermore, the function of the dissemination of news is efficiently fulfilled by the chain organizations, and this is especially true in the present national emergency. Here again the networks are providing a vital service to the country in a manner deserving of praise. These two functions of radio—entertainment and the dissemination of news—are compatible with commercial broadcasting financed by advertising. There is little question in the writer's mind that they should remain in commercial hands. In contrast, the educational and cultural functions appear incompatible with advertising support at the present time.

It is true that in recent years the public has come to demand a somewhat better cultural fare. The networks gradually, although timidly and in pathetically small amounts, have aroused an increasing interest in and appreciation of good music on the part of the public, and through other sustaining programs have encouraged the listening audience to turn its attention to the acquisition of knowledge and the cultural and artistic achievements of the human

mind. But the fact must be faced that these fairly rare gestures to the more discriminating minority are largely window dressing because network sustaining programs basically are geared to the tastes of the general public.

Within this limitation of the advertiser's appeal, however, there is still some scope, and the sustaining program service represents the more feasible way of partially fulfilling the cultural and educational functions of network broadcasting. Therefore, an important question is, Does our present system give reasonable assurance that a balanced proportion will be maintained between sustaining and commercial programs? The answer, unfortunately, is more in the negative than in the affirmative.

A licensee, in order to retain the use of the frequency allocated to him, must operate his station in the "public interest, convenience, and necessity." Under the Communications Act, the F.C.C. has no direct regulatory powers over networks themselves, which are not licensed as networks. The fact that chain organizations are the licensees of a certain number of stations, however, provides the Commission with the power of regulation over networks as a practical matter. If the network does not operate in the public interest, the licenses for those key stations which are owned or leased may not be renewed.

Consequently, a chain organization, even if it could follow the most profitable procedure of selling all its network time, would not do so because it realizes that such action would be construed by the Commission as contrary to the public interest. This fact, coupled with the network obligation to its affiliates to provide sustaining programs when business is slack and the economic incentive of the chain organization to experiment with new shows in the expectation that they may be eventually sold to an advertiser, guarantees a minimum sustaining program service. Nevertheless, the balance can be most disproportionate. For instance, in 1937 the basic Red network showed about 63 percent commercial network programs in clock hours and only 37 percent sustaining. At that time, of course, N.B.C. controlled two networks and there were actually more sustaining than commercial programs on the Blue. Although business factors were largely responsible for this disparity in the other direc-

tion, the company was rendering an over-all balanced service. But now that N.B.C. controls only one network, the economics of chain broadcasting financed by advertising results in a disproportionate share of the broadcast day—particularly those hours when the greatest number of persons are in a position to listen—being given over to commercial entertainment programs. This situation has been accentuated by the fact that the Red network was heavily weighted with commercials in the past.

This conclusion does not apply only to N.B.C. It is true of C.B.S. and M.B.S. It is one of the unavoidable consequences of commercially financed network broadcasting. In short, despite the distinction between sustaining and commercial programs and the potentialities of the former, the cultural and educational possibilities of radio from the standpoint of a national network and national coverage will largely remain dormant until these functions of broadcasting which are now incompatible with advertising have been divorced from commercial network jurisdiction and provided in some other way with the necessary economic support, or until the public becomes more discriminating.

Rural Coverage

"The real danger in the economics of broadcasting is that the interest of the advertiser in reaching large masses of listeners and the profit that is to be made in accommodating him will result in laying down too many tracks of good reception to thickly inhabited centers and too few, or none at all, to sparsely settled areas which are not such attractive markets." [2]

Today millions of people in this country have no acceptable broadcasting service at all. Other millions are entirely dependent upon nighttime sky wave propagation. Certainly it is axiomatic that every man, woman, and child, granted they possess a receiving set and can secure the necessary electricity to operate it, should be able to enjoy during the day and night the benefits of radio broadcasting from at least one station. Anything less than this, in the writer's opinion, is a betrayal of a public trust and shows that we

[2] F.C.C. Engineering Report re Docket 4063, p. 5.

have been derelict in fulfilling the minimum possibilities of this medium. Through radio communication many of the dark corners of life can be lighted. It gives relaxation and rest after toil; it brings entertainment and renewed hope to the poor and unfortunate; it can educate the people and bring the artistic masterpieces into the average home. It can, in short, lead on to a better and a happier world. Why then have we failed to live up even to this minimum?

The clear-channel policy of the Commission, which has permitted the highest powered stations operating on an exclusive frequency to be concentrated in metropolitan areas, is in large measure responsible. The lack of rural electrification in some areas and the inability to afford the purchase of receiving sets have also been retarding influences. Finally, the economics of our commercially financed system of broadcasting, as the quotation at the beginning of this section indicates, work against the extension of network radio service to sparsely settled and unremunerative communities. The advertiser is almost exclusively interested in the densely populated areas with relatively high purchasing power. The chain organizations, in business to make a profit and dependent upon the advertiser's dollar in doing so, are under enormous pressure to pattern their coverage policy solely in terms of the advertiser's demands. Before discussing the manner in which the industry has met this problem, however, it seems desirable to review the two possible methods of securing national coverage aside from transcriptions, and to comment further on the questions of clear-channel stations and primary and secondary service areas.

Assuming for the moment that a program being put on the air is suitable for broadcasting to the entire nation and also assuming that each family in the country has a receiving set and has access to the required electricity, there are two possible ways of making this program available to all: through transmission by a single station operating with very high power; or by linking up individual stations on lower power into a chain. Mr. Sarnoff originally thought in terms of the single high-powered station, and this principle has been followed up to the relatively low maximum of 50 KW permitted by the F.C.C. Because of this government limitation on the amount

of power allowed and because coverage does not increase proportionately with increase in power, the development of broadcasting in this country has inevitably tended more toward the network method.

As we have seen, a high-powered station at night requires a clear channel—otherwise intolerable interference would be present from another station operating on the same frequency but broadcasting a different program. This problem of clear channels and their use to secure the maximum coverage has been and remains one of the most disputed issues between the government and the industry. The networks, of course, want high-powered stations. In this way they can reach more people and the signal strength will be greater than that of a competitor station in the same market which broadcasts on lower power. But the network organizations are not primarily interested in using these high-powered clear-channel outlets for rural coverage purposes. Because the advertiser is their *raison d'être* and because the advertiser is concerned with a market's size and purchasing power, these Class I A stations have been located—with the approval of the Commission—in the highly populated and relatively affluent communities in the eastern part of the United States and on the Pacific Coast.

The government now insists, however, and rightly so, that the only justification for a clear-channel station in our present system is to give program service to rural areas, far removed from the centers of population. The inconsistency of having chain broadcasting, coupled with clear-channel outlets, concentrated in large cities was emphasized by Chairman Wheeler. "It seemed to me that there was perhaps some justification for these cleared channels before there was chain broadcasting. But with chain broadcasting as it is at the present time, I do not feel that the chains ought to be allowed to pick out just the areas where they can make the most money. The chains can put stations anywhere and tie them up to the chain so that people can hear them. . . . A broadcasting corporation is in the nature of a public service corporation, and it ought to place its stations, or to tie up with stations, so that people in the rural areas can hear them. . . . After all, broadcasters are dependent upon a Government license and the networks are, there-

fore, in a different position from that of other businesses in the United States." [3]

Some years ago there were fifty clear channels. Subsequently they were decreased to forty and by 1942 they had been further reduced to twenty-five. The network companies control the clear channels or Class I A stations—the lion's share being in the hands of N.B.C. and C.B.S. Before directional antennas were employed a great deal of the service of these stations was wasted over the oceans, and even today, because of their location, a large part of the potential service which these stations could provide is not being utilized. Speaking of these clear-channel stations in a colloquy with Senator Wheeler, Chairman Fly declared:

MR. FLY—They generally have the best wave lengths, and they are situated in the best and most lucrative markets. Unfortunately, rather than serve the larger purpose of the cleared-channel station—that is, to reach out to great distances and tap unserved rural areas—the tendency has been in the past—and, of course, the Commission must bear some share of the responsibility—

SENATOR WHEELER—I should say it must bear a lot of it.

MR. FLY—The tendency has been to crowd these cleared-channel stations, not where they will reach the vast rural areas, but where they will skim the cream of the market. Boston is a minor example, but consider New York, Chicago, and Los Angeles . . . The question is, considering all these factors, how can the public get the most in terms of public service out of these clear channels? I think that is a very grave question.[4]

Commissioner Craven, testifying at the Senate hearings, explained that competitive considerations constituted the main reason for the Commission's continuing to permit a concentration of high-powered stations in metropolitan areas. "Heretofore I have endeavored to apply modern engineering principles to bring about an improvement in rural service. I have been unsuccessful so far because the Commission majority has continued to increase the number of stations in the large metropolitan centers. I believe that in doing this they have overemphasized the doctrine of unlimited competition at the expense of radio service to the people as a whole." [5]

[3] Senate Interstate Commerce Committee Hearings, Transcript, p. 26.
[4] *Ibid.*, p. 25.
[5] *Ibid.*, p. 303.

The problem of clear channels and that of broadcasting service areas are closely related. The primary service area [6] of a station is served by the ground wave which gives acceptable reception only at relatively short distances from the transmitter (up to 200 miles when power of 50 KW is used). The secondary service area of a station is served by the sky wave, which generally speaking, because of factors having to do with the ionosphere, gives service only at night. This service is provided through reflection of the sky wave, and the amount of reflection that occurs depends primarily upon the degree of ionization and the angle of incidence at which the wave strikes the ionosphere. Sunspot activity appears to be the major controlling factor in the effectiveness of sky wave propagation. Although much more study of this question will be necessary before sky wave transmission is adequately understood (competent observations of the eleven-year sunspot cycle in its relation to sky wave propagation have not as yet been made), the evidence to date clearly indicates that the greater the sunspot activity the shorter the distance of sky wave transmission. It has been estimated, for instance, that the sky wave of a 50 KW station in 1935 gave serviceable signals in as wide an area as a 500 KW station in 1938, when sunspot activity was much greater.

In short, besides being a problem with important social implications, the question of national radio coverage is a highly technical one. Sky wave propagation in the standard band is extremely random. It is characterized by severe fading and is greatly subject to man-made electrical noise, changes in atmospheric conditions, and sunspot activity. Much has yet to be learned about it. However, the science of radio broadcasting is constantly progressing, and sky waves now provide an acceptable although uncertain service. Furthermore, the day may come when the entire country will enjoy

[6] The F.C.C. standards of good engineering practice define acceptable primary service as falling within the .5 millivolt per meter contour for population centers up to 2,500 people, the 2 millivolt per meter contour for population centers from 2,500 to 10,000 people, and the 10 to 25 millivolt per meter contour for population centers from 10,000 people and up, these conditions to prevail 90 percent of the time. Secondary service is defined in terms of the same signal strengths as applied to population size but the conditions are required to prevail only 50 percent of the time. It is interesting to note in this connection that our standards of acceptable signal strength are considerably below those of England.

primary service and when sky wave propagation will not be needed. There do not appear to be any conclusive technical reasons, therefore—particularly if scientific advance and adaptation are coupled with a far-sighted governmental licensing policy and with a more enlightened attitude on the part of the networks—why the whole nation cannot in the future receive radio program service.

In attempting to achieve such national coverage, program duplication, which has been defined as "the simultaneous serviceable availability of the same program from two or more stations in a given area" should of course be avoided where an acceptably strong signal is present. On the other hand, it is in the public interest to encourage all the duplication of broadcasting facilities which the traffic will bear—broadcasting facilities in competition on the basis of different program content. Such a situation would represent the ideal, for then the public would enjoy the maximum variety of programs from which to choose.

Mr. Hedges, vice-president of N.B.C. in charge of station relations, believes, however, that program duplication in certain communities is justified. To him, advertising considerations are paramount. When asked by Mr. Hennessey, counsel for the company, to what extent he would be influenced by duplication of program content in deciding whether to add a station to the N.B.C. network, Mr. Hedges replied:

> I would have no hesitation in adding a station in a large market . . . one of the first 25 in the United States . . . even though that market might be receiving primary service from a station servicing another market which was adjacent to it. If for example I were asked today whether or not I would add WTMJ in Milwaukee to the network, although WMAG is very close to Milwaukee, I most certainly would add it because in a market of that importance it is desirable to have affiliation with a station which is primarily concerned with Milwaukee interests, and to give in effect an added punch within Milwaukee to the program which we would have on the network.
>
> But when it comes to other regions where there are smaller markets, I would not place a station within the primary area of another affiliate for the simple reason that I want the affiliate to secure the full benefit of the audience which he can create with the network affiliation, instead of having him share it with someone else.[7]

[7] F.C.C. Hearings re Docket 5060, Transcript, pp. 1661–62.

And now the final questions we must ask are: Within the scientific and licensing limitations of the radio art today and within a reasonable standard of profitable operation, how have the networks met this problem of national coverage? Have they succumbed to the advertiser's restrictive inclinations or have they resisted maximum profits in order that the greatest number of people may enjoy their programs? The record shows that almost exclusively profit considerations have again been decisive; unless an unaffiliated station looks like "pay dirt" it will not be taken on the network.

This attitude is shown by Mr. Hennessey's testimony at the F.C.C. hearings when he declared that abrogating the five-year contract would be disastrous to small stations which are taken on by the networks as a "spec" because his company could not assume this risk unless a period of time at least this long was permitted to allow the arrangement to work out profitably. To these remarks Chairman Fly replied, "You are getting back now to the economics of it, and to the position that no matter how much money you make elsewhere, you are not going to lose any money on any one particular station in bringing the national service to that community." [8]

There is, of course, a basic network which the advertiser must purchase in its entirety during the evening hours. It is stated that one of the reasons for this requirement is to force the advertiser to render greater national coverage. The profitability of such a requirement is undoubtedly the most impelling reason. In any event, this policy does guarantee—the advertiser's wishes to the contrary—a greater coverage than as if he were completely free to pick and choose the individual stations.

Although this basic network requirement has been extended during the past ten years, in the writer's judgment the policy of requiring the advertiser to purchase more of the total network should be extended much further. Except for the basic network rule, which is generally enforced only in the evening, the advertiser still has far too great a latitude in choosing his particular combination of stations.

In this connection, however, the Columbia Broadcasting System in 1942 announced a new policy of giving a substantial discount to

[8] F.C.C. Hearings re Docket 5060, Transcript, p. 8813.

an advertiser if he would take the entire network. This is a significant and most encouraging development and should result in the C.B.S. network providing more continuously a greater national coverage.

The position of the chains in refusing to take on a new affiliate —both basic and supplementary—unless it can justify itself from the profit standpoint is clearly shown in connection with so-called bonus stations. A bonus station is one that is thrown in for good measure if an advertiser takes a certain other station. In 1938 N.B.C. had four bonus stations, which received no remuneration for broadcasting network commercial programs except in the case of cut-in announcements. It is true they did receive sustaining service free of charge, although frequently they were required to assume wire-line costs. Furthermore, in apparent contradiction of the provisions of the Communications Act, a bonus station had no voice in the decision as to whether a network commercial program would be broadcast over its facilities.

A bonus station is usually to be found in a minor market, a minor market, however, which has some value to the network which warrants our affiliation with it, and when I speak of "value to the network," I mean merely the extension of our program service into areas which we do not now adequately serve; where the economic opportunities, however, for that region, due to the sparsely settled territories served by the station, are not sufficient to warrant it coming on the network as a station with a rate.[9]

Briefly, maximum profit considerations and the desire of the advertiser to restrict his appeal to the more populated communities with relatively high purchasing power have been decisive in shaping the national coverage policy of the network industry in the past. This has resulted in vast rural areas going without network program service and shows the conflict between the commercially financed chain and true national coverage. But the author is convinced that the future will tell a different story. It will eventually be fully recognized by the network companies that the public interest is really their best interest. As Chairman Wheeler declared, "I am not complaining because of the fact that you are making money.

[9] Mr. Hedges, at F.C.C. Hearings re Docket 5060, Transcript, p. 1652.

The only point I want to make is that when you are making a good profit, there does not seem to me to be any reason why, if you want to continue to make the profit, you should not give up part of the profit you are making to see to it that the rural communities get better programs. That would be intelligent selfishness on your part—and on the part of all the networks and the national advertisers." [10]

One Network Organization Operating Two Networks

The National Broadcasting Company controlled until January of 1942 two networks—the Red and the Blue. At the time of the F.C.C. hearings in 1938 the company had two outlets in over thirty cities, and by 1940 the number had increased to about forty cities. This situation of course gave N.B.C. a tremendous competitive advantage over the other two national chains—the Columbia Broadcasting System and the Mutual Broadcasting System.

From the standpoint of operation and earnings, however, the Red and the Blue networks showed a great disparity. The disproportion between commercial and sustaining programs on the Red network in 1938, for instance, was even more marked than in 1937. In the former year 74 percent of the network programs on the Red were commercial as compared to only 26 percent on the Blue. Furthermore, in 1938 N.B.C. paid to the seventeen independently owned basic stations on the Red a sum of $2,803,839 for broadcasting network commercial programs, whereas to the eighteen similar basic stations on the Blue the company paid only $794,186.

Except for the basic and so-called basic supplementary stations, the standard affiliation contracts with the independent outlets associated with N.B.C. did not specify whether they were to be considered a part of the Red network or a part of the Blue network. The company retained the right to shift a station from one network to the other. Such an arrangement afforded the advertiser a much greater latitude in selecting a particular combination of stations to meet his special marketing requirements and gave N.B.C. another competitive advantage over its rivals.

An additional competitive weapon available only to the National

[10] Senate Interstate Commerce Committee Hearings, Transcript, p. 370.

Broadcasting Company by virtue of its control of two networks was the company's discount policy of allowing a discount to advertisers of 25 percent, based on the amount of total time purchased. Thus an advertiser who was already sponsoring one program on the Red network, could secure additional time on the Blue for another program at a substantially reduced price.

The operation of the two chains also represented a significant benefit with respect to programming and audience building, for N.B.C. had at its disposal twice as much time as the two other national networks. For any specific hour it was not forced to choose between a commercial or sustaining program. It could sell the period on the Red to an advertiser and broadcast a sustaining program simultaneously on the Blue.

The National Broadcasting Company contends that independent station demand for affiliation with the company constituted the main reason for the original development of the two networks under its management. In addition, N.B.C. claims that the Red and the Blue were competitive with each other, and not merely cooperative as the F.C.C. asserts.

CHAIRMAN MCNINCH—Mr. Royal, I understand . . . you do have the direction of both the Red and Blue network programs?

MR. ROYAL—That is correct.

CHAIRMAN MCNINCH—And I understand you to say that they are actually competitive?

MR. ROYAL—We try to make them that way; yes.

CHAIRMAN MCNINCH—You try to make them that way?

MR. ROYAL—Yes sir.

CHAIRMAN MCNINCH—Is that at all a difficult performance on your part, to compete with yourself in that sense?

MR. ROYAL—I don't think that I am competing with myself, Mr. Chairman . . .

CHAIRMAN MCNINCH—Does the fact of common ownership and common direction by your one mind complicate the difficulties of having the Red and the Blue networks compete with each other?

MR. ROYAL—I think I made myself pretty definite, Mr. Chairman, that it was not one mind, that one mind could not do it, that it was an organization, a large organization, and that a large organization, in my opinion, I think finds it practical and successful to compete with the Red and Blue networks.

CHAIRMAN MCNINCH—But as to all matters that are left open to decision what mind determines as to programs?
MR. ROYAL—Mine.
CHAIRMAN MCNINCH—Then that is what I thought. Now, does the fact of common ownership of the two networks by the same company, which employs you, enable you to have a fair, square chance to balance competitively, not coöperatively, the programs between those two?
MR. ROYAL—Yes.
MR. DEMPSEY—Mr. Royal, in your organization do you make any distinction as to the duties, particularly in your New York organization, between the people who work on Blue and the people who work on Red network programs?
MR. ROYAL—No.
MR. DEMPSEY—And in the field, except so far as your staff on the particular stations are concerned, do you make any such distinction?
MR. ROYAL—No.
CHAIRMAN MCNINCH—And you think you do perform that psychological and mental feat successfully?
MR. ROYAL—Definitely.[11]

At another point during the hearings, it was admitted that the only way the Red and the Blue could compete was for listener attention. The claim was made that N.B.C. entered into competition with its own advertisers to make this possible. The following testimony is significant in this connection.

MR. DEMPSEY—You said, I think, that you tried to have one network compete with the other?
MR. ROYAL—That is right.
MR. DEMPSEY—In what ways can they compete with each other except in giving programs? Compete for listener attention, is that it?
MR. ROYAL—That is it. . . .
MR. DEMPSEY—You are trying to take the listeners away with your Blue network programs which may be sustaining in character from the advertiser who is buying time on the Red network at the same time?
MR. ROYAL—That is correct.
MR. DEMPSEY—And vice versa?
MR. ROYAL—That is correct.
MR. DEMPSEY—And you schedule the best sustaining programs you can get in order to take listeners away from the commercial programs?
MR. ROYAL—That is correct.[12]

[11] F.C.C. Hearings re Docket 5060, Transcript, pp. 644–47.
[12] *Ibid.*, p. 618.

The finances of the Red and Blue networks were not segregated. All revenue from both went into a common pool and all expenses of both were paid out of this common pool. Mr. Mark Woods, vice-president and treasurer of N.B.C., agreed there was no financial competition between the two chains. In addition, Mr. Witmer, vice-president in charge of sales, as well as Mr. Royal, testified that all of the N.B.C. sales department, with the exception of a few special salesmen who were exclusively attempting to increase the business on the Blue, sold time to advertisers on either network. Hence, there was not a group trying to sell time on the Red in competition with another group trying to sell time on the Blue.

MR. DEMPSEY—Mr. Woods, is it your idea of competition that two companies can be competing with each other when their income cannot be segregated, their expenses cannot be segregated, and their income goes into a common pot, and expenses are all paid out of that common pot? In the ordinary sense of the word are they competitive?

MR. WOODS—I think they can be. The program people who are competing in building these programs know nothing whatsoever of what might happen to the revenue. . . . It seems to me it does not make so much difference where your money comes from as long as you have some money to work with. Then if you provide certain people, who have ideas, who have ability to produce programs with that money, and say, "you are now competing with someone else," they will go out to do the very best job that they can and build the best programs that they can, without thought of where the money comes from, because they never know, or the majority of them never know.

MR. DEMPSEY—If you are in business and you have a competitor, and you are using your income to finance the competition and you are getting your competitor's income to finance your competition with him, and your expenses are all paid out of the same funds, and your income all goes to the same place, would you ordinarily define yourself as in competition with that person . . . ?

MR. WOODS—In the financial sense there is no competition, because the money goes into one pocket. In the economic sense, I would say that there was very definitely competition, because the people that are providing the sales don't know where their pay comes from. . . .

MR. DEMPSEY—As I understand it, Mr. Witmer says that all of the sales department with the possible exception of a special Blue group, will sell time on either network?

MR. WOODS—That is correct.

MR. DEMPSEY—So that there are no Red network salesmen in the sense

that they only are allowed or authorized or employed to sell time on the Red network?
MR. WOODS—I think that is right.[13]

Perhaps because he felt that the criticisms of the above situation were valid or because he hoped to forestall regulatory action by the Commission, Mr. Trammell, when he became president of the National Broadcasting Company in the summer of 1940, separated the activities of the Red and Blue networks. The separation of the Red and the Blue as carried out under Mr. Trammell's direction, however, did not satisfy the Federal Communications Commission. The final *Report on Chain Broadcasting* contained Regulation 3.107, which was to become effective in ninety days and which declared:

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.

This regulation in effect required N.B.C. to sell one of its networks within ninety days. Since the Blue was the least profitable, it was the obvious candidate for disposal. The Federal Communications Commission in its Report defended this regulation as follows:

It seems clear that the Blue has had the effect of acting as a buffer to protect the profitable Red against competition. Available radio facilities are limited. By tying up two of the best facilities in lucrative markets —through the ownership of stations, or through long-term contracts containing exclusivity and optional-time provisions—N.B.C. has utilized the Blue to forestall competition with the Red. We have already noted that Mutual is excluded from, or only lamely admitted to, many important markets. . . . We are impelled to conclude that it is not in the public interest for a station licensee to enter into a contract with a network organization which maintains more than one network. With two out of the four major networks managed by one organization, a station which affiliates with that organization thereby contributes to the continuation of the present non-competitive situation in the network-station market. The re-establishment of fair competition in this

[13] F.C.C. Hearings re Docket 5060, Transcript, pp. 2564–69.

market is contingent upon ending the abuse inherent in dual network operation; our regulation is a necessary and proper means of re-establishing that fair competition.[14]

Commissioners Case and Craven in their Minority Report agreed in principle with the majority. They recognized the desirability of segregating the Red and the Blue networks and stated in this connection, "There is strong presumption that four competing national networks independently operated might afford opportunity for improved service, although there is nothing in the record to establish that stations affiliated with the company operating two networks have not rendered a good public service. It is, therefore, recommended that informal discussions begin forthwith between the Commission and the company operating two networks with a view of obtaining a voluntary segregation."

The opinion was widely expressed that N.B.C. would experience no trouble in finding a purchaser for the Blue. Senator Tobey declared, "If the rumors are true, and we have some evidence of their authenticity, there are plenty of purse strings loose to pocketbooks that are ready to grab up that network on almost a minute's notice." [15]

Chairman Fly was even more optimistic. He did not think there would be any difficulty in disposing of the Blue network. "I do not think for a moment that there will be any difficulty. It will not be wiped out. . . . I cannot imagine that they would be guilty of such business indiscretion. We are not going to tell them how to do it, but it certainly is the view of the Commission that they ought to be able to sell that network, lock, stock, and barrel, with all of the equipment and all of the personnel, existing contracts, affiliations, program sources, and everything else that would go with it, and the public that is receiving the program service from that network should not feel on the following day the slightest impact." [16]

Notice that Chairman Fly declared in the above statement that the Blue network could be sold with all of the "existing contracts." That would appear to be an impossibility, however, because the other regulations make "existing contracts" illegal. Furthermore,

[14] F.C.C., *Report on Chain Broadcasting*, pp. 71–72.
[15] Senate Interstate Commerce Committee Hearings, Transcript, p. 59.
[16] *Ibid.*, p. 96.

the question as to whether N.B.C. would have the authority to "barter with the rights" of the independent stations affiliated with the Blue was pressed by Mr. Trammell.

MR. TRAMMELL—I do not know whether we could transfer those affiliation contracts to a new owner. Mr. Fly says we could.
SENATOR WHITE—. . . You would have to look into each contract, I suppose, to see whether or not, by the terms of the contract itself, the rights given to you by it are assignable. I do not know whether they are or not.
MR. TRAMMELL—. . . I would judge that they are more or less personal in their nature and I question that they are assignable.
SENATOR WHITE—If they are personal and not assignable all you can sell would be the stations you own.
MR. TRAMMELL—One station and a half is all we own. Yet we have been building up the business under certain concepts and certain interpretations of the Act, and we are given ninety days to dispose of a business that has been rendering service. . . . We do not know what we have to sell and we do not know how we can sell it, under these new regulations. . . .
SENATOR WHITE—. . . If you are obligated to dispose of your entire network, which includes plant, contracts, and everything of the sort, if you are required, under the Commission's order to do that and then because of the terms of the contract you have not anything that you can dispose of, then whatever value there may be to you in these contracts is just wiped out. Is not that so?
MR. TRAMMELL—Exactly.[17]

Reflecting the difficulties of a forced sale and stating that it expected a separation to occur without a "legal mandate"—because separate ownership of the two chains was so generally recognized to be desirable—the Federal Communications Commission in its Supplemental Report issued in October, 1941, indefinitely suspended the effective date of Regulation 3.107.

As we have seen, the Radio Corporation of America was quick to take the hint and the Blue Network Company, Inc., was organized with the sanction of the F.C.C. in January, 1942, thus formally, at least, segregating the operations of the Red and the Blue. To reiterate, however, this solution is regarded as only temporary by the Commission and has its approval only for such time as is re-

[17] Senate Interstate Commerce Committee Hearings, Transcript, p. 487.

quired to find an outside purchaser to assume operation. In the writer's opinion the record indicates the definite desirability from the standpoint of competition—granted a fair price can be secured and a feasible and orderly plan of transfer worked out—of the eventual sale of the Blue network to an entirely independent owner.

✕ *Chapter 10* ✕

ARTIST CONTRACTS AND TRANSCRIPTIONS

Artist Contracts

ARTISTIC TALENT is the raw material of broadcasting. Aside from the profit possibilities, the two major network companies recognized from the beginning that it would be in their interests to organize an Artists Service, particularly if the management and services of the artists could be secured on an exclusive basis.

Consequently, on May 1, 1928, the National Broadcasting Company announced the formation of a department which was to "represent, through contractual relations, the famous musicians, singers, speakers, orchestras, and others who broadcast and appear in public." The talent activities of N.B.C. were further expanded in 1931 when the company acquired a 50 percent interest in Civic Concert Service, which was engaged in the business of organizing and managing concert courses throughout the country. The remaining 50 percent interest in this Service was purchased in 1935.

Following the lead of N.B.C., the Columbia Broadcasting System bought 55 percent of the stock of Columbia Concerts Corporation in December, 1930. This concern had been organized in that year as a result of a merger of a group of concert artist managements. The bulk of the business of the Concerts Corporation with respect to radio involves performances by its managed artists on commercial network programs. Unlike the Artists Service of N.B.C., however, this division secured more bookings for its artists from 1931 to 1939 on National's facilities than on the C.B.S. network. Through two other subsidiaries, Community Concerts Service and Columbia Artists, Inc., C.B.S. also engages in the business of organizing and managing concerts throughout the United States, and of managing radio artists in all fields of entertainment. The talent

activities of National and Columbia are therefore generally the same.

Mr. Daniel S. Tuthill, assistant director of the Artists Service of N.B.C., testified during the F.C.C. hearings that his department benefited the artists through urging them to accept engagements profitable to them and through advising them with respect to personal problems. Assisting the artist in these ways was given at first as the principal reason for organizing the Artists Service. However, in later testimony, it was stated that another reason was to circumvent the "chicanery in the artist service field." It was a move to protect "our clients . . . to protect the listening public . . . to protect the artist . . . and to protect ourselves." [1] Finally, when asked by Commissioner Thompson whether the earnings figure of over $600,000 from management fees in 1937 was correct, Mr. Hennessey, counsel for N.B.C., declared, "Yes, sir, the precise amount for 1937 was $674,891.[2] . . . Clearly we were in this business to make some money. Obviously, it was attractive to us as well as the artist. . . ." Chairman Fly then remarked, "Well that's the first time that you have said anything that would at all explain to me why you managed him." [3]

There are three principal talent centers in the United States—New York, Chicago, and Hollywood. The Artists Service Department of the National Broadcasting Company had offices in these cities. Furthermore, talent scouting was continually carried on and the organization of the Service was highly departmentalized. There were, among others, the concert division; the talent sales division, which was divided between radio appearances and personal appearances (in motion pictures, night clubs, theaters and transcriptions); and the private entertainment division which was equipped to provide everything from acrobats and magicians to trained seals and goats.

In 1938 the Civic Concert Service had membership concert courses in 77 cities and on November 1 of that year the Artists Service had more than 350 artists under management contracts. Whereas the gross business of this phase of N.B.C.'s activities in 1928

[1] Mr. Ashby, at F.C.C. Hearings re Docket 5060, Transcript, pp. 9030–31.
[2] This refers to gross revenue. Net profits in that year were $286,882.
[3] F.C.C. Hearings re Docket 5060, Transcript, p. 9041.

amounted to only $1,000,000, gross talent bookings in 1937 reached $6,320,274. Generally speaking, the company received a commission of 10 percent on the fees paid to artists under contract with the Artists Service, except for performances on N.B.C. sustaining programs, when no commission was collected. In short, the Artists Department through contractual arrangements not only guaranteed the services of artistic talent to N.B.C. for broadcasting purposes but this phase of the company's operations was also very profitable in itself. Most artists are desirous of performing on the air, and consequently it is entirely understandable why the cream of the country's talent was willing to sign exclusive management contracts with a company which controlled two of the four national networks.

The bulk of talent used for sustaining programs was bought outside but not through other agencies. An artist who held a sustaining program contract with N.B.C. was regarded as an employee of the company, receiving a regular salary. This was not true of the artist who held a management contract and performed on commercial programs. Hence, there was a tendency to restrict the number of regularly employed sustaining artists. This is borne out by the figures given by Mr. Hennessey. He testified that of the talent employed by N.B.C. in 1937 for sustaining programs, 28 percent was provided by artists under contract with the company, 67 percent was purchased directly outside, and only 5 percent was procured from other outside agents.

In general N.B.C. enjoyed the exclusive use of artists under its management for network broadcasting programs. Mr. Tuthill at the F.C.C. hearings testified that of the $4,280,187 paid in 1937 to artists under contract to N.B.C., $3,600,342, or 88.5 percent, represented payment for services performed on N.B.C. stations; $408,805, or 11 percent, on C.B.S. stations; and $19,040, or ½ of 1 percent, on M.B.S. stations.

The exclusive nature of the N.B.C. management contract and the extent of the arbitrary powers granted to the company are shown by the following significant excerpts from the standard agreement:

National shall have the exclusive management of his or her artistic services, trade name or names and products for all purposes of whatsoever kind and nature; the Artist will make no contracts and will fill no engagements except with the written consent of National.

He or she will broadcast (including television) exclusively over the facilities of National.

National shall have the exclusive right to use and to license others to use the name and/or license of the Artist in any proper way in connection with the advertising and/or giving of publicity to performances concerning the Artist and for commercial purposes of any nature whatsoever.

If, as and when National desires to make sound or picture records or films for use by broadcasting (including television) stations, National shall have the exclusive right to make such records or films, the Artist hereby agreeing to contract with National on a reasonable basis for such rights.

He or she will comply with all the rules and regulations of National, now or hereafter adopted.

His or her services are extraordinary and unique and there is no adequate remedy at law for a breach of this agreement by the Artist and that in the event of such a breach or attempted or threatened breach National shall be entitled to equitable relief by way of injunction or otherwise.

Such arbitrary control of artistic talent constitutes an effective competitive weapon and can be used by the network, as the following testimony illustrates, to curb competition from electrical recordings. Mr. Tuthill stated at the F.C.C. hearings, "Let us assume for a moment a commercial sponsor has engaged the services of a John Doe. . . . He wants to have John Doe all for himself. Obviously, then, we wouldn't go and sell John Doe for electrical transcription use to somebody else where he would come in competition with himself or in competition with his national sponsor." [4]

Regarding the provision in the management contract requiring the artist to broadcast exclusively over the facilities of N.B.C., the value and fairness of this provision to the artist, and the reasons why in 1938 it had not been strictly enforced for five years, there was considerable difference of opinion between Mr. Tuthill, who was selling the artist's services, and Mr. Royal, who was buying them.

[4] F.C.C. Hearings re Docket 5060, Transcript, p. 155.

MR. DEMPSEY—"He or she will broadcast (including television) exclusively over the facilities of National." Is that in all your contracts?
MR. TUTHILL—That is in all of our contracts but it is not as a matter of policy the procedure which we employ. . . . When it [contract] was originally drawn we felt that as a matter of policy we should perhaps limit the appearance of artists on N.B.C. networks. However, for the reasons that proper management of artists calls for securing employment for them wherever that employment may be found, and for reasons that we in Artists Service felt it placed an unfair restriction upon the artist's activities, as a matter of Company policy that has not been adhered to for the last five years.
MR. DEMPSEY—That is still included in the contracts you make?
MR. TUTHILL—It is still included in the contracts, probably because our legal department has been so busy getting things together, they haven't had time to change it. . . .
MR. DEMPSEY—You just put the provision in the contract and then forget about it, is that right?
MR. TUTHILL—No, they call us and ask if we have any objection and we tell them "no." . . .
CHAIRMAN MCNINCH—You said while it [exclusive provision] is written in the contract that the practice now is that you do not enforce it and that you have not asked that it be written out of the contract. . . . Are you prepared now to advise your Company that it ought not to be continued in contracts?
MR. TUTHILL—I would say yes, from the operating standpoint.[5]

At another point in the record, however, Mr. Royal expressed a contrary view. When asked by Mr. Hennessey whether he made any effort to secure the services of talent on an exclusive basis Mr. Royal replied, "Yes, definitely. . . . There is a run-of-mine lot of talent and we don't care whether they work for us exclusively or not, but there are other artists who may be what you call unique. I would insist, if I signed them, that they would be exclusive."[6]

The above testimony and the other aspects of the Artists Service already discussed suggest the presence of a fundamental conflict of interests within the company itself, with the artist somewhere in the middle. Mr. Tuthill was attempting to sell the services of the artists under contract at the highest figure possible; Mr. Royal, in charge of the program department, was attempting to purchase the services of the artists at the lowest figure possible. Both men worked

[5] F.C.C. Hearings re Docket 5060, Transcript, pp. 268–72, 382–83. [6] *Ibid.*, p. 480.

for the same company and both departments were responsible to one man—Mr. Lenox R. Lohr, then president of the National Broadcasting Company.

The company, however, disclaimed any conflict of interests. It was argued that Mr. Tuthill's department, even though it was a part of the same company that bought the talent, protected the rights and welfare of the artist just as much as if it was entirely independent, and that it had equally as difficult a time to sell the talent. Why difficulty in selling an artist's talent should be regarded as an asset in a manager was not explained.

The record shows, however, that the conflict of interests was present, which such a situation inevitably implies. Furthermore, the conflict was there as regards both commercial programs and sustaining programs and was enhanced by the fact that sometimes the same person would act as representative of the artist and as representative of the advertiser or advertising agency. These circumstances, where an employee of the company would closet himself in his office and argue with himself as seller and purchaser, are indicated by the following testimony:

MR. TUTHILL—The man who contacts the advertising agency is also a representative of Artists Service . . . He then comes back and the [artist] management representative usually, but not always . . . there is usually a different person. . . .
MR. DEMPSEY—It may be the same person, though, in some cases?
MR. TUTHILL—You will find on occasions it may be, yes, because we can't support a staff large enough so as to have that kind of a division. He comes back and either talks to himself or to another member and considers all angles . . .
MR. DEMPSEY—Well, where is the artist when this man is arguing with himself about what he should do for the artist?
MR. TUTHILL—Do you want me to tell you what he says to himself?
MR. DEMPSEY—No, I do not care particularly about that. Where is the artist? Who learns about the result after the finish of this internal struggle? . . . He [artist] isn't the referee or something in this argument, is he? [7]

The following portion of the record is particularly significant in indicating the conflict where one N.B.C. executive acted as buyer and another N.B.C. executive as seller of the same artistic talent.

[7] F.C.C. Hearings re Docket 5060, Transcript, p. 199.

MR. DEMPSEY—One of the purposes for which an artist employs an agent is to get as high a price as possible for that artist's services, isn't that true . . . other factors being equal?
MR. TUTHILL—Other factors being equal, yes . . .
MR. DEMPSEY—Now are you representing the buyer or the seller of that talent?
MR. TUTHILL—We are acting as managers of the artists and agents for the artists. . . .
MR. DEMPSEY—In some of your dealings with Mr. Royal or other officials of N.B.C., the National Broadcasting Company is the seller?
MR. TUTHILL—You mean Artists Service?
MR. DEMPSEY—That is right; selling artists' service to itself as a buyer, isn't that correct?
MR. TUTHILL—Selling it to the Program Department of the buyer.
MR. DEMPSEY—Well, it is still N.B.C., isn't it, whether the Program Department or the Artists Department?
MR. TUTHILL—Yes but you have to visualize that difference of activity there.
MR. DEMPSEY—I visualize Mr. Royal sitting in one office and you sitting in another one, maybe on different floors of the building, but it is the N.B.C. building and you both work for the National Broadcasting Company, and the National Broadcasting Company acts as agents for these artists and sells the services of the artists to itself as the buyer of talent. Isn't that a correct statement of the situation?
MR. TUTHILL—Well, I think it might be technically correct.
MR. DEMPSEY—How is it incorrect in any respect?
MR. TUTHILL—It is incorrect only because I think you have lost sight of one thing and that is . . . that two departments of the same company may still have divergent points of view and still be working in the interests of the Company . . .
MR. DEMPSEY—I will reserve until Mr. Lohr gets on the stand the question of whether he is going to permit two departments working under him to fight with each other to the detriment of the Company. . . . One is engaged in the activity of buying and the other is engaged in the activity of selling the same commodity one to the other, and the thing that is being sold is something that belongs to a third person not connected with the organization, namely, the artist.
MR. TUTHILL—That is right.[8]

As a result of such disclosures the Artists Service Department was discontinued and a separate corporation was formed to take over the business. This new company is known as the National Concert

[8] F.C.C. Hearings re Docket 5060, Transcript, pp. 217–22.

and Artists Corporation and has offices at 711 Fifth Avenue, New York City. Most of the personnel of the N.B.C. Artists Service was transferred to it and Mr. Tuthill became vice-president. In form at least, the conflict of interests inherent in the set-up, where N.B.C. was both the seller and purchaser of the same talent, has been eliminated.

Furthermore, the management contract of the National Concert and Artists Corporation, which was not adopted in its final form until April of 1942, was modified to remove the most objectionable features of the old N.B.C. contract. Although the artist agrees to engage the National Concert and Artists Corporation as his exclusive manager, not to make any contracts for his services without first consulting the corporation, and not to authorize anyone else to act as his representative, the arbitrary clause which required the artist to "comply with all the rules and regulations of National, now or hereafter adopted" is omitted. Also, the artist is no longer forced to give to the corporation the exclusive right to his services in making sound or picture records for broadcasting purposes. The former provision that in the event of a breach or an attempted breach of the contract by the artist, "National shall be entitled to equitable relief by way of injunction or otherwise," has also been eliminated.

Thus the F.C.C. investigation has served another constructive purpose in that it precipitated a relaxation of the arbitrary powers held over the artistic raw material of network broadcasting. Such a relaxation and the greater bargaining freedom which the artist now enjoys are, in the writer's opinion, definitely in the public interest.

Transcriptions

Electrical transcriptions are highly developed today and for musical or dramatic presentations their quality and fidelity are equal to "live" talent programs. The national networks tend to insist that this is not the case: that the public demands live talent and would turn away from a so-called "dead" program on a transcription disc.

Though there seems to be little question that in certain instances, such as the variety show, psychological advantages accrue

to the listener when live talent is used and that the broadcasting of such a program as it is being enacted provides greater enjoyment to the radio audience, much evidence indicates that for musical programs in particular electrical recordings are entirely satisfactory.

In some respects they are actually superior to the "live" broadcast. The best time for the performance can be chosen and the finest performances can be selected for presentation. The artists can be entirely fresh and at their peak; acoustical conditions can be better controlled; and the difference in time as one proceeds across the country presents no difficulty because simultaneous broadcasting is not required. Finally, with the development of the Miller film, a method of transcription which utilizes a narrow strip of film rather than a disc and operates on the principle of a moving picture, editing is made possible before the broadcast.

Because they can now compete on equal terms with the "live" show and because they represent the form of competition most greatly feared by a chain organization, however, the use of transcriptions is generally discouraged. For instance, by the present N.B.C. standard affiliation contract the individual station agrees "not to authorize, cause, permit, or enable anything to be done without our consent whereby a recording is made, or a recording is broadcast, of a program which has been, or is being, broadcast on N.B.C. networks." Furthermore, up to April, 1941, if an advertising sponsor insisted that a "simultaneous wire-line recording" be made of his network show for use by independent stations or by affiliated stations in other than network time, N.B.C. required, with one notable exception, that the recording be made by the R.C.A. Manufacturing Company. Although the practice has now been discontinued, N.B.C. through advertising rate provisions in its former contracts also discouraged the use of recordings and the acceptance of national "spot" advertising [9] by its affiliates.

As already suggested, the importance of transcriptions to the local station cannot be overemphasized. Because they provide sustaining program material and because they are necessary in national and

[9] When an electrical transcription of a program sponsored by a national advertiser is broadcast by one or more local stations, such a program is referred to as national "spot" advertising.

local "spot" advertising, they represent a vital factor in the economic well-being of the unaffiliated station which cannot afford to produce "live" programs of sufficient quality to compete with network performances. Transcriptions are also an important source of revenue, despite the policy of discouragement followed by the networks, to the affiliated outlet, which can and does accept "spot" advertising in its station time and in those periods under option that are not being used by the chain.

Transcribed programs are, of course, far less expensive than "live" performances. The original cost may be the same, but the recordings can be used again and again and by any station. Consequently, national "spot" advertising rates tend to be lower than network rates. Testimony introduced at the hearings showed that fifty-three N.B.C. affiliates charged less for "spot" time than the company charged for comparable network time on the same outlets, and thirty-five affiliated stations, including all but two of those owned and operated by N.B.C., charged more. "Spot" advertising, which has increased during recent years and which holds the promise of a much greater expansion if some of the present pressures and curbs are removed, is the most encouraging factor from the financial standpoint in any attempt to ameliorate the present conflicting elements in the chain broadcasting system. It offers the reasonable assurance that the average, well-run local station could prosper independent of network affiliation.

The F.C.C. *Report on Chain Broadcasting* made no recommendations for regulatory action with respect to transcriptions or to artist contracts. This silence, however, did not reflect a lack of concern on the part of the Commission. The existing restraints were recognized, but it was felt that the necessary statutory authority was lacking to deal with these problems. In its letter of transmittal accompanying the Preliminary Report, the Committee on Chain Broadcasting stated, "As the Report clearly shows, the activities of the principal networks in the fields of electrical transcription and talent supply raise problems which vitally concern the welfare of the industry and the listening public. These and other network practices which have tended to restrict competition in the radio broadcast field can be eliminated or, at least, ameliorated by a

redefinition of the licensing policy of the Commission." [10] The war has intervened and meanwhile steps have been taken to correct some of the more obvious curbs.

In considering further the industry's reasons for generally prohibiting the use of transcriptions on network programs, it should be borne in mind that the affiliated station which carries a network commercial program receives only about half of the revenue remaining after agency commissions and discounts. The revenue is divided between the chain organization and the local station. In the case of "spot" advertising, the local station receives all of the revenue after agency commissions and discounts. From the business standpoint, it is, therefore, a matter of self-interest under our present system of chain broadcasting, where the network does not own all of its outlets and hence has to divide the income with the independent stations, to discourage the use of transcriptions on network programs. The independent station would hardly be willing to share the payments from advertisers with the chain organizations for doing something it could do just as well alone.

Furthermore, as we have already noted, the majority of independent stations cannot produce high quality "live" performances. These are too expensive and the talent would not be available. Hence, reinforcing the idea that "live" programs are the *sine qua non* of good broadcasting is one of the most effective methods of keeping the affiliated station dependent upon the network organization. Once transcriptions were generally allowed during network time, much of that dependence would vanish.

The industry gives as its principal reason for not usually permitting transcriptions on network programs that it is prevented from doing so by agreements with the musicians' union. But before the agreements there had to be a willingness to agree. And that willingness is not hard to understand in view of the advantages to the chain companies of such a policy.

Turning now to the more controversial question of N.B.C.'s former prohibition of "simultaneous wire-line recordings" by any other concern but the R.C.A. Manufacturing Company, we find the testimony reveals a conflict of statements. In response to a ques-

[10] Committee Report, dated June 12, 1940, p. 138.

tion by Commissioner Sykes as to whether National would allow a competing transcription company to come in and make a wire-line recording of a commercial program, Mr. Hedges, vice-president in charge of station relations, replied, "I believe that is possible." [11]

So far as the record goes it was possible only on one occasion. According to the testimony of Mr. Waddill Catchings, chairman of the Board of Associated Music Publishers,

> The only person that has been able to get N.B.C. to do this was Hill of the American Tobacco Company, who forced them to allow his great program to be taken down on a line by somebody else by having a talk with Mr. Sarnoff direct and threatening him with removing the business. When we tried to use that as a precedent they said, "Oh no, that was a matter between Hill and Sarnoff." [12]

The fact that it was the definite policy of N.B.C.,[13] contrary to the policy of C.B.S., to prohibit any outside concern from making a line recording of a commercial program, even though the advertiser was paying for the entire show and wished such a recording to be made by an outsider, and the reasons for this policy are shown by the following colloquy:

> MR. FLY—If a sponsor, who has fully paid for a program, wants an outside transcription company to make a transcription, does National permit that company to form a connection at the studio and perform that contract?
> MR. HENNESSEY—No, sir . . .
> MR. FLY—Would you explain that . . . ?
> MR. HENNESSEY—National in its capacity as licensee of certain stations and in its capacity in its network operations has constructed large high quality studios in New York City. . . . Now we are discussing the program which goes out over the network and for which at the same time somebody desires to make a transcription. . . .
> MR. FLY—Now, wait a minute . . . The sponsor was paying for all these things . . . The sponsor pays for everything, all the fine equipment and the splendid personnel all of which you have and we all know it. He pays for all that, and in addition to that he makes a contract with an outside transcription company to tie in there and make a transcrip-

[11] F.C.C. Hearings re Docket 5060, Transcript, p. 1839.
[12] *Ibid.*, p. 9003.
[13] Mutual is not engaged in the transcription business and Columbia did not enter this field until 1940.

tion . . . It isn't that somebody else wants to come in and do it. . . . The sponsor who has paid for all these fixings——

MR. HENNESSEY—That's right.

MR. FLY—Makes a contract. And then the contracting party comes in to perform it and you say, "No, you can't hook up."

MR. HENNESSEY—He has made a contract to buy network time. These services are included in his contract. . . . Primarily our objection is this.

MR. FLY—It has already gone over the air. Surely, you are not very jittery about infringement under those circumstances?

MR. HENNESSEY—But the responsibility is ours, sir.

MR. FLY—Well, I can't think that very serious. What else?

MR. HENNESSEY—. . . We feel no obligation under the Communications Act or the anti-trust laws to permit an outsider who has gone to the expense of building a couple of turn tables to run a line into our studios and have the benefit in his recordings of all the quality that has been built into the N.B.C. studios.

MR. FLY—At the sponsor's expense.

MR. HENNESSEY—At the sponsor's expense. . . . After all we do have a slight interest in the thing, sir. The sponsor doesn't pay for it in that sense. This is a sponsor who comes in and buys a 15-minute strip.

MR. FLY—Well, then what damage is done with the outside company hook-up? First is the risk of infringement. We have discussed that. What other damage does he do?

MR. HENNESSEY—There were some additional ones developed in the record and I have forgotten them for the moment.

JUDGE ASHBY—The main reason is, to be perfectly frank about it, we do not know any reason why we should give our facilities to a competitor.

MR. FLY—Well, that at least is frank.

JUDGE ASHBY—Well, that's the reason.[14]

Here is another example of competitive restraints. Note, also, that N.B.C. claims that it would be "giving" its facilities to a competitor. Such a conception hardly corresponds with the facts of the situation. The sponsor is, so to speak, renting the facilities, even though for only a fifteen-minute period and frequently he wishes an outside transcription company to make a recording of the program which is being broadcast through the use of these rented facilities. It seems to the writer that this privilege should be granted. Compare it to a situation in which a person rented Madison Square Garden and put on a show. Under these circumstances could he have a transcription made by some outside concern if he desired to

[14] F.C.C. Hearings re Docket 5060, Transcript, p. 9041–45.

do so? There is no doubt that he could. Except for N.B.C.'s superior equipment, which would undoubtedly be reflected in the amount of rent paid, what is the difference between renting Madison Square Garden and renting the facilities of the National Broadcasting Company?

Mr. Catchings gave an example of how N.B.C.'s restrictive policy worked. The Parker Family program was being broadcast over the Columbia Broadcasting System and his company was being permitted to make wire-line recordings. But when the program was transferred to the Blue network, Mr. Catchings testified that N.B.C. refused to allow the transcriptions to be made.[15]

N.B.C. must have come to recognize the questionability of its practice of prohibiting an outside company from making a wire-line recording even when the advertising sponsor desired such an arrangement, because in March, 1941, the company publicly announced a change of policy. As of April 1 of that year the prohibition was removed, and the advertising sponsor is now permitted to engage the transcription company of his own choice.

The future of transcriptions in radio broadcasting, however, and the existence of hundreds of small independent stations which depend upon electrical recordings were threatened by an edict of the overlord of the American Federation of Musicians—James Caesar Petrillo. In July, 1942, Mr. Petrillo ordered the members of the musicians' union, of which he is president, to cease making transcriptions for broadcasting purposes after July 31. If this ban is permanently enforced, the damage that will be done to the broadcasting industry and the impairment of program service to the people that will result will be very substantial. In the writer's judgment, the action of Mr. Petrillo is so contrary to the public interest, that Congress, if necessary, should step in and see that this dictum is rescinded.

Although there is merit in the contention that the musicians originally making the recording should receive some sort of royalty for repeated use of the transcription, the small independent stations, removed from the metropolitan centers, could not afford to hire "live" talent even if the talent was available to them. Hence

[15] See testimony, F.C.C. Hearings re Docket 5060, Transcript, p. 9002.

the argument that Mr. Petrillo's action will stimulate employment of the members of his union is largely fallacious. But because of this dictatorial decision the millions in the listening audience and the radio broadcasting industry must suffer.

The network companies remained discreetly silent—a silence that is not hard to understand in view of their general attitude toward the use of transcriptions. However, there was an immediate outcry from other quarters. Senator Vandenburg demanded that the Federal Communications Commission make an investigation; Attorney General Biddle filed an injunction suit under the antitrust laws in an attempt to prevent the enforcement of Mr. Petrillo's edict; [16] and Elmer Davis, director of the Office of War Information, urged the musicians' union head to withdraw his order as being detrimental to national morale and the country's war effort.

And regarding the question as to whether Mr. Petrillo is representative of those for whom he speaks, Westbrook Pegler wrote in the *New York World Telegram* on July 25, 1942:

To call Petrillo a czar or a dictator is not to exaggerate or misuse a term which has lost meaning with over-use. The constitution of his union says that he, the president, may suspend or revoke any portion of it at will and substitute therefor any order that he deems necessary which shall become the law of the union. . . . There are some other unions in which the rank and file members have no more voice than in Petrillo's international . . . but none in which they have less, for the rank and file musicians are simply speechless. They can be booted around even for thinking ill of their masters and they know it and give no interference, because the union card is a license to work for bread and is revocable at will.

[16] The U.S. Supreme Court on February 15, 1943, sustained the action of the Federal District Court in Chicago on October 12, 1942, in dismissing the petition of the government for an injunction under the Sherman anti-trust laws. In the Chicago decision Judge John P. Barnes held that the issue was based on a labor dispute and consequently could not be considered to come under the Sherman Act.

✕ *Chapter 11* ✕

NETWORK CONTROL OF STATION RATES AND LENGTH OF CONTRACTS

Network Control of Station Rates

THE COLUMBIA BROADCASTING SYSTEM and the National Broadcasting Company bill an advertiser for the use of a station on their networks at a rate which is specified on the rate card and which is included in the affiliation contract with the outlet, whereas Mutual has no rate card and the stations themselves determine their own rates. Each outlet, including those owned or leased by N.B.C. and C.B.S., has its own network rate, which is based on the size, character, and purchasing power of the audience reached. This "station rate" is for an evening hour, and the rates for other periods of the broadcast day are multiples of this.

However, it is the exception rather than the rule when a full hour is sold to an advertiser. In most cases part of an hour is purchased by a network sponsor and N.B.C. in 1942, for example, paid to its affiliates 60 percent of the full hour rate for a half-hour program and 40 percent of the full hour rate for a fifteen-minute program.

It has already been pointed out that C.B.S. and N.B.C. guarantee to supply their affiliates with a certain number of hours of commercial and sustaining programs during each accounting period and that the affiliate in return waives compensation for a proportion of the commercial programs broadcast. According to the testimony of Mr. Hedges at the F.C.C. hearings, and on the basis of the contractual provisions for station compensation, the advertiser's dollar spent on N.B.C. network programs is on the average split as follows in each twenty-eight-day period: [1]

[1] C.B.S. pays a specified hourly rate to each station after the first five "converted" hours. Mutual receives a commission on all proceeds from network programs broadcast.

Agency commissions account for 12 cents, and volume discounts and annual rebates consume another 20 cents. This leaves 68 cents to be divided between the network organization and the affiliated station. For the first sixteen "unit" hours, N.B.C. retains the entire 68 cents. During the next twenty-five "unit" hours, the outlets receive 20 cents and N.B.C. keeps 48 cents. The station's share goes up to 30 cents for the succeeding twenty-five "unit" hours, and for all subsequent "unit" hours in the twenty-eight-day period the station is paid 37½ cents, N.B.C. retaining 30½ cents. In other words, not until the individual station has broadcast sixty-six "unit" hours—which are, of course, equal to a very much larger number of clock hours—of network commercial programs in the twenty-eight-day accounting period does it receive as much compensation as the network organization.

In addition to retaining more than half of the revenue for the first sixty-six "unit" hours in each twenty-eight-day period, the National Broadcasting Company, contrary to the general practice of the Columbia Broadcasting System, also maintains through its affiliation contracts effective control of the rates to be charged for stations on the network during the term of the contract. The usual contract states that "N.B.C. reserves the right to change at any time your network station rate to advertisers from that set forth in the preceding table." [2] The company can increase the rate for a station at any time and can decrease the rate on ninety days' written notice, provided that the rates for a majority of its affiliated stations are lowered at the same time. If such a reduction is made, the station is permitted to terminate the contract upon thirty days' written notice from the time it learned that its rate was being reduced. At the F.C.C. hearings Mr. Hedges commented upon these provisions as follows: "This clause gives to the National Broadcasting Company a degree of flexibility in respect to rates which is absolutely essential to meet any possible general reduction which might be made by other advertising media. . . . When you are using stations for a period so long as 5 years, there is no telling what may happen and if a depression were to suddenly come about it might be very necessary in order to keep the network functioning as a na-

[2] See copy of new affiliation contract, Appendix, p. 249.

tional advertising medium to reduce those rates to meet the competition of national magazines or other media which advertisers may employ for national advertising purposes." [3]

The rate of a single affiliated station can also be reduced upon one year's written notice, and in this case the station has the right to terminate the contract in ninety days if it promptly notifies N.B.C. to this effect in writing.

The really controversial rate provisions, however, found only in the former N.B.C. contracts, involve the question of the station's freedom to establish either below or above its network station rate its own charges to advertisers for programs broadcast locally. This problem is at the heart of the competitive situation between "live" network commercial programs and "spot" advertising through the use of transcriptions. Should an outlet be at liberty to charge more or less for "spot" advertising than N.B.C. charges for a comparable period on the same station when time is sold to an advertiser producing a "live" network program? That is the major issue. N.B.C. argued that the station's "spot" rate should be the same as its network rate. Affiliates should not be permitted to compete with the chain organization for national advertising business. To guarantee as far as possible that they did not compete, the former N.B.C. contract contained two clauses: one aimed at preventing the station from reducing its national "spot" rate below the network rate; the other making provision for "liquidated damages" in case the station rate was higher than the network rate for a substituted commercial program, either local or "spot."

The first clause discouraged the use of transcriptions by seeking to eliminate any rate differential in favor of the national "spot" advertiser. Although the reasons are not as obvious, the second tended to accomplish the same thing, because even in those instances in which a national advertiser would be willing to pay more for the facilities of a certain station in connection with a "spot" program than he would have to pay for the same outlet when used on a "live" network program, the attempt was made by N.B.C. to remove all incentive on the part of the station to accept such business. The "liquidated damage" clause, by including local programs as well as

[3] F.C.C. Hearings re Docket 5060, Transcript, p. 1824.

national "spot" programs, also aimed to prevent the affiliate from rejecting a network program because of profit considerations.

The clause in the N.B.C. contract which sought to prevent the station from lowering its rate below the network rate read as follows: "If you accept from National advertisers net payments less than those which N.B.C. receives for the sale of your station to network advertisers for corresponding periods of time, then N.B.C. may, at its option, reduce the network station rate for your station in like proportion, in which event the compensation due you from N.B.C. will be likewise reduced but your right of termination provided for in the preceding paragraph shall not thereby accrue to you." [4]

Mr. Hedges not only frankly conceded that the purpose of this provision was to curb competition but he also high-lighted the potential threat which electrical transcriptions represent. In discussing the clause he stated:

> 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.* It means that if a national advertiser is able to plan a campaign whereby he could place a partial network order and a partial transcription order on these stations, in order to save money, all network business suffers, and this precaution was put in there to prevent that. However, we have not, up to date, reduced any of the station rates to meet the rates fixed by the stations themselves for national spot advertising but that is no promise that we will not do it. . . .
>
> Last summer, one of the leading advertising agencies in the country that places millions of dollars' worth of business in radio advertising, in discussing a particular account that was on the N.B.C. network, pointed out the wide discrepancy that exists at some stations between the charges which the National Broadcasting Company makes and the charges which the station makes. The discrepancy was sufficiently great that with a list of 15 or 16 stations which was shown to me, if the national advertiser had been willing to sacrifice the advantages of simultaneous live talent broadcasts and substitute therefor electrical transcriptions on those 15 or 16 stations, the client would have been able to save $44,000 in one year, and that is not particularly healthy, in my estimation.[5]

[4] See former affiliation contract, Appendix, p. 258.

[5] F.C.C. Hearings re Docket 5060, Transcript, pp. 1825–26. (Italics added.)

Not particularly healthy for the National Broadcasting Company!

The liquidated damage clause provided that the individual station would have to pay over to N.B.C. any additional compensation it received above the network rate for a commercial program which the station might substitute for a sponsored network program. This provision read as follows: "In the event you substitute a program for a network program which you are obligated to broadcast hereunder you agree to pay us as liquidated damages a sum equal to the amount by which the total moneys you receive for broadcasting the substituted program during the scheduled period of said network programs exceeds the moneys you would have received from us had you broadcast said network program. This provision is without prejudice to any other rights which we may have under this agreement arising from your failure to broadcast any of our network programs, and shall not be deemed to give you the option to refuse to accept such a network program by making the payments specified in the foregoing sentence." [6]

Mr. Hedges made these illuminating remarks with respect to this clause: "While we do not accuse our stations of being actuated by mercenary motives, at the same time this particular clause in effect removes temptation. In fact, it might be said, that by it his subconscious mind would never be influenced by the mere consideration of money to substitute a local program or a national spot program for a network program. It has worked out quite satisfactorily because we have never had to invoke it." [7]

With respect to these two provisions, the F.C.C. took the position that the licensee should be left free to charge whatever in his own discretion he saw fit during the periods when the network was not using his broadcasting time. To the argument raised by N.B.C. that in promulgating Regulation 3.108 the Commission is endeavoring to dictate management policy contrary to the language of the Sanders decision, the government replied that in reality it is doing just the opposite. Instead of fixing rates, it is freeing the affiliated stations from rate fixing by N.B.C. and is restoring the liberties

[6] See former affiliation contract, Appendix, p. 259.
[7] F.C.C. Hearings re Docket 5060, Transcript, p. 1849.

which the licensee "ought to have and which under the law it really must have." [8] And the final *Report on Chain Broadcasting* concludes with respect to this matter: "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 be served and listeners supplied with the best programs if stations bargain freely with national advertisers." [9]

Regulation 3.108 was therefore promulgated and it reads 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.

Stating that neither of these controversial rate provisions in N.B.C. contracts had ever been a matter of issue between the network organization and its stations and declaring that many affiliates did maintain rates for local and national "spot" business different from the network rate, Mr. Trammell, president of the company, at the Senate hearings in June, 1941, announced that he had had "memoranda prepared to all N.B.C. affiliates affected by these contract provisions, asking them to agree to the elimination of these clauses." [10] The clauses were subsequently eliminated and the present N.B.C. affiliation contract does not include them.

Length of Contracts

The standard affiliation contract of N.B.C. prior to 1936 was for a period of one year. In 1936 the standard contract was changed so that the affiliate was bound to the network for five years. The National Broadcasting Company, however, did not assume an equal obligation, since it retained the right to cancel the contract on twelve months' notice, thereby binding itself to the station for only one year.

[8] Chairman Fly, at Senate Interstate Commerce Committee Hearings, Transcript, p. 89.

[9] F.C.C. *Report on Chain Broadcasting*, p. 75.

[10] Senate Interstate Commerce Committee Hearings, Transcript, p. 462.

The early C.B.S. contract was also only for one year. Since 1937 and until recently, however, the standard Columbia contract was for five years with the network retaining the right to cancel on twelve months' notice. In January, 1940, the Mutual Broadcasting System entered into contracts with its seven stockholders, binding on Mutual for five years, but cancelable by the stockholders after the first two years on twelve months' notice.

The Commission attacked this discrepancy between the length of time that the outlet was tied to the network and the network tied to the outlet, the curb on competition which this situation implied, and the fact that the arrangement meant that the affiliate was making a contract for a longer duration than the three-year maximum licensing period permitted under the Communications Act. Regulation 3.103 aimed to correct these circumstances. Although subsequently amended, this rule read as follows at the time the final *Report on Chain Broadcasting* was issued:

> 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 one year: Provided that a contract, arrangement, or understanding for a one-year period, may be entered into within 60 days prior to the commencement of such one-year period.

Four principal arguments were presented by the industry in support of the five-year contract: (1) It is necessary from the competitive standpoint; (2) advertisers expect to be able to use the same station year after year; (3) it prevents a new affiliate from leaving the network as soon as it is operating profitably; and (4) a long-term contract is necessary from the standpoint of stable network operations.

With respect to the first contention, Mr. Hedges declared that the five-year contract aimed to curb competition and to prevent N.B.C. affiliates from joining another network. At the F.C.C. hearings he testified as follows:

> Our present contracts run up to 5 years. The reason for that was simply this. With a contract of this nature . . . where a station may cancel upon a year's notice, we were exposing ourselves to our compe-

tition. Our competition, so we were informed, were willing to sit down and negotiate contracts with such of our affiliates as they desired and bide their time for the year to elapse before they could take over the stations.

It seemed rather poor business for us to leave ourselves in such a vulnerable position and for that reason we decided to further stabilize our business and to stabilize the network business not only for our own benefit but for the benefit of all those affiliates associated with us, by retaining the network in as intact order as was possible subject, of course, to the individualities that were involved and whose individual determinations in each case might induce further change within the network. For that reason, we adopted a 5-year plan.[11]

Yes, a five-year plan, but one that worked in only one direction.

Mr. Herbert V. Akerberg, vice-president in charge of station relations of the Columbia Broadcasting System, had this to say regarding the competitive benefits of a five-year contract:

It has been my personal experience that a length of time up to five years has been the practical period of time because should there be a year to year situation you would be continually renewing and negotiating and renewing contracts, and you would also be vulnerable from a competitive standpoint. If we know a station is going to be with us for five years at least, and if the station knows we are going to be with them five years, it is a question of both of us taking off our coats and going to work to make a better station and a better outlet because we can furnish—we know that we are going to have that station for that period.[12]

Of course, until recently, the station did not know that it was "going to be with them five years." Now, however, the contract is reciprocal.

The Commission in answering these arguments refers to the severe lack of frequencies, pointing out that in many key cities the number of stations is strictly limited. The result is that with these five-year contracts in force "it is utterly impossible for a competitor to move into the field," [13] and a new network is up against an almost insuperable barrier, because it would have to wait up to five years before attempting to secure an outlet in the desired community. The government's censure in this instance springs from lack of

[11] F.C.C. Hearings re Docket 5060, Transcript, pp. 1819–20.

[12] *Ibid.*, p. 3683.

[13] Chairman Fly, Senate Interstate Commerce Committee Hearings, Transcript, p. 87.

broadcasting facilities. If there were a larger supply of available frequencies, which in turn would mean a greater number of stations in the desirable markets, the objections raised on these grounds would largely disappear. Furthermore, as the remaining regulations are analyzed, we shall find that underlying each one there is this premise: frequencies are stringently limited and therefore we must put an end to network domination of those available and free the individual station so as to create a truly competitive broadcasting industry—networks competing for the same station, stations competing for the same network, networks competing with each other, and stations competing amongst themselves. A competitive conglomeration! Whether such a situation would really be in the best interests of the public will be discussed later.

Claiming that a national advertiser's use of chain broadcasting differs from "spot" advertising on local stations designed to find immediate customers, the networks next assert that one of the benefits which their advertising clients receive from the five-year contract is the building up of a loyalty on the part of the listening audience to a particular station that carries the advertiser's programs year after year. This thread runs through much of the record: that the public turns to the station rather than to the program. Although this is true to a limited extent, any proper solution of network broadcasting must be based on the recognition that it is the program and not what station happens to be putting it on the air that is important. The listening audience should and unquestionably does make its fundamental choice of what will be heard in terms of program selection and not station selection.

This does not deny that an individual may turn more to a certain station and keep that station on hour after hour. The housewife, for instance, frequently stays tuned to her "favorite" all morning while she is doing the housework. But this is an undiscriminating choice and of dubious value to the advertiser. Selling requires audience attention, which is largely lacking when a radio is used merely to provide a vague background of diversion.

The F.C.C. points out in answer to this second argument for a five-year contract that as a matter of fact the usual network practice is not to make commitments with an advertiser for more than one

year. Mr. Roy C. Witmer, vice-president of N.B.C. in charge of sales, testified:

> We do not make commitments beyond 52 weeks because it is pretty difficult in this business to determine exactly what the situation would be after a year and we do not want to commit ourselves beyond a year. We don't know what new regulations may develop; what we may find it necessary to do. This radio business has changed pretty rapidly since it started, and we always want to be in the flexible position, as far as we are concerned, so that we can make any necessary moves, and we don't want to be cramped by longer than 52-week contracts.[14]

In short, the chain organizations are unwilling to place the advertiser in an assured position to secure the very thing he is supposed to want and the thing that is propounded as a justification for the five-year contract with the affiliate.

The third contention put forward in defense of this term of contract and one that again reflects the policy of not taking on a new station unless it can pay its own way is that a period as long as five years is only fair in order to prevent a new affiliate from leaving the network as soon as it is operating in the black. The following colloquy illustrates this point:

> MR. TRAMMELL—It is true that most of our contracts are on a 5-year basis. I think one of the primary reasons for that is, particularly with the addition of new stations, when we go into a new area we are taking a tremendous chance as to whether we will get our money back or not. For instance, when we went into Montana that venture did not pay out for the first three years, but it is now profitable not only for the stations but for ourselves. However, for the first three years of that operation we were substantially in the red . . .
> CHAIRMAN WHEELER—I think that is correct.
> MR. TRAMMELL—Now, if at the end of that period of three years, after that operation got upon a paying basis, the stations had wanted to switch to another network, do you think it would have been fair for them to do so?
> CHAIRMAN WHEELER—No.
> MR. TRAMMELL—That is one of the reasons for asking for a 5-year contract.
> CHAIRMAN WHEELER—Very frankly, I do not think it would have been fair for them, after the operation became established and you got it on a

[14] F.C.C. Hearings re Docket 5060, Transcript, pp. 2166–67.

paying basis, to have left you abruptly. I do not think anyone would consider such a proposition as being fair.[15]

The final and most convincing argument in support of a long-term contract—one that appears to the writer difficult to deny—is that such an arrangement is necessary to stable and efficient operations both from the standpoint of the chain and the affiliated station. As Mr. Paley, president of the Columbia Broadcasting System, stated, "It seems to me we are entitled to some sort of feeling of permanency." [16] However, the relationship should be entirely reciprocal. The outlet is entitled to a feeling of permanency as much as the chain organization. With the two major networks retaining the right to cancel the contract on twelve months' notice this of course was impossible and the affiliate's "feeling of permanency" had to be based on faith.

In elaborating the last argument for a long-term contract it is stressed that an advertiser purchasing time regards certain markets as so essential that unless he can secure these he will not use the network. The ability, therefore, of one or two stations to change their affiliation to another chain might jeopardize the entire hook-up. The long-term contract gives protection against this contingency.

It is also emphasized that substantial investments in plant are being continually made and long-term commitments necessarily have to be entered into. Complicated and costly engineering installations are amortized over a period of years. Studios are constructed, office space is rented, and artist and feature contracts are signed—all on the basis of more than one year. For instance, N.B.C.'s rental contract with R.C.A. is for twenty-one years and Toscanini was engaged as conductor of the N.B.C. Symphony Orchestra on a three-year basis. It is argued that a reasonable assurance of stability and of continuity of existence, which the five-year contract tends to provide and which the original regulation limiting contracts to one year would virtually abolish, is therefore essential to network operation.

In answer to these contentions the F.C.C. replies that broadcasting is a public-service business operating under a license from the

[15] Senate Interstate Commerce Committee Hearings, Transcript, p. 472.
[16] *Ibid.*, p. 419.

government, and consequently the use of this franchise must be continually subject to review in the public interest. Any long-term affiliation contract, particularly where it extends beyond the maximum three-year license period permitted by the Communications Act, contradicts this requirement and is inconsistent with the public-utility nature of the business.

Furthermore, the Commission points out that from 1927 to 1938 N.B.C. built 17 studio plants at a total cost of $7,719,200, but that 11 of them, or 71 percent, costing $5,519,700, were completed prior to 1936, or during the period when the company's contracts with its affiliates were for only one year. This, it is maintained, answers the argument that plant investments require a long-term contract. Finally, the F.C.C. maintains that the quality of network service and the needs of local stations may change considerably, and therefore any contract of long duration is undesirable.

The conclusions of the Commission state that "long-term network affiliation contracts remove the choice outlets from the network-station market and thus prevent the establishment and development of new networks; that, under such contracts, 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." [17]

On the basis of these conclusions, the original Regulation 3.103 was promulgated, limiting affiliation contracts to a period of one year. Shortly afterwards Mr. Trammell announced at the Senate hearings that the provision giving N.B.C. the right to cancel on twelve months' notice was being removed from all the company's affiliation contracts, thereby making the five-year arrangement reciprocal. Finally, the Commission in its Supplemental Report, issued in October, 1941, amended Regulation 3.103 to permit contracts for a period of two years, which can be entered into 120 days rather than sixty days prior to the commencement of the contract period.

Before we leave this matter of length of contract, it should be noted that the Commission's policy up to very recently has been to

[17] F.C.C., *Report on Chain Broadcasting*, p. 62.

grant licenses to standard broadcast stations for a period of only one year even though the Communications Act permits a license period of three years.[18] It must also be borne in mind that the length-of-contract question is inextricably associated with the other contractual issues, principally option time and exclusivity. These represent the crux of the contract, and if they are removed, the length of the contract becomes of little importance because the contract itself is of little value.

[18] The F.C.C. in 1942 announced that it would grant licenses for two years.

✕ *Chapter 12* ✕

EXCLUSIVITY

EXCLUSIVITY, which means what it says—that something will be exclusive—is today one of the most significant words in the English language to network broadcasting. It has two principal applications in the standard affiliation contract: (1) it defines the type of time option which the affiliate grants to the network; and (2) it defines the general relationship that shall exist between the network and the individual station. When the major issue of option time is discussed in Chapter 14, we shall see how very important exclusivity is in that connection.

When this term is applied to the general network-outlet relationship it must also be considered from two points of view. In the first place, from the station standpoint it deals with a contractual arrangement whereby the affiliate agrees not to broadcast the programs of any other network. This type of exclusive association is called "station exclusivity."

The other type is the reciprocal of this and treats the matter of exclusivity from the network standpoint. It is termed "territorial exclusivity." By such a provision in the contract the network agrees not to furnish its programs to any other station in the territory served by a regular affiliate even when that regular affiliate does not broadcast a particular network program. In other words under territorial exclusivity if a certain outlet does not put a network program on the air the community in which this outlet is located simply does not hear the program.

Until 1942, the National Broadcasting Company required in its standard contract that the affiliate agree not to broadcast the program of any other network—in short, station exclusivity was enforced. On the other hand, the company, even though Mr. Sarnoff testified that the "obligation ought to be reciprocal," did not reciprocate by extending territorial exclusivity, the corresponding

provision in the contract merely reading that the station agrees "not to authorize, cause, permit, or enable anything to be done whereby any other station may broadcast any program which we supply to you." Notice that this says nothing about N.B.C. not furnishing a program to another station in the same territory of the regular affiliate either as a straight duplication or in the event the regular outlet was not broadcasting it. In this latter instance, assuming the desirability of the program and assuming N.B.C. furnishes it to another station, this non-reciprocal arrangement is more in the public interest than a territorial exclusivity agreement which would deprive the listeners of that community from hearing the program. Nevertheless, from the network-outlet standpoint, such non-reciprocation is obviously unfair to the affiliate, which grants the exclusive use of its facilities to N.B.C.

In contrast, the Columbia Broadcasting System has always had in its standard affiliation contracts a thoroughly reciprocal provision with respect to exclusivity.[1] The provision reads:

> Columbia will continue the station as the exclusive Columbia outlet in the city in which the station is located and will so publicize the station and will not furnish its exclusive network programs to any other station in that city, except in case of public emergency. The station will operate as the exclusive Columbia outlet in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The station shall be free to join occasional local, statewide or regional hook-ups to broadcast special events of public importance.

Before a more detailed review is presented of these two issues—station and territorial exclusivity—which are covered by Regulations 3.101 and 3.102, it is important to understand where exclusivity fits into the present pattern of network broadcasting through affiliation contracts.

With respect to the question of how long such contracts should run, the statement has been made that this matter would become academic if the value of the contract in securing the necessary willingness of the individual stations to broadcast the same program at the same time was abolished. It was further stated that this value

[1] For full text of the C.B.S. standard affiliation contract, see Appendix, p. 261.

of the contract lies principally in exclusivity and option time. This needs further clarification. Station exclusivity applies only to those periods when the outlet is not actually being used by the network. Territorial exclusivity is merely a negative provision. It does not in itself secure the willingness; it simply says willingness will not be sought elsewhere. Station and territorial exclusivity are, therefore, only the wrapping. It is true they tend to bind the network and the affiliate together—to make them more mutually dependent—but in the last analysis they are not indispensable. Exclusive option time is the essence of the contract; it is the principal means whereby the network secures this willingness. If a chain organization had an exclusive option on all of the time of each of its affiliates and used all of this time, there would be no need for station and territorial exclusivity, and, except for the problem of program duplication, there would be no issue.

Station Exclusivity

Prior to 1935, the National Broadcasting Company did not have written provisions in its affiliation contracts dealing with station exclusivity. This clause was added at the same time that the length of the contract was extended to five years. It was testified, however, both at the F.C.C. hearings and the Senate hearings that such an exclusive relationship had always been implied and understood. "They [exclusive contracts] were only implied and were gentlemen's agreements. They were not signed," stated Mr. Trammell.[2] And Mr. Hennessey, counsel for N.B.C., stated, "The facts are that prior to 1935 National generally had no written contracts with its affiliates but the relationship, the oral relationship, had always been exclusive and from time to time prior to 1935 stations had been dropped because they did not regard themselves as exclusive affiliates . . . Exclusivity . . . had been implicit in the arrangement since 1927." [3]

The station exclusivity provision adopted by N.B.C. in 1935 and continued until December, 1941, read as follows:

For the purpose of eliminating confusion on the part of the radio audience as to the affiliation and identity of the various individual stations

[2] Senate Interstate Commerce Committee Hearings, Transcript, p. 464.
[3] F.C.C. Hearings re Docket 5060, Transcript, p. 9055.

comprising radio networks, you agree not to permit the use of your station's facilities by any radio network, other than ours, with which is permanently or occasionally associated any station serving wholly or partially a city or county of 1,000,000 or more inhabitants.

Observe that the provision does not make a formal exception of national emergencies, as is true of the C.B.S. contract. The provision is less drastic than Columbia's, however, in its definition of what constitutes a competing network.

In defense of station exclusivity the networks present four principal arguments: (1) that it eliminates confusion (as indicated in the N.B.C. provision itself); (2) that, since the network provides sustaining program service to the affiliate and thereby enhances its good will and advertising value, it is not fair to permit a competing chain to reap the profit from these assets and that if station exclusivity is abolished, all incentive to produce such sustaining programs will be destroyed; (3) that it is a legitimate competitive device which provides the necessary degree of stability for network operation; and (4) that it divides network business more equitably between the small and large stations.

With respect to the confusion argument, Mr. Hedges testified at the F.C.C. hearings that "It is inherent to the American system of network broadcasting and has been from its inception that there be a fidelity of the network to its stations and the stations to the network. It is necessary from the viewpoint of the listeners that the identity of the station and its affiliation be well known to them so that they may know where they receive N.B.C. programs." [4]

The government answers this assertion by pointing out that twenty-five stations in 1939 were affiliated with both N.B.C. and Mutual and five with C.B.S. and Mutual, and no such confusion resulted in those situations. The F.C.C. also stresses the fact that listeners generally are keenly aware of the quality of the shows being broadcast and follow their favorites from station to station. "Numerous ratings of programs show that the power of programs to attract listeners varies widely among programs broadcast over the same station. Indeed, the whole effort to improve programs by spending large sums on talent and material is founded upon the

[4] F.C.C. Hearings re Docket 5060, Transcript, p. 1852.

theory that good programs attract large audiences." [5] The chief statistician of the National Broadcasting Company confirmed this conclusion when he declared, "It [a survey of listening audiences] merely shows that there are wide shifts of the audience from station to station, depending on programs; that the audience does not stay with any particular station throughout the morning or afternoon . . . There is no constant level of listening nor constant level of listening to any one station." [6]

The second or "sustaining program" argument is stressed by Mr. Hedges and Mr. Sarnoff. The former emphasizes that chain broadcasting by a joint enterprise creates good will which is enjoyed by both the affiliates and the network. "For one party to be faithless to the other to the extent that it barters the good will which has been built through the broadcasting of N.B.C. programs by disposing of its time to another network is unfair to N.B.C. . . . The N.B.C. provides . . . a vast amount of sustaining network programs. These sustaining programs are offered to maintain continuously the interest of the audience in the station being thus served so that the time on that station may be of more value to the National Broadcasting Company and may be of more value to the station individually. There would be no incentive for N.B.C. to continue to serve its stations with such a vast amount of sustaining service if it were reduced to a status of a mere time brokerage, as it would be in the case that a station could play fast and loose with its affiliations between networks." [7]

Mr. Hedges' memory is short. In speaking about one party's being faithless to the other in bartering good will, no mention is made that the N.B.C. contractual provisions regarding exclusivity were non-reciprocal and permitted the network organization to give over its good will enjoyed by the affiliate to another station. The affiliate must not barter, but N.B.C. can. That was the actual situation existing until recently. However, there is a definite reasonableness in the contention, granted the exclusive provisions are reciprocal, that the good will and advertising value of the outlets, built up through program efforts at great expense, should not be handed

[5] F.C.C. *Report on Chain Broadcasting*, p. 53.
[6] Mr. Beville, at F.C.C. Hearings re Docket 5060, Transcript, pp. 418–19.
[7] F.C.C.Hearings re Docket 5060, Transcript, pp. 1853–54.

over to another competitive network organization. Mr. Sarnoff stresses this point: "Obviously, if a network spent money, as we are doing, to develop the popularity of an individual broadcasting station in some territory, if we gave them sustaining programs and they attracted a listening audience and they built up circulation, and then some other organization came along that did none of these things, but just had a commercial program, and asked that broadcasting station to take their program and put behind it the good will and the circulation and the pioneering that had been done by whoever built that station up, of course, that somebody would have a temporary advantage." [8]

However, memory again is short. The statement that N.B.C. gives sustaining programs to its affiliated stations overlooks the fact that these stations waive compensation for the first sixteen "unit" hours of network commercial programs broadcast by them in payment for such sustaining service. And this is the government's first answer to the "sustaining program" argument. Furthermore, the F.C.C. emphasizes that the main incentive of a network for supplying good sustaining programs to its affiliates is to build up a listening audience for commercials, and therefore that it would not permit the stations on its chain to broadcast poor programs during non-network time. "The evidence . . . leads to the conclusion that the elimination of exclusivity will not bring any deterioration in the over-all quality of network sustaining programs. Indeed, as an historical matter, N.B.C. supplied its affiliates with sustaining programs for 10 years before it adopted exclusivity . . . Audiences are not N.B.C.'s to use or withhold as it sees fit, even though N.B.C. claims that they were attracted in part by virtue of its sustaining programs. The licensee must remain free to use its time and facilities, when they are not being utilized by N.B.C., in any way that it sees fit in the public interest." [9]

The justification of the use of station exclusivity as a competitive weapon is brought out by the following testimony of Mr. Hedges and, paradoxically, by the testimony of Mr. Louis Caldwell, counsel for the Mutual Broadcasting System, which, as we have seen,

[8] *Ibid.*, p. 8521.
[9] F.C.C. *Report on Chain Broadcasting*, p. 54.

sides with the Federal Communications Commission in the dispute. Mr. Hedges testified: "The clause . . . that refers to any radio network serving wholly or partially a city or county of 1,000,000 or more inhabitants was a definition—it may not be a perfect one, but at least it expressed the intent which we had that it should define a network which might be presumed to be competitive with N.B.C. . . . and was, in effect, designed to apply to any network which would seek to establish itself as a national advertising medium . . . This paragraph is not in every contract but it should be in all of them . . ." [10]

Mr. Caldwell, in explaining the reasons for Mutual's entering into contracts having exclusive and time option features, stated: "There was an endeavor to raid Mutual in the latter part of 1939 and the early part of 1940 by a new organization known as the Transcontinental. . . . Mutual felt it had no alternative if it was to live but to enter into such arrangements . . . It [Mutual] does not . . . propose the complete elimination of exclusivity in cities where there are enough stations so you don't have to worry about competition." [11]

The Commission, in fact, argues that prohibiting competing networks from making any use of the audiences of affiliates is really the main purpose and function of station exclusivity. And then the Report contends that "No station should be permitted to enter into an exclusive agreement which prevents it from offering the public outstanding programs of any other network or hinders the entrance of a newcomer in the field of network broadcasting."

The assertion that station exclusivity is necessary to stable network operation is unequivocally made by the industry.

> Under the new rule [Regulation 3.101 eliminating station exclusivity] all will be chaos and confusion. Stations will rush for the best features of every network service. Advertisers will try to pre-empt the best hours on the best stations. Time brokers will inject unfair methods of competition. Advertising agencies will make their own arrangements for "front page" position with the bigger and better stations. . . .
>
> The destruction of exclusivity would have an equally serious effect on non-commercial or sustaining programs . . . The possibility of get-

[10] F.C.C. Hearings re Docket 5060, Transcript, p. 1858.
[11] *Ibid.*, pp. 8908–10.

ting a satisfactory line-up for public service features becomes remote. Every public-service program which N.B.C. would offer would be measured by the stations against the commercial and public-service offerings of every other network for that particular period. . . . Whatever element of public service remains will be local service. National service will be the exception, not the rule.[12]

This claim is denied in the F.C.C. Report as follows:

We cannot agree that so essential a factor in the operation of a network —the number and character of the affiliated stations which are its customers—should be removed from the field of competition. We cannot agree that the field should be forever limited to the present incumbents. . . . This attempted justification of exclusivity fails to take into account the function of competition in our economy. . . . Programs may be good; they are not perfect. . . . Competition is in the public interest not because the particular service offered by a new unit is better than the existing service, but because competition is the incentive for both the old and the new to develop better service.[13]

This statement is very significant because it reflects the Commission's conception of the nature of a broadcasting network in our economy and reinforces the emphasis on the competitive function of the individual station. The affiliates are portrayed as being the customers of the network. The network in turn becomes a seller of programs to the individual stations—merely a program-producing agency. Although in some important respects under our present system of chain broadcasting a network organization is a program agency, the concept of a network would lose most of its meaning without stations. They are indispensable according to the government's definition of chain broadcasting, as given in the Communications Act—"the simultaneous broadcasting of an identical program by two or more *connected stations*." [14]

Furthermore, as network executives will confirm, their principal customers are not the stations but national advertisers. Stations on a network are the necessary distributing points for its circulation. To attempt to make them something else, to insist that they must be entirely free, is to deny the basic nature of chain broadcasting.

[12] Mr. Trammell, at Senate Interstate Commerce Committee Hearings, Transcript, p. 508.

[13] F.C.C. *Report on Chain Broadcasting*, pages 55–56.

[14] Italics added.

In the writer's opinion, a network should not have to compete with its own outlets any more than the outlets should have to compete with their own network. But such a situation has always existed to some extent and the regulations make this inconsistency the guiding competitive principle in the entire industry.

The final industry argument in favor of station exclusivity is that it divides network business more equitably between the small and large stations. "By preventing a station from being the exclusive outlet of a network, and a network from offering a definite fixed line-up of stations, these rules cut an essential link out of the broadcasting chain, and set stations and networks adrift. . . . What would happen if the best organizations, the best features and the largest advertising accounts gravitated, as they would, to the 50 or 60 largest and most powerful stations in the country? Yet that is exactly what would happen under the so-called non-exclusivity rule . . . [it] would lead to a concentration of advertising support for broadcasting over large stations and in larger communities, weaken the economic structure of hundreds of smaller stations, and make for inadequate service in many parts of the country that are now suitably covered by network broadcasting." [15]

The government denies that such inequitable results would follow the elimination of station exclusivity. On the contrary, it is argued that through such elimination the number of networks should increase. It is further contended that the quality of programs should improve with "increased competition among networks for the time of outlet stations. Not only the more powerful stations, but those with less desirable facilities, and the public as well, will benefit. From a practical standpoint, this contention by the networks overlooks the highly important matter of cost of time. The large stations in each city cannot monopolize the best commercial programs unless the advertising sponsors are willing to pay the higher rates charged by such stations." [16] And then the Report goes on to state that on the basis of some twenty-five cities suitable for a "basic" network and on the basis of a fifty-two week program schedule, the cost to the advertiser of the most high-powered stations

[15] Mr. Trammell, at Senate Interstate Commerce Committee Hearings, Transcript, pp. 507–8.

[16] F.C.C. *Report on Chain Broadcasting*, p. 56.

in each of these communities would exceed by approximately $50,000 the cost of purchasing the N.B.C. Red network. Admitting that some advertisers might be willing to meet these increased costs, the F.C.C. rebuttal concludes that if high-powered stations become too commercial to the exclusion of public service programs, the Commission will have something to say about it.

The attitude of the Commission with respect to station exclusivity is, therefore, very definite. It was found to restrict the station's choice of programs and its ability to compete with other stations, to tend to deprive the listening public of programs of other networks, and to hamper the development of existing and future chains. Hence, station exclusivity is contrary to the public interest.

> Our conclusion is that the disadvantages resulting from these exclusive arrangements far outweigh any advantage. 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 affect the program structure of the entire industry.[17]

On the basis of this conclusion the Commission promulgated Regulation 3.101, which reads 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.
>
> * The term "network" as used herein includes national and regional network organizations.

Station exclusivity, as we have noted, is not vital to the operation of a network under our present system, granted exclusive option time is permitted. The National Broadcasting Company, of course, despite its arguments to the contrary, realized this. Consequently, Mr. Hedges on December 10, 1941, sent a letter to all affiliates stating that N.B.C. had decided to "eliminate as a term of network affiliation any obligation pursuant to which an N.B.C. affiliate may not broadcast the programs of another network at such times as do not conflict with the station's obligation to broadcast N.B.C. pro-

[17] *Ibid.*, p. 57.

grams." The present N.B.C. affiliation contract,[18] therefore, does not contain any provision for station exclusivity. The Columbia Broadcasting System, on the other hand, had not abandoned it up to 1943.

Territorial Exclusivity

Territorial exclusivity is the reciprocal of station exclusivity. Through the former provision the network agrees not to furnish its programs to any other station located in the territory served by an existing affiliate. Although both the Columbia Broadcasting System and the Mutual Broadcasting System grant territorial exclusivity to their outlets, the National Broadcasting Company, as we have seen, never has had this clause in its standard contract. In fact, Mr. Hedges testified that in the few cases where the company had been forced by the individual station to incorporate this feature in the contract it had been granted only "after a knock down and drag out fight."

MR. DEMPSEY—In general what provision do you make, if any, in your contracts with your affiliates with respect to your future contracts with other stations that may serve the same area?
MR. HEDGES—There is no such provision within the general contract.
MR. DEMPSEY—Do you have it in some of your contracts?
MR. HEDGES—There have been certain restrictions placed upon us in certain contracts. I have in mind KMO at Seattle, Washington, which restricts us from placing stations within 125 miles of that station. . . .
MR. DEMPSEY—And in general, that is the basis on which you grant it or refuse it?
MR. HEDGES—After a knock down and drag out fight.
MR. DEMPSEY—And under compulsion, if it is necessary to get the station, you will give it to them?
MR. HEDGES—Yes.
MR. DEMPSEY—You think quite different principles apply there as to the question of network exclusivity. . . .
MR. HEDGES—I think it adds up to about the same thing. Simply a station places such a high valuation upon its affiliation with the N.B.C. that it zealously guards that affiliation and wants to keep it for itself. I can't blame any station for feeling that way about us.
MR. DEMPSEY—If they still have to knock you down and drag it out of you to get it, is that right?

[18] See Appendix, p. 247.

MR. HEDGES—That is right, because the less restrictions that we have upon us are always to be preferred.[19]

The conclusion should not be drawn from the above testimony, however, that N.B.C. generally duplicates network programs in the same area. Obviously, few advertisers would be willing to pay twice for the same coverage. However, in keeping with its policy of retaining flexibility and wherever possible avoiding restrictions on its freedom of action, the company reserves the right in the great majority of contracts to duplicate the program if it sees fit, and, as noted when the question of rural coverage was discussed in Chapter 9, duplication has been allowed to occur in some instances in order, as Mr. Hedges put it, to give "an added punch" in an important advertising market.

In so far as territorial exclusivity prevents duplication of network programs in the same territory—which is an unnecessary waste of program service and an undesirable dilution of program choice on the part of the listening audience—it is not an issue in the controversy. In this connection Mr. Telford Taylor, general counsel of the Federal Communications Commission, declared, "We have no objection to such a practice as long as it is intended to prevent duplication. Duplication would be wasteful." [20]

The major issue concerns the question: Should another station in the same territory be prevented from broadcasting a network program if the regular affiliate of that network has turned the program down. There is also the subsidiary technical problem of what constitutes the same territory or how to define program duplication in terms of the area served.

Mr. Charles Evans Hughes, Jr., counsel for the Columbia Broadcasting System, strongly defended the territorial exclusivity provision in the company's contracts. He argued that it enables the affiliated station to build itself up through Columbia programs of national prestige. This is particularly important to the weaker station, and, instead of acting as a restraint, the provision actually promotes competition because it forces the national advertiser to accept the smaller outlet. If the advertiser had complete freedom of choice,

[19] F.C.C. Hearings re Docket 5060, Transcript, p. 1842.
[20] Injunction Suit, Oral Arguments, January, 1942, Transcript, p. 206.

he would prefer to have his network made up of only the highest powered stations with the greatest potential circulation—a Columbia outlet here and an N.B.C. outlet there—"to give him a 50,000 watt, unlimited time, clear channel station in every town he wanted to cover." The result would be that the strongest stations would get most of the business and the weaker stations would suffer correspondingly.

"Under this plan of the C.B.S. affiliation contract, however, the advertiser, when he deals with Columbia, has to take its network over-all; he has to take the weaker stations with the stronger ones, and it enables, even in a city where N.B.C. has a 50,000 watter on unlimited time and we have a 5,000 watter, that intrinsically weaker station to be built up by reason of having exclusively the Columbia programs." [21]

This argument of Mr. Hughes assumes that the Columbia affiliate broadcasts all of the programs offered to it by the network and therefore it does not meet the principal objection to territorial exclusivity, namely, that a community should not be deprived of hearing a program which has been rejected by the regular affiliate. Under circumstances in which the individual station did not have this right of rejection, however, the argument of Mr. Hughes is sound, in the writer's judgment. An advertiser should not be able to pick and choose his stations completely at will, and territorial exclusivity undoubtedly curbs his freedom of action in this respect.

Here again we see the conflicting nature of the chain broadcasting system as it is established today. On the one hand, it is generally agreed that territorial exclusivity prevents wasteful duplication of program service in the same area and is a financial boon to the weaker station. Therefore, it is in the public interest. On the other hand, the licensing policy of the Commission insists that the individual station must be sovereign, retaining at all times the right to reject a network program, and territorial exclusivity is condemned because in the event of such rejection it would deprive a community of service. Therefore, it is not in the public interest.

[21] Mr. Hughes, Injunction Suit, Oral Arguments, January, 1942, Transcript, pp. 126–28.

Declaring that it is as reprehensible for an affiliate to agree to a contract preventing another station from carrying a network program as it would be for an affiliate to drown out that program by electrical interference, the *Report on Chain Broadcasting* concludes with respect to territorial exclusivity: "The crucial point is that it is not in the public interest for a station licensee to enter into an arrangement with a network to preclude other stations in the area from broadcasting network programs which it rejects." [22]

Regulation 3.102 covers the question of territorial exclusivity. In its original form it read 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.

Notice that the definition of what constitutes a station's territory is left extremely vague. It is dismissed with the phrases "serving substantially the same area" and "serving a substantially different area." What "same" and "different" mean remains unexplained except for the general connotations of the words themselves. The technical determination of service areas, however, is a highly complicated and changeable one fraught with misunderstandings and variations. Consequently, the rule would seem to be most difficult of equitable enforcement.

Chairman Fly does not share these views. He believes that the regulation is sufficiently precise and that its proper interpretation is clear. Nevertheless, as the following colloquy illustrates, this assumed precision turns out to be pretty much the personal interpretation of the Chairman. It should also be noted that Mr. Fly in the testimony given below twice concedes—inadvertently no doubt—the necessity for exclusive affiliation contracts.

CHAIRMAN WHEELER—Before you go to that let me direct your attention, if I may, to rule 3.102, which has created some misapprehension in the

[22] Page 59.

minds of some broadcasters. A question involving an interpretation of that rule arises in my mind which might best be answered if I relate a specific case.

I have in mind a 50,000-watt station and a 1,000-watt station operating in the same community such as Washington, D.C. Both stations serve the city itself, where you have the main concentration of population but the larger station sends its signal beyond the metropolitan area. Both stations are affiliated with competing networks . . . Would you say that these stations served substantially different areas or not?

MR. FLY—In the example given, sir, I would say that such stations do serve substantially the same area. It is the general rule, and it will be found that even with the smallest stations the commission has licensed there is adequate service over the entire metropolitan area where the station is located. Therefore, so far as these rules are concerned we should consider as comparable all stations that are so located as to serve metropolitan areas . . .

CHAIRMAN WHEELER—I was going to say that some of these small stations have been worried for fear all the good programs would go to the big stations, and that under your rules the network would simply say: "Well, we will not put it on the little station . . ." If that were permitted it would seem to me you would be eliminating the small station.

MR. FLY—Yes; and it will be seen that under the rules the advertiser would not have the privilege of picking and choosing in that way, *because he is up against the contract which affiliates the station to the network.*

CHAIRMAN WHEELER—. . . But, for example, if an advertiser plans on advertising by radio in the sparsely settled western area, he will want to reach the largest number of listeners possible with the smallest number of stations. Consequently it is probable that an advertiser would not want to put his program on the smaller stations in Spokane or in Salt Lake City or in Denver. I think an advertiser would want to go on the big stations because the big stations get the listeners; and unless the small station can get good programs you will be giving the big stations a monopoly. I think that is one thing you have to guard against because certainly when you are trying to tear down one monopoly you do not want to be building up another—putting the small stations out of business. That is one thing you have to guard against.

MR. FLY—Mr. Chairman, I think we are in absolute agreement on that. I do think that to give the small station the first refusal of a program, and *tying it up by contract,* to make that permissible under the rules, is the protection. Of course, it is not the intention of the Commission that the big stations shall take advantage of the small ones. If that starts to happen we will have to reëxamine that phase of the subject.

CHAIRMAN WHEELER—. . . It could not be true unless the rules would let the advertiser pick and choose whatever station he pleased.
MR. FLY—We would not go along with that construction of the rule.[23] [Italics added.]

The vagueness of the original regulation, however, was not the principal industry argument against it. It was pointed out that the most inequitable aspect of the rule was the fact, as Mr. Fly states above, that whereas Mutual or any other network, if it is shut out of a certain market, can use under Regulation 3.101 any station affiliated with another chain, the network organization is supposed to give its outlets first call on all programs, despite the fact that some of these outlets would be competitively inferior. At the Senate hearings Mr. Paley, president of the Columbia Broadcasting System, gave strong expression to this criticism.

This idea that we are to have an affiliation arrangement by which the station makes no commitment to us but by which we are to give it the first option on all our programs is not to be found in the rules themselves. It seems to have emerged as an answer of necessity to a question from the committee which involved a practical problem. Are we being told that we have to make one-sided arrangements of that kind with our affiliates in the future? If exclusivity is to be broken down, is it conceivable that at the same time we are to be asked not to try to avail ourselves of open time on competitive stations? In other words, according to the statement made by Mr. Fly, we might have a station in a town that had inferior facilities, and we would have to give that station first call on everything we had. That station would have no obligation to take our programs. We would not have the right to go to a better station in that town if we found that an advertiser would give us more business in case we had that better station. No; we have to remain faithful to the affiliate, but he has no loyalty whatsoever to us.[24]

The necessity mentioned by Mr. Paley refers to the objection raised by Senator Wheeler in the testimony already cited, namely, that, without such a first call's being granted to the affiliate, network business would tend to gravitate toward the highest-powered station in each community. To meet this objection, but with no adequate explanation of why a chain organization should be expected to grant such program priority to its affiliate which would be

[23] Senate Interstate Commerce Committee Hearings, Transcript, pp. 131–33.
[24] *Ibid.*, p. 414.

under no obligation to the network, the Commission amended Regulation 3.102 by adding the following sentence:

> 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.

By this amendment the vagueness of what constitutes a station's "area" is somewhat clarified. Presumably it is to be regarded as the station's primary service area. Such clarification is not very helpful. As already noted, the precise demarcation of a primary service area under the Commission's standards is a difficult, prolonged, and dubious job. The primary area changes from day to day with changes in sunspot activity, climatic conditions, and man-made electrical interference. Consequently, the regulation remains about as unsatisfactory as it was before, both from the standpoint of feasible enforcement and of notifying the network industry what the rules for their business are to be.

In its Supplemental Report the Commission stated that the added sentence "does not change the meaning of Regulation 3.102 but is intended to eliminate confusion with respect to its interpretation. Regulation 3.102 is not intended to and does not prohibit a regular affiliation contract whereby a network agrees to make a first offer of all its programs to one particular station in a given community. The Commission believes, however, that in the case of non-commercial public service programs of outstanding national or international significance, such first offer should not constitute an exclusive offer and that the network should be left free to furnish such programs to other stations in the same area." [25]

Thus the network is expected, contrary to the natural wish of the advertiser, to continue to furnish commercial programs to its weaker affiliates in certain markets but to make outstanding sustaining programs available to all—and this in a situation in which the individual station is to be under no obligation to the network.

[25] Page 5.

⋇ *Chapter 13* ⋇

STATION OWNERSHIP AND REJECTION OF PROGRAMS

One of the contradictions in our present system of chain broadcasting lies in the fact that while a station may be owned or leased by a network organization, it still has the right to reject any network program. Station ownership or lease implies network sovereignty; the right of rejection implies station sovereignty. In principle, therefore, the two concepts are in fundamental conflict. It is as if the government said to the Atlantic and Pacific Tea Company, "Yes, we approve of the chain store system of food distribution. But when you have bought or rented stores in the different communities of the country, and when you have engaged a manager for each store, you are not to have authority as to how those stores shall be operated."

Despite this contradiction, however, and despite the fact that the network organization officially grants to its owned or leased outlets the right to reject any network program which they may consider contrary to the "public convenience, interest, or necessity," ownership or lease in actual practice provide the means whereby the national chain secures the maximum assurance that these key stations located in the principal advertising and talent markets will be willing to broadcast the same program at a given time. Although rejection is permitted in theory, the prerogatives of ownership, as would be expected, generally prevail and allow an assured network circulation to be secured over these key facilities.

Network Ownership and Lease of Stations

The inherent conflict between network sovereignty and station sovereignty is brought out by the testimony of Alfred Morton, who at the time of the F.C.C. hearings was vice-president of N.B.C. in

charge of operated stations. He declared that each outlet owned by the company, although it was under his and President Lohr's supervision, was nevertheless a complete broadcasting unit in itself, with its own manager, chief engineer, program director, sales manager, promotion manager, and press representative. Each is "set up and designed so that each . . . could function thoroughly and completely as individual broadcasting enterprises in their respective communities."

This conflict between owned stations acting in their network capacity and owned stations acting in their local community capacity is further illustrated by the following colloquy:

MR. MORTON—It is the policy and philosophy of the Company in relation to its stations that they must function as local broadcasting enterprises in their respective communities. The managers of these stations are given autonomy in authority to conduct the local activities of their stations in accordance with the best public service, convenience and necessity requirements of their communities. They pursue in the main the basic policies of the National Broadcasting Company but in the conduction of their local activities and business they are given great latitude of judgement and decision and action, conforming only to the framework of the basic policies.

MR. HENNESSEY—If a local program arises in one of these communities which is susceptible of being broadcast, do the local managers have any authority with respect to that program?

MR. MORTON—They have complete authority with respect to it.

MR. HENNESSEY—What happens if a conflict should occur between a local program of that sort and a network program, either sustaining or commercial?

MR. MORTON—If the local program that they desire to carry is of greater importance to the area served by that station than is the network sustaining program, first they will cancel that network sustaining program and do the local job. On a network commercial going through their stations, if there is also an outstandingly important local event taking place, the network commercial on that station is frequently canceled that they may be able to carry this local event . . .

MR. HENNESSEY—When Mr. Royal testified here, he stated that these local stations were required to carry certain programs which he designated as "must" sustainings. Is that a fact?

MR. MORTON—That is correct. . . . That requirement is imposed because the sustaining programs that Mr. Royal referred to are considered by the Company to be outstandingly important.[1]

[1] F.C.C. Hearings re Docket 5060, Transcript, pp. 2037–39.

In short, the local managers of owned stations do not wield complete authority. They could not, if ownership is to mean much.

In defense of continued operation of the stations owned or leased, the networks stress that the Federal agencies responsible for granting radio broadcasting licenses in the public interest—the Federal Radio Commission up to 1934 and the Federal Communications Commission since that time—have repeatedly licensed all of these stations to the chain organizations. The record shows in the case of N.B.C. that 150 separate licensing proceedings were involved in this history of renewal and it is argued that none of the circumstances according to which these licenses were reissued have changed. Consequently, the Commission's threat under Regulation 3.106 to revoke any or all of these licenses—continually renewed in the case of WEAF for sixteen years—is regarded as "sufficient evidence of arbitrary and capricious action." [2]

N.B.C., for example, further defends its ownership of key outlets by claiming that there are not less than three other stations in any locality where the company operates one and hence "it cannot be said that operation of stations by N.B.C. keeps other networks from having available outlets in such localities." [3] It is also argued that ownership permits a better service to the public, and that by owning these stations the network organization can guarantee that the finest sustaining features are heard by large audiences in the densely populated regions of the United States. This argument appears sound and the results of station ownership in this respect seem definitely in the public interest.

As might be expected, the two arguments most emphasized by National and Columbia in support of station ownership are: that it provides in the more important advertising markets a greater assurance of circulation or willingness on the part of the station to broadcast a certain program at a given time; and that it is necessary to the efficient operation of a broadcasting network.

The N.B.C. brief of December, 1941, declares, "The necessity for the operation of these stations directly by the network organization is only an extension of the need for option time in localities where the assurance of circulation to an advertiser must be more

[2] N.B.C. Brief, December, 1941, p. 91. [3] *Ibid.*, p. 92.

certain and more continuous. Where facilities are plentiful there are no arguments against network operation. All national networks need and have key stations, N.B.C. and C.B.S. by ownership or operation and Mutual by being owned." [4]

And in his affidavit dated October 31, 1941, Mr. Trammell, president of the National Broadcasting Company, states, "These key stations now operated by N.B.C. are not many in number, but they are vitally important to the efficient operation of its business of network broadcasting; they minimize operational difficulties; they serve as originating points for major programs; and they are useful as laboratories for new ideas which may later be used on the entire network. They are the focal points of network operations and without them it would be impossible to furnish the network services enjoyed by the radio audience today." [5]

Mr. Paley, president of Columbia, also stressed the essential importance of owned stations, as the following colloquy illustrates:

MR. BURNS—Would you state what are the factors, as you see it, behind your policy of acquisition of radio stations?
MR. PALEY—Well, we had to be assured of the necessary network broadcasting facilities, as I have just pointed out, and then again it was necessary in certain key points to have radio outlets so that our programs could be heard in certain territories and very often it was necessary for us to purchase a station in order to be assured of that coverage.[6]

The government takes a two-fold position with respect to network station ownership. In the first place, the Commission contends that it is contrary to the public interest for a chain organization to own or operate two outlets in the same community. To the writer, this contention is valid. It does not appear necessary or desirable that N.B.C. continue to be the licensee of two stations in New York, Chicago, Washington, and San Francisco. As we have seen, this situation has been rectified, at least in a formal manner, with the separation of the Red and the Blue networks and will be fully corrected when the latter is sold to an independent owner.

In the second place, the Federal Communications Commission maintains that network ownership of single stations in different communities should be severely restricted. Although in its Report

[4] Page 91. [5] Page 16. [6] F.C.C. Hearings re Docket 5060, Transcript, p. 3416.

the Commission fails to specify except very vaguely the degree of restriction which it deems advisable, it is pointed out that ownership "renders such stations permanently inaccessible to competing networks. Competition among networks for these facilities is nonexistent, as they are completely removed from the network-station market . . . This 'bottling up' of the best facilities has undoubtedly had a discouraging effect upon the creation and growth of new networks." [7]

It is then emphasized that in several cities where N.B.C. or C.B.S. owns one station, the facilities available are of such unequal power or are so limited in number, that network ownership results in a virtual monopoly. Cleveland and Charlotte, N.C., are cited as examples. The only broadcasting facilities available in the former city when the Report was issued were the clear-channel station owned by N.B.C., two full-time regional stations, and one part-time regional station. Charlotte had only two stations, one being operated with 50 kilowatts and owned by C.B.S. The Commission, therefore, concludes that "It is against the public interest for networks to operate stations in areas where the facilities are so few or so unequal . . . as to require that all facilities be open to competition among networks for outlets and among stations for networks." [8]

The argument rests on lack of frequencies, particularly in the standard band, and the resulting domination of the small available supply which network ownership brings. If more frequencies could be made available, the government's principal criticism would again have little application. Furthermore, the reiteration of the type of competition which the F.C.C. wishes to apply to the broadcasting field should be noted. Networks are to compete for the same stations; stations are to compete for the same networks. This competitive philosophy is reinforced when the Commission states in its Report that were the question "presented as an original matter at this time, [the Commission] might well reach the conclusion that the business of station operation and network operation should be entirely separated." [9]

In the author's mind this is an amazing statement. Under our

[7] F.C.C., *Report on Chain Broadcasting*, p. 67.
[8] *Ibid.*, pp. 68–69. [9] *Ibid.*, p. 67.

present system how can the business of station operation be entirely divorced from the business of network operation and have any network left? The chain organization must have some control over its outlets. To separate completely the businesses of the two would seem to make any such control impossible.

The final argument of the government is that network ownership of stations creates the danger that the chain when dealing with advertisers will give preference to these outlets at the expense of affiliated stations. It is pointed out that owned or operated stations have been the most profitable, although it is conceded that this may have been due to their higher power and location in the best markets.

The Commission was, therefore, adamant in its condemnation of network ownership of stations, and as a result Regulation 3.106 was promulgated. It 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 same 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.
>
> * The word "control" as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

Like Regulation 3.102 this rule is vague in its definition of a station's service area. In addition, the general phrase "for 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" gives the Commission, because of the lack of precision in the language and because of the difficulties in arriving at a fair determination of what constitutes substantial competitive restraints, arbitrary powers to force immediate sale of network assets by refusing renewal of a license. It is true that, whereas the effective date of the other new regulations, except 3.107, was to have been November

15, 1941, it was provided that "the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties." However, this is small comfort to the network organizations and does not ameliorate the questionable nature of the rule, since the decision to extend the effective date is left entirely in the hands of the Commission. The provision says "may be extended"—not will be extended.

Right of Individual Station to Reject Network Programs

This right applies both to stations owned or leased by a network and to stations linked to a network through affiliation contracts. It denies the principle of exclusive option time, is in conflict with the sovereignty implied by network station ownership, and represents the antithesis of the principle of chain broadcasting requiring the simultaneous transmission of the same program over a group of connected stations.

The right of rejection, however, is specifically reflected in the N.B.C. standard affiliation contract which states, for instance, with respect to the provision for exclusive option time, "That because of your public responsibility your station may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity." N.B.C. officials testified that the same understanding was also provided for in memorandum instructions to the stations owned or leased by the company.

Although not as precisely as in the language of the Act itself, the standard contract of C.B.S. also provides for rejection of network programs. The clause in the Columbia contract reads, "In case the Station has 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." This provision actually gives less freedom to the outlet to reject than the N.B.C. arrangement, because frequently it is most difficult for the network organization to give adequate details of a proposed program to the stations much before the broadcast takes place.

Mr. Royal, vice-president in charge of programs, insisted at the F.C.C. hearings that all N.B.C. stations—both those affiliated and those owned—have the right of rejection and that the company respects it.

MR. DEMPSEY—Is it your understanding that under the contracts between N.B.C. and its affiliates, that is, stations that are not owned or operated or managed by you, those stations have to carry any programs sent out in those hours irrespective of whether they are commercial?
MR. ROYAL—They have a right to reject them.
MR. DEMPSEY—Any programs?
MR. ROYAL—Any programs. . . .
MR. DEMPSEY—Are they free in their contracts with you to do that without being subject to some penalty?
MR. ROYAL—They are free to run their stations and to take what programs we offer them or to refuse them.
MR. DEMPSEY—That is true both with respect to commercial and sustaining?
MR. ROYAL—That is correct. You are now talking about all stations or just our own stations?
MR. DEMPSEY—All stations.
MR. ROYAL—All stations.[10]

Mr. Hedges, vice-president in charge of station relations, however, gave a more moderate appraisal of the situation. When asked by Commissioner Sykes if the station had the absolute right to cancel, Mr. Hedges replied:

The word "absolute" may not be accurate, but it does have a right to cancel if it is able to demonstrate that the program which it will substitute for the N.B.C. commercial program will be more in the public interest than the program which we are offering. . . . It is the responsibility which the station must assume that the program which we are offering is not in the public interest, perhaps as compared with the program which they wish to substitute. . . .

It is purposely phrased in our contract in that way so that there will be no abuse on the part of the station in kicking out N.B.C. programs for inconsequential and trivial things which they might assert were in the local public interest, but if they are willing to submit to a test, perhaps an arbitrator, as to whether or not their judgment has been accurate in that particular case, that can be done . . . [Stations] are not capricious in the exercise of their judgment with respect to local programs.[11]

[10] F.C.C. Hearings re Docket 5060, Transcript, pp. 573–75. [11] *Ibid.*, pp. 1748–49.

This is not surprising. A station's affiliation with a network is economically valuable. The station will naturally hesitate to oppose the wishes of its economic benefactor. Furthermore, N.B.C.'s former policy of pegging the individual station rate at the network rate reinforced this reluctance. Finally, this right of rejection on the part of the individual station is not practically feasible in most instances. These considerations are entirely aside from the writer's conclusion that any such right is so inconsistent with the essential nature of chain broadcasting as to render it the most contradictory element in our present network system.

Except in a general way—as for instance by the title of a series of programs, by the name of the sponsor, or by some character that is represented—the outlet may have little notice of the content of a network program until it is received over the wire. The decision to reject, therefore, has to be made frequently at the actual time of the broadcast.

MR. DEMPSEY—And he [station] has no actual opportunity to know what the full content of the program is?
MR. HEDGES—No . . .
MR. DEMPSEY—It is not usually possible to tell the program content from just the title or the sponsor or the product to be advertised, is it?
MR. HEDGES—No, it isn't . . .[12]

In at least one instance, N.B.C. used great pressure to prevent an affiliate from exercising its right of rejection. The facts as given at the Senate hearings by Mr. Hope H. Barroll, Jr., executive vice-president and general manager of station WFBR in Baltimore, Maryland, were as follows: WFBR became an affiliate of the Red network in 1934. In 1937 the station commenced broadcasting every Friday evening from 9:45 to 10:00 a local recruiting program for the Maryland National Guard at the request of Major General Milton A. Reckord. In January, 1940, the station received a request from N.B.C. that the time between 9:30 and 10:00 P. M. on Fridays be made available for a commercial program sponsored by Proctor and Gamble. Mr. Barroll testified that he "promptly advised N.B.C. that the National Guard program which we were broadcasting would conflict with the commercial program and as we con-

[12] F.C.C. Hearings re Docket 5060, Transcript, pp. 1893 and 1983.

sidered the National Guard program to be more in the public interest, because it assisted in our national defense by calling for recruits, we would not be able to carry the program for Proctor and Gamble." [13]

Thereupon Mr. Barroll received the following letter from Mr. Hedges of the National Broadcasting Company.

MR. HOPE H. BARROLL, JR.,
GENERAL MANAGER, RADIO STATION WFBR,
BALTIMORE, MD.

DEAR HOPE:

Commercial traffic has given me a copy of your wire in which you refuse to accept P. & G. Oxydol Friday 9:30–10. If the Maryland National Guard program is of such transcendent importance, why don't you use your own time for it? That was the reason why time of affiliates was divided between network optional time and station time. We have always been willing to step aside for important local broadcasts which come up from time to time, but I think it is grossly unfair for you to set up a permanent schedule in network optional time for something which you should handle in your own station time.

I must say that I have not been at all happy with the degree of cooperation which you have extended to N.B.C. during the recent months. It can lead to only one conclusion, and that is that you are not happy as a member of the red network. Maybe we can do something about that, too.

Sincerely yours,

BILL,
WILLIAM S. HEDGES.

Then Mr. Barroll explained that, despite the importance of having the National Guard program reach the largest possible audience, he had it shifted to a less desirable period because of N.B.C.'s attitude and implied threat that if he did not comply his station would be transferred to the Blue network—a threat that was subsequently carried out. "This shift meant a loss of a great part of the audience which had become accustomed to listening to this program from 9:45 to 10:00 P. M." declared Mr. Barroll. Having quoted the letter which he wrote to Mr. Hedges in reply, Mr. Barroll concluded, "I think these letters show in the clearest possible way the coercion which networks can and do use to force their affiliates to do their

[13] Senate Interstate Commerce Committee Hearings, Transcript, p. 590.

bidding." [14] The final outcome of this episode was that WFBR left N.B.C. and became an affiliate of Mutual.

The government's attitude toward the right of the station to reject all network programs, notwithstanding the Commission's recognition that "precise information concerning the program the network proposes to distribute is not . . . always easy to furnish," is unequivocal. The station must have that right because it and "not the network is licensed to serve the public interest."

The government also stresses the fact that if the station is not allowed to reject a program except under circumstances where it can satisfy the network organization that the local program is more in the public interest, the individual licensee loses his discretionary autonomy in violation of the statute, and he soon would be broadcasting any program furnished by the network. "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. . . . The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. . . . Even after a licensee has accepted a network commercial program series, we believe he must reserve the right to substitute programs of outstanding national or local importance. Only thus can the public be sure that a station's program service will not be controlled in the interest of network revenues. . . . The licensee himself must discharge the responsibilities imposed by the law." [15]

In accordance with this attitude Regulation 3.105 was promulgated. This rule reads:

> 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,

[14] *Ibid.*, pp. 591–92.
[15] F.C.C., *Report on Chain Broadcasting*, p. 66.

is contrary to the public interest, or from substituting a program of outstanding local or national importance.

Stating that under the Communications Act the discretion as to what shall be broadcast by any particular station is certainly lodged in the licensee and cannot "be delegated to a couple of New York corporations," Chairman Fly defended this regulation and defined its purpose as follows: "The purpose of Regulation 3.105 is simply to restore to the station owner the very privileges and rights and, indeed, the duties which the Congress, through the Commission, has placed upon him in granting him a license. Of course, the station ought to be free to reject any program that is contrary to the public interest, in his judgment, or to reject a program if there is an outstanding local or national program which is offered in the meanwhile. Of course, a station, in order properly to perform its public service, must be free to do those jobs that are of outstanding importance in the community in which the station is located." [16]

[16] Senate Interstate Commerce Committee Hearings, Transcript, p. 91.

✕ *Chapter 14* ✕

OPTION TIME

EXCLUSIVE option time, because it applies to the majority of a network's outlets, is the keystone of the arch of compromise between the contradiction of network ownership of stations and the right of the individual station to reject network programs. As we have already noted, it is the essence of the contract whereby the network organization secures the assurance that the independent affiliates will be willing to broadcast the same program simultaneously. It is true that this assurance is not as certain as in the case where the outlet is owned by the chain, and in both instances the assurance is denied in principle by the station's right to reject any program. This arrangement of option time, nevertheless, forms the practical foundation of our network system today.

The standard affiliation contract of the National Broadcasting Company provides:

> Upon 28 days' notice, your station will broadcast network commercial programs for N.B.C. during any periods required by the National Broadcasting Company within the hours designated below as Network Optional Time, provided, that because of your public responsibility your station may reject a network program the broadcast of which would not be in the public interest, convenience and necessity.

Network Optional Time will be as follows:

(New York City Time)

Weekdays	*Sundays*
10:00 A. M. to 12:00 Noon	1:00 P. M. to 4:00 P. M.
3:00 P. M. to 6:00 P. M.	5:00 P. M. to 6:00 P. M.
7:00 P. M. to 7:30 P. M.	7:00 P. M. to 11:00 P. M.
8:00 P. M. to 11:00 P. M.	

The National Broadcasting Company, in other words, has an exclusive option on eight and one-half hours each day during the

week and eight hours on Sundays of the broadcasting time of its affiliated stations, the option being exercisable on twenty-eight days' notice.[1] In its standard affiliation contracts with stations west of Denver, N.B.C. has a "floating" option time provision similar to that of C.B.S. because of the time differential involved. It will be seen that the specified hours under option are the most desirable ones from the standpoint of selling time to national advertisers. This exclusive provision means that the National Broadcasting Company, when it has accepted a new advertising account, can guarantee (except, of course, for the general right of all stations to reject any program) to the advertiser that within twenty-eight days the stations making up his particular chain will be available if the hours fall within network option time.

Although Columbia has had an exclusive option time provision in its affiliation contracts from the beginning, N.B.C. did not incorporate such an arrangement until 1935. On the other hand, Mr. Trammell, president of the company, contended at the Senate hearings that exclusive option time also had always been implied through "gentlemen's agreements" before that year, although the affiliate did not actually sign to that effect.

There were a number of reasons given for National's adopting the exclusive option time provision in its contracts in 1935. Mr. Hedges, vice-president of N.B.C., testified at the F.C.C. hearings that it had been found to be necessary for stable operations of the network and was competitively advantageous to the company.

> It was practically impossible for any salesman to approach an advertiser with any assurance at all that he would be able to deliver any station in any market excepting those markets of course where the National Broadcasting Company operated stations . . . This placed the N.B.C. salesman in a very bad competitive position. The salesman for a national magazine could go to the same client and could tell him definitely that

[1] The Columbia Broadcasting System has what is called a "floating" option time provision in its contracts by which the Company has an exclusive option up to fifty converted hours (a converted hour equals about two daytime hours and three early morning hours) per week of the station's time. In other words, the broadcast day is not specifically divided between network and non-network time. The Mutual Broadcasting System has had time option contracts since 1940 with its seven stockholders covering the fifty-odd stations owned by them or affiliated with their regional networks. These exclusive options cover from 3¼ to 4¼ specified hours on week days and 6 hours on Sundays.

he would have his advertisement appearing immediately . . . and he could tell him exactly what his circulation was in each individual market that the client desired to reach.

On the other hand, the N.B.C. salesman would go to an advertiser . . . and say in effect, "I purport to represent a national advertising medium; in reality I don't. I can't deliver national coverage. I can't give you stations in Detroit or Pittsburgh or Buffalo, or Cleveland." The advertiser then will say, "Well, when radio grows up, come back and see me sometime, because it sounds like a great business."

Now this [option time] I think is one of the greatest forward steps that has ever been taken in the business to place the business on a stable basis. Those stations which heretofore had been refusing may have been actuated by their own individual selfish purposes, but at the same time they were working an injury on their fellow broadcasters who desired those programs and who were denied them by reason of the fact that a complete network or a practically complete network could not be delivered.[2]

Mr. Hedges in other parts of his testimony reëmphasized that competitive considerations with respect to other networks and particularly with respect to national "spot" advertising through the use of transcriptions were the decisive factors in the company's decision. "At least one of our competitors was in a much more fortunate position in that respect, having a substantial number of contracts, so we understand and believe, which enabled it to secure right of way at any time of the day or night. Of course that made it possible for the competitor to tell one of our clients who was dissatisfied with the inadequate network turned up . . . that he was in a position to deliver complete coverage and he would show the list of stations. As a result we have lost considerable business." [3]

And with reference to transcriptions, Mr. Hedges stated, "National 'spot' representatives could frequently go to an advertiser and offer him the best stations at times when it would be the same time across country . . . The fact that national 'spot' representatives were blocking out time which otherwise would be strongly desired by a network advertiser who wished to have a simultaneous broadcast, throughout the length and breadth of the network, made it impossible for that time to be delivered. It became vital that we secure a straight line across the country in time so that we could

[2] F.C.C. Hearings re Docket 5060, Transcript, pp. 1793–95. [3] *Ibid.*, pp. 1722–23.

deliver to the national advertiser the time that he desired for simultaneous broadcasts." [4]

Whatever the reasons were in 1935, exclusive option time today is claimed to be an indispensable factor in chain broadcasting operation. The N.B.C. brief of December, 1941, states, "The *sine qua non* of network broadcasting is the certain availability at a definite time of a large number of stations in the principal markets from coast to coast. Option time granted by stations to the networks fills that need." [5]

Mr. Sarnoff testified, "If you are going to continue the present system of American network broadcasting I know of no other way by which it can be continued except by the network system to have a right of way for a specified period of time over a good number of stations. Otherwise, networks can't make contracts with advertisers. That is inherent in the situation." [6]

And Mr. Trammell, in his October, 1941, affidavit, declares, "The optional time provision is the balance wheel which regulates the cooperative efforts of the network organization and its affiliated stations in the production of a nation-wide broadcasting service. It affects every aspect of the network business." [7]

Mr. Paley, president of the Columbia Broadcasting System, and Commissioners Craven and Case of the F.C.C. also contend that some form of exclusive option time is indispensable to the operations of a network. Mr. Paley asserted at the Senate Interstate Commerce Committee hearings, "Since a network can only exist when a number of stations are joined together for simultaneous broadcasting, it seems evident that there must be some kind of priority for the through program unless the whole network operation is to be haphazard, accidental, difficult, and often impossible except on a patchwork basis. We have to know exactly what we have to sell when we go into an advertiser's office. Without option time we cannot handle that situation. And little by little this time is going to be chiseled away from us and we will not have a network. It is impossible for anything to operate as a network unless it has option time." [8]

[4] F.C.C. Hearings re Docket 5060, Transcript, p. 1716.
[5] Page 88.
[6] F.C.C. Hearings re Docket 5060, Transcript, pp. 8637–38.
[7] Page 13.
[8] Transcript, pp. 396–97.

The two commissioners in their Minority Report state, "Time options appear essential because they facilitate better radio service to the public. Also, they appear necessary for effective coordination of program service on a national scale, because without them the situation would be analogous to a railroad in which each station master along the through route had adequate power to make his own train schedules for through trains." [9]

It is significant to note that the Federal Communications Commission itself prior to the reform movement accepted the principle of exclusive option time. The Engineering Report of the Commission issued in 1937 declared, "It can be appreciated that a coast-to-coast network without coordination, such as an agreement common to all stations on the network to deliver the same time for given programs, would not be a useful or efficient medium of simultaneous nation-wide communication. Such coordination undoubtedly is necessary for proper functioning of a network, providing the individual station is left sufficient opportunity for local self-expression." [10]

And Chairman Wheeler declared at the Senate hearings, "Frankly, I cannot see very much excuse for not giving you option time. I may be wrong about it, but I cannot see very much reason why you should not be able to have it. If I wanted to give you an option on some of my time, I do not see any reason why I should not be permitted to give you some option time. I am frank to say that, unless there is some reason I do not know of now, I think the Commission is wrong in saying you should not have any option time at all." [11]

Even the F.C.C. majority admits that clearing time for a network program is a legitimate business convenience. "A network does need to get through to be able to clear away local programs in order to put on its programs. It is a convenience for them to be able to do so." [12] And the F.C.C. Supplemental Report declares, "It is clear that some optioning of time by networks in order to clear the same period of time over a number of stations for network programs will operate as a business convenience."

[9] Page 123. [10] Page 18.

[11] Senate Interstate Commerce Committee Hearings, Transcript, p. 510.

[12] Mr. Taylor. Injunction Suit, Oral Arguments, January, 1942, Transcript, p. 199.

As already indicated, it is argued that an exclusive option is necessary to stable network operation and the sale of time to advertisers. Mr. John T. Cahill, counsel for N.B.C., asserted at the Injunction Suit oral arguments in January of 1942:

> It is N.B.C.'s firm business judgment that network broadcasting, as we know it, on a national scale cannot be carried on without the existence of firm option time. You just cannot organize a dynamic business with split-second timing, hooking up these many, many stations, separated by thousands of miles, on the basis of a town meeting. . . .
>
> The option time arrangement enables a network composed of these many independently owned and operated stations . . . to deal with national advertisers in competition with other national advertising media, such as magazines. . . . The network has got to be able to tell the prospective purchaser what it has to offer and it must be able to give reasonable advance assurance of the circulation of the advertiser's message and of his program.[13]

It is then pointed out that an advertiser using the Red network during the evening hours must purchase all of the stations on the basic network, of which only six are operated by N.B.C. Without option time, therefore, every such advertising contract would require the company to negotiate successfully with a minimum of about fifty stations—a requirement that is considered highly impractical.

Another argument put forward in defense of option time is that only through this provision can a network business be conducted on a sufficiently large scale to pay the expenses of operation. Mr. Trammell states in his December, 1941, affidavit that the expenses of N.B.C. in 1940 for network and key station operation, aside from all international broadcasting or other non-standard broadcasting, amounted to more than $17,900,000. "It is a human impossibility to obtain unanimity among the large number of necessary affiliates a sufficient number of times to carry this load." [14]

On the other hand, despite its agreement that it is a business convenience, the majority of the Commission originally condemned any exclusive option time provision. In support of this position the government advanced six principal arguments. It is not needed, as shown by the fact that N.B.C. operated successfully up to 1935

[13] Transcript, p. 61. [14] Page 14.

without such program priority. It restrains competition and in a locality where there are only three or less broadcasting stations it entirely prevents the fourth network or a new network from gaining access to that community. It tends to prevent the public from hearing programs except those of the network to which the option is given. The network organizations use only a portion of the time covered by the option. The provision gives N.B.C. and C.B.S. a whip hand over stations shared with the Mutual Broadcasting System. And finally, exclusive option time discourages the growth of national "spot" advertising.

The *Report on Chain Broadcasting* points out that N.B.C. in 1938 used only 58.1 percent of its network optional time on the basic Red network and only 19.4 percent on the basic Blue. But the individual stations on their own account can only sell the unused time subject to a twenty-eight-day cancellation and "this limits severely their ability to sell their own time." [15] The Report then refers to Mr. Witmer's claim that thirteen weeks is the minimum time required for a radio advertising campaign to take hold. Likewise, it is contended that the thirteen weeks minimum, which cannot be guaranteed because of the network's right to force cancellation on twenty-eight days' notice, applies equally to a local advertising campaign.

Referring to the fact that as of January, 1939, twenty-five N.B.C. outlets which did not have the provision for station exclusivity in their contracts were shared with the Mutual Broadcasting System, the Report stresses that N.B.C.'s right to force cancellation of a program series during the more desirable hours covered by exclusive option time, places Mutual in a highly disadvantageous position. The Commission asserts further that control of the most desirable hours through exclusive option time has a most adverse effect upon national "spot" advertising because the twenty-eight-day cancellation provision can be invoked at any time.

The emphasis placed by the Commission upon the competitive restraints which exclusive option time permits is brought out by the following statement of Chairman Fly: "The existing affiliation contract prevents the affiliates from disposing of the unused hours

[15] Page 63.

to any competing network. . . . We feel the Sherman Act is applicable, that the avenues of competition should not be obstructed, and that it should be possible for competing networks to make an entrance to the public and to serve the public in that area. . . . That I think is basic in this picture under the law and under the facts. . . . In short, I do not think the networks adopted restraints because they were essential to network operation; but the record clearly shows that they adopted them to block competition. There is no doubt that in the record there are shown the circumstances and the occasion when they adopted this clause—that it was to block competition." [16]

In keeping with the above opinions as expressed by Chairman Fly, the *Report on Chain Broadcasting* concludes with respect to option time:

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 spot transcriptions. 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.

The fact that N.B.C. was able to carry on its business for 7 years without time options, and changed only when C.B.S. began to derive a competitive advantage from its time options, as well as the somewhat similar experience of Mutual, leads us to the conclusion that time options, with their restraint upon the freedom of licensees, are not an essential part of network operations. With all the networks operating on an equal footing, the absence of optional time as it now exists will not, we believe, hamper network operations or drive advertisers to other media.[17]

Consequently Regulation 3.104 was included as part of the final Report and as originally promulgated read 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 the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station

[16] Senate Interstate Commerce Committee Hearings, Transcript, pp. 31 and 53.
[17] Page 65.

to clear time already scheduled when the network organization seeks to utilize the time.

This regulation prohibits any option time agreement whatsoever, express or implied, between a network organization and a standard broadcast station. As we shall see, however, because of the opposition raised by the industry, including the Mutual Broadcasting System, it was later modified to permit options as against local and national "spot" programs.

In addition to reiterating the arguments previously put forward in defense of option time provisions, the industry asserted that two disastrous results would follow the enforcement of Regulation 3.104 as originally drawn: (1) that network service to the public would suffer particularly with respect to sustaining programs; and (2) that a super advertising network would come into being thus concentrating chain advertising support on the larger stations and in the larger communities.

The N.B.C. brief of December, 1941, has this to say regarding the first of these predictions. "The fundamental misconception of the Commission majority is its idea that the networks are in possession of a continuous supply of programs which they arbitrarily distribute to the nation in a manner best suited to the whims of the particular network. The truth of the matter is that there is such a continuous supply of programs only because of the distribution system developed between stations and the networks. Without this system, made up of option time and key station operation, there can be no such program supply. There is a deliberate disregard of the practical necessities of radio broadcasting on the part of the Commission majority." [18]

To this the government answers that profitable operation of a network will encourage the continuation of sustaining service, that in reality sustaining programs are only build-ups for commercials and therefore will be continued as a matter of business necessity, and finally that a network organization in reflection of its obligation in the public interest will provide sustaining programs to its operated stations (of which it is the licensee) and this will mean that the service will be available to the affiliated stations as well.

[18] Pages 84–85.

Regarding the danger that a super advertising network may develop in the absence of exclusive option time provisions, Mr. Trammell stated at the Senate hearings,

> A grave question of public interest was put to Chairman Fly at these hearings. He was asked whether a group of advertising agencies, or even big advertisers on their own account, could construct their own network under the new rules. Chairman Fly replied that he did not think it would be feasible. I believe, on the contrary, that it would not only be feasible, but inevitable.
>
> There is no problem in interconnecting broadcasting stations. The Telephone Company has adequate facilities for the purpose. Many agencies now have expensive production departments and studios, and already place much business direct with the stations. Such networks, however, would lead to a concentration of advertising support for broadcasting over larger stations and in larger communities, weaken the economic structure of hundreds of smaller stations, and make for inadequate service in many parts of the country that are now suitably covered by network broadcasting. . . .
>
> Mr. Fly has stated that there is no reason why the stations and the networks, under these regulations, cannot for all practical purposes operate pretty much as they did before. That is fallacious thinking. The large advertiser, from experience, is thoroughly familiar with the coverage and popularity of practically all stations in the country. Being desirous of purchasing the best network—and by that we mean the network that will give him the greatest audience at the lowest cost—the advertiser already sees in these regulations the opportunity to put together a network line-up heretofore unavailable to him, by selecting the best stations from all networks.[19]

Then Mr. Trammell introduced into the record three maps. Map No. 1 showed the sixty-four-station network which national advertisers could acquire under the new regulations. It was stressed that this was not a theoretical line-up of outlets but a combination chosen by a leading advertising executive as illustrating the ideal network from the advertiser's viewpoint. The sixty-four stations, according to Mr. Trammell, would provide excellent ground-wave coverage for 92.4 percent of all radio families in the United States, and the remainder would be reached through sky wave propagation. It was further testified that this network, assuming for example that it was used between 9:00 and 10:00 o'clock on a Monday eve-

[19] Senate Interstate Commerce Committee Hearings, Transcript, pp. 508–11.

ning, would actually cost less—despite its greater coverage—than the N.B.C. Red network, the C.B.S. network, or the No. 2 and No. 3 supernetworks discussed below.

Map No. 2 displayed the stations which a second advertiser during the same hour would have to purchase to approximate the coverage of his competitor using the chain of map No. 1. It was claimed that 160 stations would be required by the second advertiser to secure excellent coverage for only 76.4 percent and good coverage for an additional 7.7 percent of the radio families in the country. Furthermore, this second combination, with considerably less coverage, would cost more than the N.B.C. Red and C.B.S. networks, as well as more than the supernetwork No. 1.

Finally, map No. 3 showed what a third advertiser could do during the same hour if supernetworks Nos. 1 and 2 were being used by competitors. The assertion was made that no matter how many stations he was willing and able to buy, the third advertiser could not put together a chain which would give him coverage equal to the No. 1 or No. 2 networks. The best remaining line-up of stations would necessitate the purchase of time on 191 outlets and would give excellent coverage to only 65 percent and good coverage to an additional 2.2 percent of the radio families in the United States.

"The significance of these maps is somewhat startling in contrast with Mr. Fly's statement that he believes that 5 or 6 national networks are possible under the 'new freedom.' It looks to me as if even three would be impossible. . . . True national coverage, under the new regulations, will become the opportunity of a relatively few major advertisers. The bulk of the advertising revenue under these new regulations will go to a relatively few of the country's major stations," declared Mr. Trammell in summary.[20]

Although counsel for the Commission did not discuss this claim at the Injunction Suit oral arguments, the F.C.C. had engaged Mr. Harold C. Read, program service manager of the long lines department of the American Telephone Company, to examine and report on the supernetwork No. 1 submitted by Mr. Trammell. Mr. Read's report is contained in the appendices of the Commission's December, 1941, brief and shows that at the time it was written the Ameri-

[20] Senate Interstate Commerce Committee Hearings, Transcript, p. 512.

can Telephone Company had available for the type of service desired wire facilities for connecting only 54 of the 64 stations. "Of the 54 stations, 40 would be reached over regularly established program facilities . . . and 14 over facilities normally in the telephone layout for toll service but which may be suitable and available for the desired program transmission service. Service to the 10 remaining stations cannot be provided until the completion of new construction." [21] The report indicates, however, that the latest date for the completion of such construction was to be July 1, 1942. Hence, from the standpoint of adequate connections, the 64-station network was feasible by that date.

With respect to the cost, Mr. Read's report indicated that the wire-line charge for one half hour, one time, for the fifty-four stations where adequate connections were then available, would be $3,538.60. When the construction was completed and wire facilities were available for all sixty-four stations, the wire-line expense for one half hour, one time, would be $4,167.40, and on the basis of a weekly half-hour program for fifty-two weeks the wire-line expense would be $141,504.80.

The Mutual Broadcasting System through its counsel, Mr. Caldwell, argued from these figures during the Injunction Suit that no advertiser would go to this expense to secure the hypothetical sixty-four-station network. "In any event, to say that the advertiser would have to spend $141,000 a year to afford wire lines for just half an hour's contract, why do that when he can get the same coverage for less money by taking fewer cities into account, by buying 'Blue' or Mutual. It simply is not going to happen." [22]

Notice that Mr. Caldwell's statement excludes the N.B.C. Red network and the Columbia network. Also, no mention is made of the fact that included in the regular network charge to an advertiser is a substantial allowance for wire-line expense.

Even Chairman Fly had some doubts regarding Mutual's positive claim that the danger of a super advertising network's developing need not be feared, as the following portion of the record illustrates:

[21] Mr. Read's report, F.C.C. Brief, December, 1941, Appendices, p. 45.
[22] Mr. Caldwell, Injunction Suit, Oral Arguments, January, 1942, Transcript, p. 349.

SENATOR WHEELER—What is there to the suggestion that has been made that if the networks did not have exclusive contracts, or optional time, some advertising agency could come in and pick out just the stations they wanted and operate in that way, in effect, setting up a network of their own for commercial purposes? . . .

MR. FLY—I do not think that would be wholly feasible for two or three reasons: in the first place, there are a number of these big, basic stations that are owned by the networks; and then the agency would have to go into the full network business except for the ownership of stations. The agency would have to do the programming and have its own studios, either directly or indirectly, and do that entire job. Then it would have to arrange for its own wire facilities. And then, due to failure to get access to various key points, it has to be scattered, with stations long distances apart. . . . So I cannot think that anything short of a pretty thorough going network system is going to be feasible. I do not believe that advertisers can run in spasmodically and make a system of that kind.[23]

Mr. Paley, president of the Columbia Broadcasting System, was as emphatic as Mr. Trammell, in his conviction that a super advertising network is entirely feasible. "Columbia's traffic experts who have had many years' experience in this whole wire line field have made a careful investigation. On the basis of that investigation I now assert to you positively that this type of operation . . . is physically practical and economically wholly feasible if exclusivity is outlawed. . . . For example, an advertiser who wants to buy 50 stations from coast to coast could hook them up for an hour a week . . . at a cost of about $3,000 for wires. When you stop to consider the cost of the time for 50 stations on C.B.S. of say $13,000 a week an hour and add to that perhaps as much or nearly as much for the program itself, you will see that the wire line cost, even if it were completely an additional expense, would not be prohibitive." [24]

Reflecting the arguments put forward by N.B.C. and C.B.S. against the original proposal and in line with other suggestions made by Mutual, the Commission in its Supplemental Report amended Regulation 3.104 as follows:

No license shall be granted to a standard broadcast station which options [a] for network programs any time subject to call on less than 56

[23] Senate Interstate Commerce Committee Hearings, Transcript, pp. 85–86.
[24] *Ibid.*, pp. 391–92.

days' notice, or more time than a total of 3 hours [b] within each of 4 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.[c] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

[a] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[b] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight-saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[c] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight-saving time or vice versa.

This regulation as revised contains four principal elements, the last of which is the most vital point at issue. A "floating" option such as Columbia employs is outlawed. The broadcast day is broken up into four specific segments and a network organization is permitted to option not more than three hours in any one segment, thus guaranteeing to the local station a certain amount of free time within each of the four periods of the day. This, of course, corresponds roughly with N.B.C.'s arrangement with its affiliates. The option allowed under the regulation cannot be exercised on less than fifty-six days' notice, as contrasted with the twenty-eight-day provision. Finally, and most important, an individual station is not allowed to grant an option on any of its time to a network organization which will be exclusive as against other networks, both national and regional. The option can be exclusive only as against local programs and national "spot" programs.

The principal objection raised by N.B.C. and C.B.S. to the amended regulation is the fact that it prohibits a firm option as against other networks. Under the new rule, in order to secure the maximum of assurance that an affiliated outlet will be available to broadcast a network program at a specified time and will not furnish its facilities at that hour to another network, the chain organization *must buy the time.* This interpretation of the words "agrees to utilize" in the Commission's definition of an option was confirmed by Mr. Taylor during the Injunction Suit oral arguments in January, 1942. "They [networks] must buy the time definitely and if they do not tell the station what sort of program it is going to be, the station must have the right, under Regulation 3.105, to reject the program, if it is unsuitable or inappropriate." [25] And yet we have seen that it is very difficult for the network to "tell the station what sort of program it is going to be" in sufficient detail before the actual broadcast to provide an adequate basis for making a decision to reject. Perhaps the most illogical aspect of the situation, however, is that the organization producing the program does not have the final responsibility for deciding whether the program is in the public interest. The final determination of this all-important question is left to the individual station, which does not originate the broadcast.

Mr. Taylor at the Injunction Suit oral arguments in January, 1942 defended Regulation 3.104, as amended, in the following manner:

MR. TAYLOR—The non-exclusive requirement . . . is the requirement that the network having an option contract cannot utilize it to displace a previously scheduled program of another network on the station in question. In other words, in towns, we will say, with limited facilities, if the Mutual or some other network has exclusivity in selling a program within the option time held by N.B.C., N.B.C. cannot exercise its option and force the program of the other network to be cancelled or modified or what I called yesterday unscheduled.

It has to be borne in mind that this rule does not prohibit firm agreements between stations and networks for the use of a given period of time. The network can go to the station and by firm contract obtain the use of a specified hour for a series of programs. The network can go to the station and say "We want to use your time for such-and-such a

[25] Transcript, p. 255.

program for 52 weeks." There is nothing in the rule which prevents that being done. The rule does prevent the network having a prior option good as against other networks. It can use the option to clear away local programs, national spot transcriptions, but not as a competitive weapon to displace the program of another network already scheduled and being broadcast over a station.

JUDGE HAND—It must have a definite program in mind, though?

MR. TAYLOR—I am not sure, your Honor—

JUDGE HAND—I should think that was the difficulty.

MR. TAYLOR—I am not sure that I see the question your Honor has in mind.

JUDGE HAND—My brothers have suggested that all it means is that they must buy the time definitely.

MR. TAYLOR—They must buy the time definitely . . . Even under the present day option, there is uncertainty about the fact that stations will accept a program given to them.

JUDGE HAND—To what extent does that operate?

MR. TAYLOR—It is sufficient so that the network does not enter into a firm contract with its advertiser until it has determined the availability of the stations, and the record so shows. It is also sufficient so that in all cases either network will not rely on the station; they always check up to see what decision the station is going to come to . . .

The two questions are distinct. One is the question as to what reasons the station can give for turning down a network program offered to them. The other question is whether the network can and has a right to unschedule a program that is already on there and that another network has sold. I mean, they are two very different things, and it is the second of those, involved in the non-exclusive option, which has caused all the controversy here and to which the plaintiffs have devoted apparently all their time. . . .

The only additional hazard that this non-exclusive option brings about over and above what the networks now face under their present practices, is the risk that some other network may be able to sell a particular period that they are dickering with the advertiser for before they can sell it. In other words, it is pretty much a matter of first come, first served, and we see no other way out in towns particularly where there are less than four stations. Where you do have this shortage of facilities, and where any network has to be able to make a firm commitment for the sale of his time, the vice of the option, as applied to other networks, is that the other network, even though it has no option at all, cannot make a firm commitment. Mutual cannot go on one of those stations in a town with less than four stations and buy on a firm basis for a 52-week program series. It is continually in jeopardy of being removed on 28 days' notice.

I think that additional hazard, that another station may sell the time first, is quite unsubstantial. There has been a lot of talk here about traffic operating without traffic lights and endless confusion. The simple facts show that it does not really amount to anything.

There are only three national networks, and the program schedules of each are well known to its two competitors. There is a relatively limited number of potential national network advertisers, and an N.B.C. witness estimated them at 300 in all. A large part of the network business is quite stable. Programs stay on year after year on a particular hour and everybody knows that that hour is not open. So that the scope of uncertainty here is much limited. A Columbia witness testified that over a period of what he called "some several years" Columbia took only 42 advertisers away from other networks and lost only 32 clients to other networks. This is not a problem of a great mixup of a great many programs and a terribly complicated traffic schedule.

The upshot of all this is that at any one time there are relatively few negotiations with advertisers pending, and each of the network organizations knows pretty well what those negotiations are all about.

While N.B.C. and C.B.S. have tried desperately to build up a picture of incipient confusion and business chaos, the simple fact is that they oppose the rule so strenuously because it deprives them of the signal advantage that they now hold over Mutual or any new network which might be projected; in cities with limited facilities their option time clauses make it impossible for any other network to make a firm contract for a particular period of time, because a program so scheduled can be forced to remove if the N.B.C. or C.B.S. option on that period is exercised.[26]

One thing should be noted with respect to the above defense of Regulation 3.104 as amended. Most of the argument which Mr. Taylor presents is based upon the assumption that the arrangements for securing the necessary facilities of the individual stations for the simultaneous broadcasting of the same program have been successfully completed. That would seem to be the principal and most crucial question, however.

Regarding the necessity of buying the time of the outlets to provide assurance of circulation, Mr. Paley at the Senate hearings stressed the economic impracticality of such a requirement.

MR. PALEY—Mr. Fly sought to reassure Chairman Wheeler and others who questioned him on this point by testifying as follows:

[26] Transcript, pp. 254–62.

"The station can contract for the same number of hours as it contracts for today. It can contract for any commercial program. It can contract to give that network all the time it does not otherwise sell up until the time it sells it to somebody else. It can contract to take a minimum amount of sustaining programs in terms of time and in terms of minimum payments. The only thing they cannot do pertains to the time which is vacant. . . ."

If you know nothing about how network business is done and if you are completely unaware of our necessity to have a large volume of business in order to function as we do, all this sounds very plausible. Now let us look at the facts. On a very rare occasion some advertiser will contract with us to put on a program for 26 weeks. The standard practice is for the advertiser to have an option to continue his program for 52 weeks, but to have the right to cancel at the end of any 13-week cycle on 30 days' prior notice. This means that it would be financial suicide for us to commit ourselves firmly for station time in the way Mr. Fly assumes. This would mean that if we in turn could not option time from the station but had to make firm contracts for it, we would be committed for staggering sums which we might never receive from our advertisers. Economically this basis of operation would be completely impossible . . .

Another thing Chairman Fly skipped over was that even were it possible for us to contract for time we would be forced to face a loss of future business opportunity in every single instance where an advertiser went off unless we were able to resell this time to someone else instantly. Indeed, even a resale might not be possible because there would be nothing to prevent the station from agreeing to sell this time to someone else when and if the present advertiser's contract lapsed. . . .

SENATOR WHEELER—I do think there is some very just argument for having a certain amount of option time.[27]

Also emphasizing the financial hazards, Mr. Trammell stressed that the new rule as amended might well promote the very thing the Commission seeks to ameliorate—control of the limited supply of frequencies in a few hands.

The Chairman of the F.C.C. has denied to your committee that either in this or in other rules was he engaged in a wrecking operation. He has said that stations could continue to be known as the regular affiliates of given networks, while networks could continue to arrange for necessary time from individual stations. How does he achieve this miracle under the new rules? By substituting in his testimony the word "contract" for the word "option." . . .

[27] Senate Interstate Commerce Committee Hearings, Transcript, pp. 399–400.

If Chairman Fly's statement is to be taken literally one network or several networks could purchase and control all the salable time of all of the stations . . . Under the chairman's new proposal a network-station relationship, by which both sustaining as well as commercial programs are balanced by option time, would have to go overboard. It would be necessary for the network to contract for time, to buy certain specified hours, and for the network to take all risks of cancellation. . . .

Say we receive today the cancellation of a period from 9:30 to 10:00 on Monday evening . . . and assuming for a moment that we do not sell this particular period until October 1. . . . Under Chairman Fly's plan it would be necessary for us to continue to pay the station for this period for the three months mentioned, even though it might be broadcasting another local commercial program at the time.[28]

In the writer's judgment, the most convincing arguments in opposition to Regulation 3.104 as amended were presented by Mr. Cahill and Mr. Hughes during the Injunction Suit oral arguments in January, 1942. The most significant excerpts from these arguments are as follows:

MR. CAHILL—The rule on option time as amended prohibits the giving of any option whatsoever to any network by any station which is good against any other network. . . . The idea is apparently that you option simultaneously the identical hour to all four [networks]. I just take this situation to illustrate that point: As I read this, if an advertiser came into N.B.C. and said, "Can I have your network from 9.00 to 10:00 in the evening on Tuesday nights?" it would not be possible to take an option on the time of the first station that you called up for that hour, to ask them if they were free, to permit you to go ahead and call up the other 100 stations that you need to assemble your network of stations. Any kind of firm option is completely out. You cannot have an option for 24 hours good as against another network. If after you call the first station and before you get the last, Mutual, for instance, came in and bought that particular hour, the fact that you were going to all the trouble and expense of trying to assemble a network would avail you nothing.

JUDGE HAND—You do it if you get through before anybody else gets in on the hour?

MR. CAHILL—If you are so lucky as to get through, then you have to get back with your firm offer for the time. . . .

JUDGE HAND—This illustration then merely means that you cannot do this if any of the stations have meanwhile made an arrangement with some other network.

[28] *Ibid.*, pp. 516–17.

MR. CAHILL—That is true. There is absolutely no way that you can assure a prospective advertiser that he can have the facilities of your network at any given time in advance. . . .

JUDGE BRIGHT—You mean a firm option by a contract; but how about an option over the telephone? They can give you an option to be exercised in three or four days?

MR. CAHILL—I think it is just as illegal. The rule makes no reservation. A firm option of any time, exclusive option on any time to a single network is out, whether it is for a week, a day or a month . . . And it goes beyond contracts. It says any arrangement or understanding to the contrary is out . . .

JUDGE HAND—Suppose they say they are free, for example, and that you may have that time and they are faithful to what they say they will do. Then you go down the line and you have all you want, and then you come back to the first one. Do you have the time or don't you?

MR. CAHILL—Provided nobody has come in meanwhile.

JUDGE HAND—Provided no one has come in.

MR. CAHILL—That is right; but there can be no understanding, express or implied, with them that they won't take anybody else and if somebody wants to block us, all he has to do is to go to two or three different stations strategically located and out you are. When he hears you want to put on a program, all he has to do is to buy that time for that half hour and you are through as far as the network is concerned . . .

JUDGE HAND—You say it is unlawful for the station to say it will go into the network if you get them all.

MR. CAHILL—He cannot give you an exclusive contract. He cannot say to you, "I won't take somebody else before you come back to me with a firm offer."

JUDGE HAND—No, he cannot lawfully, as I understand it, make a contract, but is it unlawful to tell you that, "I will hold it open until you see whether you can get everybody else in"?

MR. CAHILL—I think it is unlawful for him to say that to you. I think he is in effect giving you an option there that would be good against all other buyers of that time or a competing network coming along while you are on your rounds of the stations.

JUDGE HAND—Certainly he can say, "I will give it to you if I don't change my mind"?

MR. CAHILL—That is what he can tell you. And then you have precisely the position of the dissenting Commissioners. . . . As the dissenting Commissioners say, you would be in an analogous position to a railroad trying to run a through train with every division train master thinking he had the right to make up his own sort of time tables.

I might say that the only function of this non-exclusive option, which the Commissioner has thought up, is to allow the station to clear as

against local programs, not as against the programs of other networks. . . . So that this amendment, while confusing, and I think it is confusing, has exactly the same effect in practical operation as the regulation in the original order which banned option time completely.[29]

When Judge Goddard questioned him, Mr. Taylor conceded that Mr. Cahill's interpretation of the amended rule was correct.

JUDGE GODDARD—Mr. Taylor, if another network came along and said he wanted this hour definitely, would the station say, "Well, I have agreed to give another network an option on that"?
MR. TAYLOR—No.
JUDGE GODDARD—Or agreed to hold it pending the answer from their client?
MR. TAYLOR—No, it could not. . . .[30]

Mr. Hughes emphasizes the point that a considerable length of time is required for the preparation of a network program which would be most difficult if not impossible to secure under the amended rule. The following extracts from the record give the highlights of his contentions: "The network has to have, not a few days, but a few months in which to prepare one of these programs. The whole business of a network . . . depends on its ability to sell time to advertisers. Those negotiations for the sale of time require months of effort. There has to be a scientific study of the market made, the kind of program to be used; the kind of talent to employ; whether it is going to be an orchestra, a band, a comedian, or what it is going to be. The network works with an advertiser on a great many of these problems. The main effort of the network is to convince the advertiser to put in his money on a national hookup radio broadcast instead of devoting it to the advertising pages of *Life* or *Saturday Evening Post* or *Colliers,* and to succeed in that he has to be able to tell the advertiser what stations he can offer. . . .

"He has to be in position to guarantee the market and he has to be able to do that in competition with *Life* and the *Saturday Evening Post* because they have an assured and known circulation. . . . Columbia's circulation, which it offers to advertisers in com-

[29] Transcript, pp. 66–72.
[30] Injunction Suit, Oral Arguments, January, 1942, Transcript, pp. 266–67.

petition with *Life* and the *Saturday Evening Post,* is its outlet stations, and if it cannot count on them, it has nothing that it can offer in competition with *Life.* That is very discouraging, and it would be very discouraging to the advertiser. Why should he spend months in working up a radio program, making arrangements with artists, working out a script, if at the end of that time he finds that during the months of these negotiations, one after another of the stations in the market he wants to cover has been preempted by another network? It won't take many stations lost to do that, if they are in important places. . . .

"While . . . he is working out with Columbia what stations he wants to use, and what kind of program will be popular in this and that and the other place, and, planning those, he finally settles on a single program, perhaps a half a dozen stations scheduled, it is found, sold a half an hour, or perhaps even a quarter of an hour, say 8:30 to 8:45, or 8:00 to 8:30, Wednesday evenings. Well, it has lost its attractiveness to the advertiser; Columbia and all the affiliated stations that he was going to use, perhaps 75 of them, lose the deal. . . .

"The Commission pretends to misunderstand this, and it says there is no difficulty in a network communicating with its stations. Of course, there is no difficulty communicating with the stations, but what are you going to communicate, and for what purpose are you going to communicate?

"An advertiser comes in with this proposal that he is tentatively considering a 75-station hookup, 8:00 to 9:00 on Wednesday evening, and Columbia telephones or telegraphs, or whatever it does, to its 115 affiliated stations and finds that they all have that time open, and it is so reported to the advertiser. They go on, and the advertiser considers whether he is going to do the radio program or advertise in *Life,* and he thinks about that for a couple of weeks, and then he comes back and he thinks he would like to go ahead with it, if he can work out his program satisfactorily and the talent is available and all that. Then Columbia communicates with its stations again and it finds out that, say, Cincinnati is gone, St. Louis is gone, and it reports back to the advertiser. Well, the advertiser says, 'That is rather serious. I have important markets in those

cities. You cannot give me outlets there?' 'No, I can't give you outlets there.' 'Well,' he says, 'I'll consider going ahead anyway.'

"So then they begin thinking about what kind of program to produce, and they go after talent and that kind of thing, and they get on and that is about ironed out, and then Columbia communicates, as the Commission says, again, and the report is that Harrisburg is gone, and Dayton, Ohio, is scheduled 8:30 to 8:45 with some other network. At that point the advertiser says, 'That is too many key stations out'; he will deal with some organization that has controlled circulation, and he will be able to depend on their ability to control that circulation which they offer him.

"The loss of the exclusive relation and the option time together would simply undermine the network's whole business and usefulness and it would be the public interest and the network's interest that would suffer, because it is only through the sales to advertisers that Columbia can do the things that it is most important to the public that it should do . . ." [31]

The following portion of the record in which Mr. Taylor answers these contentions of Mr. Cahill and Mr. Hughes is significant:

JUDGE HAND—I wish you would, if you can, answer the embarrassment which both Mr. Cahill and Mr. Hughes said any network would be faced with under these rules in dealing with a national advertiser, that is, a new national advertiser. I understood you to think that that embarrassment was not very real. Was I right?

MR. TAYLOR—You are right, your Honor.

JUDGE HAND—I do not follow quite why it was not real in the sense that they described in some detail, that they have to line up all their stations, and while they were lining up the stations, they would lose some of them because they could not give firm commitments at the time of inquiry, and, consequently, it would be practically impossible to put on a national advertisement . . .

MR. TAYLOR—The network certainly can tell the station, "We have an order from such-and-such an advertiser for a network composed of such-and-such stations. Will you accept?" If they get acceptance of the stations ordered by the advertiser, the network is complete. If they do not, then the advertiser may or may not make another offer based on what is available. . . .

JUDGE HAND—. . . Your theory would be your regulations would not

[31] Injunction Suit, Oral Arguments, January, 1942, Transcript, pp. 134–39.

make invalid an acceptance by a station conditioned upon all the stations in the proposed broadcast accepting?

MR. TAYLOR—I do not think I quite meant that. The condition of acceptance——

JUDGE HAND—I should think that was an essential condition.

MR. TAYLOR—I should think the offer is conditioned. In any event, that is what the network tells the station, that we can put on this program if 96 stations accept. If they do not accept, nothing has happened.

JUDGE HAND—Taking the answer of the station, wouldn't that be contrary?

MR. TAYLOR—I should think definitely not, because if 96 had accepted, there is a firm contract.

JUDGE HAND—And if they did not, that will be unlawful, if one of them falls down . . .

MR. TAYLOR—. . . I think the offer is conditional. What the offerer really says is, "We have a program here if 96 accept." If they do not accept, there must be a redicker with the advertiser and recontact with the stations.

JUDGE HAND—Your theory is the whole thing could be upset by anyone changing his mind.[32]

Although the dire results predicted by N.B.C. and C.B.S. with respect to the enforcement of Regulation 3.104 as amended are undoubtedly exaggerated, some form of exclusive option time as against other networks is in the writer's opinion a practical requirement in our present system of chain broadcasting. However, it has been frequently pointed out that the present system contains many contradictory elements. In conclusion let us reëxamine the more important of these divergent factors.

Network station ownership implies network sovereignty; the right of the individual station to reject network programs implies station sovereignty. These are two extremes of the problem. And exclusive option time is the compromise between these conflicting principles which provides a fairly efficient broadcasting service in actual practice.

Local stations are necessary in order to fulfill the important broadcasting functions of the local community. In this capacity the individual station should be sovereign—should have the right to decide what programs shall be put on the air over its facilities. Regulation 3.105 is appropriately applicable to this situation.

[32] Injunction Suit, Oral Arguments, January, 1942, Transcript, pp. 264–67.

But networks are also necessary in order to fulfill the equally important broadcasting functions of the nation as a whole. The essential nature of chain broadcasting calls for linking up individual stations for the simultaneous transmission of the same program. This requires that the network rather than the station be sovereign.

Today network and local broadcasting are both combined in a common system. Little attempt has been made to explore the possibilities of divorcing the two as a matter of long-term policy. Rather, it is generally assumed that these antithetical but necessary functions must and should continue to be included in a single broadcasting establishment.

✕ *Chapter 15* ✕

ARE THE REGULATIONS IN THE PUBLIC INTEREST?

IT IS EVIDENT from what has preceded that the writer believes the regulations as a whole fail to meet the network broadcasting problem in a realistic and far-sighted manner consistent with the public interest. Before their principal shortcomings are summarized, however, certain background circumstances out of which the new rules emerged should be noted.

First, the Federal Communications Commission can be fairly charged with political bias and favoritism in the past. The following statements made by Senator Wheeler at the Senate Interstate Commerce Committee hearings went unchallenged:

> There has been too much political—and other—pressure brought to bear upon the Commission in times past. If someone with "influence" appeared, no hearing might be held. They would grant the transfer of a station license, or grant this or that without any hearing. But if someone else appeared, a long hearing might be required, oftentimes making it impossible for a small station, because of the expense involved, to secure its rights.[1]
>
> The trouble has been that first a decision would go one way and then another on the same set of facts.[2]
>
> I felt at the time that the Commission should have been investigated because it was being dominated by political and other considerations, wholly foreign to good administration. I thought there had been a good many scandals in connection with the Commission which should be brought to light. But those things have passed now, and we are not interested in old scandals and skeletons in the closet.[3]

It is difficult for the Commission to escape this inheritance, and even though an entirely new leaf has been turned such a background is not reassuring.

[1] Transcript, p. 179. [2] *Ibid.*, p. 180. [3] *Ibid.*, p. 237.

In the second place, the regulations were discussed and weighed in an atmosphere of acrimony and intense partisanship—an atmosphere alien to an intelligent and calmly deliberated plan. The following colloquy between Chairman Wheeler and Mr. Fly is significant in this connection:

CHAIRMAN WHEELER—One unfortunate thing is evident in this whole controversy. There has been too much heat on the part of the broadcasters and probably too much heat on the part of the Commission. After all, we are trying to work out something which is in the interest of the public. I regard it as a grave mistake . . . for the industry and for the networks to make some of the statements and charges that they have made. On the other hand, I think the Commission makes a mistake when it loses its temper, perhaps, and makes too broad statements.
MR. FLY—By slugging with them?
CHAIRMAN WHEELER—Yes.
MR. FLY—I think you are right.
CHAIRMAN WHEELER—Instead of having a slugging match we ought to have the facts and we ought to have sane, cool judgment. There are vital problems of national policy involved in this matter.[4]

And finally, according to the testimony of Commissioner Craven, the regulations were adopted in haste, without adequate consideration, and in the absence of full understanding of their import and intent. "The rules were received by the various Commissioners—the rules themselves, not the Report—about eighteen hours before the meeting in which the final votes were taken. . . . There was no real discussion of the rules by the Commissioners. . . . I will wager that the majority itself does not know what the rules mean. Furthermore, I know that one member of the majority believes one of the rules [that dealing with option time] to be so impractical that it makes almost impossible the operation of chain broadcasting on a stable basis." [5]

The past history of the Commission, the atmosphere in which the debate was conducted, and the procedure of adoption, therefore, militate against the new regulations constituting an enlightened and realistic solution to the network broadcasting problem and against their promoting a more efficient and better quality radio service for the people of this country. Furthermore, in the

[4] *Ibid.*, p. 99.

[5] *Ibid.*, pp. 268–69.

writer's judgment, the rules taken as a whole fail to meet these criteria for the following reasons:

(1) *The regulations, by outlawing exclusive option time as against other networks and by drastically curbing network ownership of key outlets, disregard the practical requirement that a network organization under our present system must be permitted to secure with as much certainty as possible the willingness of the individual sovereign stations to broadcast the same program at the same time.* The regulations in these respects, however, are consistent with the record which indicates that the network concept for commercial broadcasting has not been accepted by the majority members of the Commission, although their protestations are to the contrary. Mr. Fly declared at the Senate hearings, "Of course, I believe that the networks have been rendering invaluable national program service and will continue to do so." [6] At another point he stated, "I think it ought to be a part of the Commission's job to see that they [networks] do not go out of business, because no one could contemplate with equanimity a substantial impairment of the nation-wide network service." [7]

And the *Report on Chain Broadcasting* contains similar expressions of acceptance. "Network broadcasting has been an important factor in the development of the broadcasting industry. Many improvements which have taken place in engineering, in program quality, and in the broadcasting of special events of national interest to ever-increasing audiences have been due, in considerable measure, to the advertising revenue brought to the radio broadcasting industry by the network method of broadcasting to nation-wide audiences. . . . We have exercised our jurisdiction upon the premise, generally accepted by the public and the industry, that the network method of program distribution is in the public interest. We subscribe to the view that network broadcasting is an integral and necessary part of radio." [8]

But the Commission's actions belie their words. The individual station licensing policy and the philosophy of individual station program sovereignty upon which it rests, is a direct contradiction of the essential nature of chain broadcasting. Furthermore, the

[6] Senate Interstate Commerce Committee Hearings, Transcript, p. 87.
[7] *Ibid.*, p. 95. [8] Pages 4 and 77.

basic objective of the Commission of seeking the maximum of competition between the network organization and its own outlets, and the rules covering network ownership of stations and exclusive option time are destructive of chain broadcasting.

(2) *The regulations make no attempt to resolve this fundamental conflict in our present system between the essential nature of a network, which necessitates the simultaneous broadcasting of the same program by a group of outlets connected in a chain, and the philosophy of individual station program sovereignty, which necessitates the right of rejection and the placing of all stations in a position to broadcast different programs at the same time.*

To Chairman Fly the regulations are entirely couched in terms of freedom. "The network is free; the radio station is free." In the writer's opinion this is fantastic. If chain broadcasting is to be preserved on any kind of a stable and efficient basis it is a sheer impossibility to have the network organization entirely independent and the stations making up the network entirely independent.

This conflict between the individual station concept of broadcasting (and the program sovereignty that goes with it) and the network concept of broadcasting is well illustrated again by the following testimony at the Senate Interstate Commerce Committee hearings.

SENATOR TUNNEL—You assume, of course, that under your regulations the broadcasting station is a free agent?
MR. FLY—The Supreme Court has declared that it is, sir.
SENATOR TUNNEL—The network is a free agent also, is it not?
MR. FLY—Both of them are always free, subject to the laws of the land, including the Sherman law which you have made specifically applicable.
SENATOR TUNNEL—Suppose the network, as a free agent, refuses to contract with the broadcasting company except on such terms as you have declared it to be impossible.
MR. FLY—It does not have to go into business.
SENATOR TUNNEL—It does not have to go into business, but it has to go out?
MR. FLY—Yes; that is right, if it does not want to conform to the law.[9]

We have already noted that up to the time of the investigation the emphasis was primarily on the network aspect of broadcasting,

[9] Transcript, p. 37.

and the Commission, tacitly at least, gave its sanction to this emphasis. Now, however, the emphasis is on the individual station. In short, the pendulum has simply swung toward the other extreme. "There is a temptation to overemphasize local interests to the detriment of national interests. . . . The real goal should be efficiency of service from a national standpoint rather than a vague objective which fosters a conglomeration of local units uncoordinated for rendering a truly national service." [10]

(3) *Although the intent to promote greater competition in the broadcast field is in the public interest, the regulations as a means of accomplishing this are ill advised because they foster the wrong type of competition and will result in a chaotic condition of economic rivalry between networks for the same stations, which is destructive to chain broadcasting.* The Minority Report comes to the same conclusion. "It is, therefore, no exaggeration to predict that the decision of the majority instead of resulting in 'free competition,' would more likely create 'anarchy' or a kind of business chaos in which the service to the public would suffer." [11]

(4) *The regulations tend to freeze a technical situation which is dynamic and do not give sufficient weight to the potential possibilities of the radio spectrum.* "It seems that no recognition is given to the fact that broadcasting is dynamic and not static. No consideration seems to be given to the probable effect of new developments," states the Minority Report of Commissioners Craven and Case with respect to the rules. Take, for example, Mr. Fly's assertion when he was speaking of Portland, Maine, that "I do not think any of us would contend that a network should own one of those stations, because just as surely as it does, then *for all time to come competition is frozen out there.* It is pretty well frozen out now . . . but *that would certainly make it permanent.*" [12]

(5) *In conducting the investigation and in formulating the regulations the Commission failed to explore the possibilities of making a greater supply of frequencies available for network broadcasting in the standard broadcast band through a reorientation of*

[10] F.C.C. *Report on Chain Broadcasting,* Minority Report, p. 119.
[11] *Ibid.,* p. 116.
[12] Senate Interstate Commerce Committee Hearings, Transcript, p. 94. (Italics added.)

its allocation and licensing policies. The rules not only tend to deny the potential possibilities of the radio spectrum outside of the standard band but they are also based, as has been made abundantly clear already, on the fundamental premise that there is an extreme scarcity of wave lengths for commercial broadcasting purposes in the standard band itself—and that little can be done about it. This premise is perhaps nowhere better illustrated than by the following colloquy between Senator White and Chairman Fly:

SENATOR WHITE—One of the questions that has been in my mind is whether under these regulations you have not disregarded some of the physical facts in connection with the radio industry.
MR. FLY—No, indeed. They are in large part based on them. . . . Assuming now this physical limitation. That is where we have to begin. I could no more make it physically possible to put an unlimited number of stations, for instance in St. Louis, than the Supreme Court could make it possible to put additional terminal facilities in that same city.[13]

[13] *Ibid.*, pp. 56–57.

Chapter 16

NETWORK DOMINATION OF BROADCASTING

THE COMMISSION'S primary objective of promoting greater competition in the broadcasting industry, particularly in the network-station market, is, as we have seen, founded on the conclusion that the restricted frequencies available in the standard band are dominated by the National Broadcasting Company and the Columbia Broadcasting System contrary to the public interest. Is this charge of domination by N.B.C. and C.B.S. substantiated by the evidence? The record indicates that it is.

At the end of 1938 there were 660 commercial stations in operation. Of these, 160 were affiliated with National and 107 with Columbia, or 40 percent of the total. There has been a steady growth in the proportion of the total licensees which serve as outlets for the two major national chains. This is indicated by Table 5 in Chapter 4.

Furthermore, the stations on the N.B.C. and C.B.S. networks are more desirable from the standpoint of frequency, power, and coverage. At the end of 1938 there were 44 clear-channel, unlimited-time (Class I A) stations in the United States. Of the 30 operating with the maximum power, 17 were affiliated with N.B.C. and 11 with C.B.S. All of the 14 clear-channel stations operating on power of 5 KW to 25 KW were affiliated with these two companies, 9 with National, and 5 with Columbia. Thus 95 percent of all unlimited-time, clear-channel stations were outlets for the two major network organizations. In addition, N.B.C. and C.B.S. had as affiliates the 8 part-time, clear-channel stations. In short, in December, 1938, National and Columbia either owned or had as outlets 50 (96.2 percent) of the 52 clear-channel stations.

Very much the same situation existed with respect to unlimited-time, regional channels. N.B.C. and C.B.S. shared equally the 8

high-powered stations in this category. Of the 196 unlimited-time regional stations operating on power of 1 KW to 5 KW, 80 were outlets for National and 58 for Columbia, which represented 70.4 percent of the total.

Using power as the index, a similar domination is shown. The 212 unlimited-time commercial stations affiliated with National and Columbia at the end of 1938 accounted for 1,618,000 watts or 86 percent of the total nighttime power of 1,869,400 watts used by all of the 475 stations broadcasting after sundown. Stations affiliated with N.B.C. represented 51 percent and those affiliated with C.B.S. 35 percent. Although the extent and economic value of coverage in terms of audience is not necessarily correlated with the amount of wattage used, the signal strength is, of course, improved as power is increased, and generally speaking audience coverage is extended. This is indicated by the fact that the 475 unlimited-time commercial stations in 1938 represented 86.3 percent of the total time sales of all the 660 commercial stations.

These facts indicate beyond reasonable doubt that at the end of that year the National Broadcasting Company and the Columbia Broadcasting System dominated the clear and regional channels employed for commercial broadcasting in the United States. These channels are, of course, the most desirable from the advertising standpoint and are therefore the most profitable. Except for the separation of the Red and the Blue networks, the situation has not changed materially since that time.

The domination of these two companies is further shown by the character of the stations owned or leased. As we have seen, these are the key outlets in the principal advertising markets and program origination centers. Notwithstanding the legitimate business reasons for such control, lease or ownership of these strategic stations has accentuated the dominating position held by the two major network organizations. For instance, almost half of the country's high-powered, clear-channel stations are owned or leased by National and Columbia.

The financial record also supports the charge of domination. The broadcasting industry in 1938 (all chain organizations and the 660 commercial stations combined) had net time sales amounting to $100,892,259. N.B.C. and C.B.S. accounted for $44,313,778, or

44 percent, as contrasted to net times sales by the Mutual Broadcasting Company of $2,015,786, or about 2 percent. In addition, the net time sales for non-network programs of the stations owned or operated by N.B.C. and C.B.S. in that year were $6,734,772. Consequently, National and Columbia, either through the sale of network time or through the sale of local time on stations owned or operated by them, accounted for more than half of the total broadcasting business in this country.

In 1938 the consolidated net operating income of the broadcasting industry was $18,854,784. Of this amount, $4,319,062 represented the net operating income of National and Columbia combined from network operations, $30,384 represented the net operating income of the Mutual Broadcasting System, and $14,505,338 represented the net operating income of the 660 commercial stations, this amount including payments for the broadcasting of network programs.[1] The figure of $14,505,338 is further broken down as follows: $9,696,156, or 67 percent, constituted the total profit of the 327 stations affiliated with but not owned or operated by the three national network organizations; $4,958,289, or 34 percent, constituted the profit of the stations owned or operated by N.B.C. and C.B.S.; and $149,107 in the aggregate constituted the loss shown by the 310 stations not affiliated with a national chain.[2] Consequently, the net operating income of the National Broadcasting Company and the Columbia Broadcasting System of $4,319,062 from network programs and the net operating income of the stations owned or operated by them of $4,958,289 give a consolidated total of $9,277,351, or approximately half of the net operating income of the entire broadcasting industry in 1938.

The domination held by Columbia and National over the present restricted supply of broadcasting frequencies in the standard band is further confirmed by the following evidence. A list of cities[3] (in order of size) having a population of fifty thousand or more, in which the Mutual Broadcasting System had no outlet on

[1] In this connection the F.C.C. Report points out that of these 660 stations, 420 showed a net income totaling $16,728,533, while 240 stations operated at a loss amounting to $2,223,195.

[2] Of these 310 stations, 162 operated profitably and showed a total net income of $888,493, whereas 148 experienced a loss amounting to $1,037,600.

[3] Senate Interstate Commerce Committee Hearings, Transcript, p. 220.

May 1, 1941, in which N.B.C. or C.B.S. or both had affiliation contracts with full-time outlets, and in which no independent full-time outlet was available either to Mutual or to a new network, was introduced into the record at the Senate hearings. The list is as follows:

Milwaukee, Wis.	Evansville, Ind.	Wheeling, W. Va.
Toledo, Ohio	Utica, N.Y.	Charleston, W. Va.
Dayton, Ohio	Schenectady, N.Y.	Augusta, Ga.
Worcester, Mass.	Sacramento, Calif.	Madison, Wis.
Youngstown, Ohio	Savannah, Ga.	Springfield, Mo.
Flint, Mich.	Altoona, Pa.	Jackson, Mich.
Jacksonville, Fla.	Lansing, Mich.	Kalamazoo, Mich.
Erie, Pa.	Portland, Maine	Greensboro, N.C.
Spokane, Wash.	New Britain, Conn.	Fresno, Calif.
Fort Wayne, Ind.	Springfield, Ohio	Durham, N.C.
Reading, Pa.	Johnstown, Pa.	Columbia, S.C.
Miami, Fla.	Montgomery, Ala.	Asheville, N.C.
Peoria, Ill.	Topeka, Kans.*	Pueblo, Colo.
South Bend, Ind.	Terre Haute, Ind.	
El Paso, Tex.	Charleston, S.C.	

*Columbia station operates part time.

Another list was introduced at the same time, showing the cities in order of size (also as of May 1, 1941), having a population of fifty thousand or more, in which Mutual had a part-time station as an outlet, in which N.B.C. or C.B.S. or both had affiliation contracts with full-time, regional, or clear-channel outlets, but in which no full-time regional or clear-channel facilities were available to Mutual or to another network. This list is as follows:

Baltimore, Md.*	Hartford, Conn.	Wilkes Barre-Scranton, Pa.†
New Orleans, La.	Nashville, Tenn.	
Rochester, N.Y.	Norfolk, Va.	Little Rock, Ark.
Louisville, Ky.	Albany, N.Y.	Lincoln, Nebr.
Columbus, Ohio	Chattanooga, Tenn.	Winston-Salem, N.C.
Atlanta, Ga.	Wilmington, Del.	Roanoke, Va.
Akron, Ohio	Knoxville, Tenn.	Mobile, Ala.
San Antonio, Tex.	Duluth, Minn.	Macon, Ga.
Oklahoma City, Okla.		

* WFBR, a regional station, became affiliated with Mutual on October 1, 1941.

† Columbia station is part-time station, but uses most of the operating hours.

In the writer's opinion the conclusion is inescapable that the broadcasting industry in the United States is dominated by the National Broadcasting Company and the Columbia Broadcasting System. Breaking up this domination, promoting what the Commission believes to be the most desirable type of competition in the broadcast field, abolishing present contractual restraints in the network-station market, and supposedly opening the door of opportunity to Mutual and to new networks were the principal reasons behind the Commission's reform movement. "The heart of the abuse of chain broadcasting is in the network-outlet contract," states the conclusion of the Preliminary Report. And the final *Report on Chain Broadcasting* declares:

> This Commission, although not charged with the duty of enforcing that law [Sherman Act], should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. In the absence of Congressional action exempting the industry from the anti-trust laws, we are not at liberty to condone practices which tend to monopoly and contractual restrictions destructive of freedom of trade and competitive opportunity. . . . The nature of the radio spectrum is such that the number of broadcasting stations which can operate, and the power which they can utilize, is limited. The limitations imposed by physical factors thus largely bar the door to new enterprise and almost close this customary avenue of competition. . . . Restrictive affiliation contracts might be tolerated if there were a dozen potential stations of comparable character in every city; they are intolerable when there are few cities which have (or can have) more than four stations of all kinds. . . .
>
> If national networks compete for station outlets on the basis of performance, there will be a direct incentive to improve and expand the programs. . . . If stations are not tied exclusively to a single national network . . . each will be stimulated to improve the quality of the programs which it offers and hence its value as an outlet of a national network. This two-way competition—among network organizations for station outlets and among stations for network affiliation—will insure the listening public a well-diversified, high quality program service. . . .
>
> N.B.C. and C.B.S. contend that the networks compete, and compete vigorously. Certainly there is a considerable degree of competition among networks for advertisers and for listening audiences; but this does not mitigate the restraints found with respect to network-station relationships. In the broadcasting field, three different markets must be

distinguished—the market in which networks and stations meet advertisers, the market in which networks and stations meet listeners, and *the intermediate or internal market where stations meet networks. It is in this intermediate network-station market that current practices have most directly restrained competition;* no considerations of the extent to which the networks may compete for advertisers or listeners can conceal the extent to which they do not compete in the network-station market.[4]

There is no question in the writer's mind that more competition of the right type in the network broadcasting field is desirable. The kind of competition, however, which the new regulations seek to encourage in contradiction of the nature and requirements of network operation, is destructive to chain broadcasting itself, is based upon the questionable assumption that the present scarcity of frequencies for commercial broadcasting, particularly in the standard band, is necessarily a permanent condition, and apparently springs from the traditional but antiquated belief that salutary economic rivalry can exist only as between individual competing units. Little weight is given to the possibility that aggregations of capital in competition with each other may be more in the public interest if properly regulated than the individualistic rivalry of pioneer days. *The real answer to the competitive problem in the chain broadcasting field, as the Report itself implies, is a greater available supply of frequencies for commercial broadcasting which in turn would result in a greater number of national networks.*

Aside from the fact that the record is replete with instances where the two major network organizations guarded and extended their domination—obviously it was good business to do so—there are two principal and more fundamental reasons, therefore, why this domination was able to be achieved. First, the limitation on the number of usable frequencies outside the standard band which has persisted, even though in lessening degrees, up to the present time. And second, the allocation and licensing policies of the Commission which have determined the number and use of standard broadcast frequencies themselves.

Although it is probably true that commercial broadcasting can never be competitive in the same sense as other industries, where

[4] Pages 46–48. (Italics added.)

there is an unlimited potential supply of facilities, and although some of the statements made in the quotations cited hereafter are undoubtedly over-optimistic regarding the possibilities of increasing the usable supply of broadcasting wave lengths, it is indisputable that a vast portion of the radio spectrum remains unused and that there is a tremendous reservoir of high and ultra-high frequencies which will be employed in the future.

Scientific research has increasingly enlarged the number of usable radio frequencies. The process will continue. The present radio spectrum, which is either actually or potentially available for broadcasting purposes, is from about 10,000 cycles to 500,000,000 cycles. It is true that as one proceeds toward the shorter wave lengths, one is confronted with important technical problems of propagation and a technological lag in equipment; the average receiving set today is not capable of high frequency reception. In addition, the war will temporarily postpone the further development and use of shorter waves for commercial broadcasting purposes. Granted the government gives its approval, however, the eventual utilization of a much greater part of the radio spectrum in this manner appears certain, as the few frequency modulation and television stations now operated for commercial purposes testify. Consequently, the assumption of the Commission that there is a severe lack of frequencies for commercial broadcasting does not give sufficient weight to these potential factors.

Mr. Lohr, former president of N.B.C., declared at the F.C.C. hearings, "When you get to these very high frequencies, especially frequencies above 300 megacycles, there are ample channels available. As a matter of fact as you get into the microwave there could be a full width channel for every man, woman, and child in the United States." [5] Mr. Sarnoff stated during the hearings, "There is no warrant for assuming that network operations must necessarily be within the present limited band of frequencies. . . . I can see the day when there will be more networks possible, technically, than people to use them. There is no reason I can see why there can't be a dozen, or two dozen, or several dozen national networks." [6]

Mr. Herman S. Hettinger, formerly associated with the Federal

[5] F.C.C. Hearings re Docket 5060, Transcript, p. 2662. [6] *Ibid.*, p. 8520.

Communications Commission, wrote in the *Annals of the American Academy of Political and Social Science* for January, 1941, "There is no doubt that frequency modulation will materially alter the present sound broadcasting structure. . . . Thousands of stations can be accommodated if there is social or economic need for them. . . ." [7]

And finally, Edwin H. Armstrong, the inventor of frequency modulation, professor of electrical engineering at Columbia University and former associate of Professor Michael I. Pupin in research at the Marcellus Hartley Research Laboratory for twenty-one years, states: "For years there has been a shortage of 'wave lengths' or channel space, and the attempt to allocate equitably the inadequate facilities available has been the bane of the existence of those charged with this duty. . . . The new system (FM) offers a solution not only to the national and international interference problem, but to the problem of giving every community one or more channels on the air. . . . This result has come about because the system operates most effectively on wave lengths hitherto not put to use. . . . If in the future the demand for broadcast channels exceeds the facilities of the channel space now practically available, the engineering world is prepared to open up new bands in that space technically known as the ultra-high and microwave region where the ratio of the unused channel space compares to that now in use as the unsettled to the settled parts of the earth. The trend of radio inevitably will be upward into the higher frequencies." [8]

Hence the competitive problem in the network broadcasting industry resulting from the present-day lack of usable frequencies, assuming that the F.C.C. formulates its policies accordingly, will tend to correct itself as more and more potential lanes through the ether are opened up for commercial use. Chairman Fly at the Senate hearings gave some recognition to these dynamic possibilities of the radio art. In a colloquy with Senator Johnson of Colorado, Mr. Fly stated:

MR. FLY—I think we ought to bear in mind, in viewing this whole problem, that frequency modulation . . . has already come into operation.

[7] Page 181.

[8] *Annals of the American Academy of Political and Social Science,* January, 1941, pp. 154 and 161.

That is going to move out and will give us to a substantial degree a more diversified and improved radio service.
SENATOR JOHNSON—That will be a chain in itself, will it not?
MR. FLY—I think the chains will develop there. There is one now that is in the making.[9]

The standard broadcast band, which before the development of television and frequency modulation included all commercial stations and which still includes the great majority, occupies a very small portion of the radio spectrum. Out of the range of 10,000 cycles to 500,000,000 cycles, all standard broadcast stations are squeezed into the segment from 550,000 cycles to 1,600,000 cycles. In addition to television and FM, there is of course a great demand from other services—police, marine, amateur, etc.—for a place on the spectrum. The national interest requires that these demands be met but what part of the spectrum and how much of it should be allocated to each is certainly open to debate. Granted international agreements were revised, the standard band could be enlarged to some extent at both ends. Witness the addition of 100 KC (from 1,500 to 1,600 KC) within the past nine years. In other words, the present technical limitations on the supply of standard broadcast frequencies are a matter of degree and of evaluating the importance of one service as opposed to another. The Federal Communications Commission has attempted to establish a far-sighted, well balanced, and fair allocation system. Although the difficulties and perplexities of the problem are appreciated, the writer believes the Commission's success in accomplishing this is open to question.

But let us assume for the moment that the alleged natural and allocation limitations are entirely real and that commercial broadcasting is permanently limited to the present standard band—550 KC to 1,600 KC. It is obvious that even within this very narrow range, whether there is or is not a severe lack of frequencies, depends to a large degree upon how the frequencies in this segment are licensed.

Within this range there are available only 106 broadcasting channels because experience has shown that a separation of at least 10 KC is required between channels to prevent side-band interference.

[9] Senate Interstate Commerce Committee Hearings, Transcript, p. 146.

Furthermore, this 10 KC separation is based on present-day wire lines which will transmit audio frequencies only up to about 5,000 cycles without serious attenuation.[10] It appears almost certain that networks will eventually transmit either by wire lines, co-axial cable, or short-wave radio beams the full audio range, and the American Telephone Company has already perfected wire lines which make this possible. The cost of the wire lines and the inability of the average receiving set to accept these high audio frequencies are now the principal obstacles. But in the future, when this maximum audio fidelity is transmitted by chain broadcasting, it will require not a 10 KC separation but at least a 20 KC separation. Thus the available channels would be reduced to about 53 from 106 and the lack of frequencies would be even more acute.

The problem, therefore, is a crucial one. However, a basic premise of the Commission, as we have seen, is that, except in a very minor degree, it is impossible to increase the supply of frequencies in the present standard band available for network broadcasting. This premise is again illustrated by the following statement of Mr. Taylor, general counsel of the F.C.C., made during the Injunction Suit oral arguments in January, 1942:

> The range of frequencies used in radio runs from 10 to 12 kilocycles per second up to, at the present time, 300 or more megacycles per second, and this range is known as the radio spectrum.
>
> A very small portion of the spectrum—550 KC to 1600 KC—is used for standard broadcasting; the rest of the spectrum is devoted to police radio, marine radio, aeronautical, military, other and newer forms of broadcasting such as television and frequency modulation, and many other services; but the rules here challenged apply only to standard broadcasting.
>
> The necessities of the radio art dictate that, if opportunity for selection by listeners among the radio signals is to be effective, there has to be a separation of approximately 10 KC between each cycle, so that between 550 to 1,600 KC you have about 106 channels available for standard broadcasting.
>
> *The result of all that is that facilities available for standard broadcasting stations are limited.* True, as the plaintiffs have pointed out, the Commission allots to stations their power and their frequency, *and it*

[10] The minimum and maximum of the audio range is from approximately 30 cycles up to 16,000 cycles.

has a certain amount of play within that range of available frequencies, but the Commission is not omnipotent and cannot extend the laws of nature. Therefore, we have to act within the pretty rigid limits, and there are very severe restrictions on the number of stations it will be advisable to put here, there and somewhere else, in order that we can get the most economic distribution and widest service.

That factor of limitation of facilities, particularly with respect to towns where there aren't as many as four stations, is one of the underlying reasons why the Commission found these regulations in the public interest.[11]

It is clear that under the present system, where only individual stations are licensed, where each one is in a position to broadcast a different program at the same time, thereby requiring a separate frequency if program interference with another station would occur, and where many single stations have the exclusive use of unlimited-time clear channels, a severe shortage of frequencies for chain broadcasting in the standard band cannot be avoided. It is significant to note, however, that in July, 1937, the individual station licensing policy was still in the realm of debate. The following quotation from the Engineering Report of the F.C.C. will make this clear. "The Engineering Department believes that in the interest of clarification, all network stations, including those owned by a chain company, should be considered as separate licensees." [12]

And as late as January, 1942, Mr. Taylor referred to the policy as simply a "notion." He declared, "I should like to state very generally the basic lines of thought which the Commission's report and regulations involve. To begin with the notion of station responsibility. . . . Our administrative construction of the Act has consistently, since 1927, from the outset of the administration of this law, been based on this notion." [13]

The Commission takes the position that the best broadcasting establishment in the present standard band can be achieved through placing the principal emphasis upon the individual units in the industry in disregard of the essential requirements of chain broadcasting, and maintains that very little can be done in any event even if we wished to change the present system. In the next chapter

[11] Transcript, pp. 192–93, 199. (Italics added.) [12] Page 17.
[13] Injunction Suit, Oral Arguments, Transcript, pp. 203 and 214.

we shall review two interesting possibilities which are aside from the suggestion frequently made that the number of Class I A licensees should be further reduced as a means of accommodating for network broadcasting additional standard stations operating on lower power.

✕ *Chapter 17* ✕

LOOKING FORWARD

IF THERE WERE no broadcasting industry in this country today—if we could put into operation any system which is technically possible and economically feasible—what kind of a system would it be, based on what we now know about the science of radio, the demands and interests of the public, and the operational requirements of networks and individual stations? There appear to be four principles which are generally accepted and which would form the basis of any system that was devised.

Accepted First Principles

(1) *Advertising should continue to be the major means of financing broadcasting.* We are today about the only leading country in the world where the broadcasting system is commercially supported. Such a system is far from perfect. As we have seen, it minimizes the possible fulfillment of the educational and cultural potentialities of radio; in many important respects it is in conflict with true national coverage; it tends to clutter up the air with distasteful selling appeals on the part of the advertiser; it results in a disproportionate amount of commercial programs; and generally it fosters an undiscriminating and in many instances an undesirable program content.

However, the system possesses many advantages. It seems unlikely that under any other could the showmanship and personal initiative be secured which insure that the American people enjoy free of charge superior radio entertainment and which promote the dissemination of news on a national basis, swiftly and efficiently.

Finally, even though advertising may not be the ideal means for financing broadcasting, most of the alternatives are fraught with grave dangers. For instance a government subsidy through a tax on receiving sets or a system whereby the government owns and oper-

ates the broadcasting facilities opens the door to direct Federal censorship of what goes out on the air and to political abuse. As the *Report on Chain Broadcasting* declares, "The United States has rejected Government ownership of broadcasting stations, believing that the power inherent in control over broadcasting is too great and too dangerous to the maintenance of free institutions." [1] And Chairman Fly rejects government ownership just as strongly. In a colloquy with Senator Wheeler he stated, "I want to say, sir, that not through these regulations or any that I myself shall initiate or have anything to do with, shall the Government take over the broadcasting industry." [2]

Observe, however, that the first generally accepted principle given above states that advertising should continue to be the *major* means—not the sole means—of broadcasting support. It is not the sole means today; in the future there is even more reason why it should not be. As the argument in Chapter 9 pointed out, if the educational and cultural potentialities of broadcasting, particularly from the network standpoint, are to be fulfilled to a greater extent than at present—if we are not to wait in the uncertain hope that the public will demand their fulfillment—some other method of financing this type of radio program must be found. The efforts that are now being made in these directions are strictly localized and the economic basis of the broadcasting station, owned and operated by an educational institution, for example, is unstable.

Here then is an opportunity for some public benefactor—to endow a national network. Music, being auditory but not verbal, could be made the exclusive program content of such a chain. In this way the dangers of individual propaganda and opinion-forming abuse would be avoided. Furthermore, electrical transcriptions could be utilized to reduce the expense of operation.

Here too is a challenge to our towns and cities. Granted that sufficient frequencies are available, there is no reason why a great many more of these communities cannot each have its own subsidized station, geared to and working closely with the educational system, to diffuse among the people the world's cultural and educa-

[1] Page 72.
[2] Senate Interstate Commerce Committee Hearings, Transcript, p. 105.

tional heritage. Station WNYC in New York City is a heartening illustration of what can be done.

(2) *It is in the public interest to continue to have both individual stations and networks.* An individual station offers an advertising medium to the local merchant as well as to the national "spot" advertiser, it provides the opportunity of publicizing local events of interest and significance to the people of the community, and it makes possible the maximum of local self-expression over the air—in short it fulfills local functions vital to our economy and to our democratic institutions. It is generally agreed without question that the individual station should be preserved.

Networks broadcasting "live" programs are also generally accepted as of essential value. Such a network system, of course, is an inevitable result of the first principle, namely, that advertising should continue to be the major means of financing broadcasting. Because power is not unlimited and coverage does not increase proportionately with the increase in the power used, chain broadcasting, where the national advertiser wishes to transmit a "live" performance, is the only way of satisfying his objective to reach the maximum audience.

In providing the advertiser with opportunities for simultaneous nation-wide circulation, the chain organization also performs an important economic function, since increased competition is promoted as between different media in the advertising field, and the production and distribution of goods are stimulated. Furthermore, large sums of money are made available for the production of a single program of superior quality. If each of ten stations, let us say, has $250 to spend, the probabilities are overwhelming that the quality of the performance will be far better if these funds are pooled in the production of one program. Linking stations up into a chain reduces the cost per unit enormously and results on the average in a better program service, both commercial and sustaining, where "live" talent is employed.

With further reference to talent—irrespective of the cost factor to the individual station—chain broadcasting is practically indispensable to the production of "live" programs of high artistic and professional merit. The principal talent centers, as we have seen,

are in the major cities. Hence the best talent is physically unavailable to the large number of individual stations not located in one of the leading metropolitan areas.

Perhaps the most significant advantage of network broadcasting, however, is its ability to bring events of national importance and interest from almost any point in the country to the people while these events are actually happening. News can be disseminated with incredible speed and during a national emergency a method of instantaneous mass communication is available. Chain broadcasting gives government a national as contrasted to a local forum. Whatever one may think of the network organizations themselves —no matter how much certain of their policies may be criticized— it seems clear that they performed a crucial public service by organizing and developing our national system of chain broadcasting. The fact that it was profitable for them to do so does not detract from the result. The government would now be facing a grave situation if the radio broadcasting industry had been exclusively organized on an individual station basis. In short, national networks are absolutely essential to the nation in times of disaster or war. The advantages of chain broadcasting, therefore, appear beyond dispute.

(3) *Government assignment of frequencies and power is necessary.* There is no disagreement on this point. The experience of 1926 proved conclusively that in order to have any broadcasting service whatsoever, a traffic policeman of the airways is necessary. In addition, only the Federal government is in a position to perform this job in an adequate manner.

(4) *The public interest demands government regulation of broadcasting.* The whole issue is the degree of regulation. Even the industry concedes that, because of its public utility character, its vital social implications, and its tremendous powers to affect the public welfare, some degree of regulation of the economic and social aspects of broadcasting—in addition to the regulation of its merely physical or technical aspects—is necessary. The determination of the proper degree of this regulation, on the other hand, is a very difficult problem. Government censorship of program content and the intrusion of the Federal authorities into the legitimately private

affairs of the business should be avoided. Nevertheless, sufficient latitude of regulation should be present to insure against commercial abuse of this public franchise and to guarantee as far as possible that the potential benefits of broadcasting service to the people as a whole will be realized.

In conclusion, the four basic and generally accepted principles are: (1) broadcasting should be primarily financed by advertising; (2) there should be both networks and individual stations; (3) the government must assign the frequencies and power to be used; and (4) some degree of Federal regulation of the social and economic aspects of broadcasting is necessary and in the public interest. These are the starting points in any attempt to improve upon our present system.

Licensing a Network

Licensing a network as such would give the Federal authorities direct regulatory power over chain organizations themselves. Many persons, including the writer, believe it is highly desirable that the government within proper limits should have such power. They claim it is illogical and undesirable to perpetuate a situation in which the organizations broadcasting the programs heard by national audiences have no final responsibility—that this responsibility rests with the individual stations.

Mr. Paley, for instance, stated in 1941 that networks should be licensed. "I frankly think that to whatever degree there should be licensing at all, networks should come under such licensing. Whether or not the Commission admits it, network broadcasting is the most important single element in the industry. It does not seem logical, if there is to be licensing for the other elements, that the part of greatest nation-wide importance should escape licensing. In making this recommendation, we wish to assure the gentlemen of this Committee that we are not unmindful of the fact that, along with subjection to the licensing authority, we will, under a properly drawn statute, have our status acknowledged and our rights safeguarded." [3]

[3] Senate Interstate Commerce Committee Hearings, Transcript, p. 349.

At another point in the record, Mr. Paley remarked, "The Commission seems to have been obsessed in its whole thinking by the fact that it is radio stations and not networks that hold the licenses. It seems to feel that under the circumstances the success of the networks must be in some way improper. From this they have gone on to reason that virtually every practice which we in long experience have found to be essential is wrong and must be stopped regardless of the effects on programs and the public service. This is why I said to you at the very outset that I think the time has come when the Congress should recognize the validity of networks and should license them. Once they are licensed it should cease to be fashionable in Commission circles to indicate that they are an illegitimate factor in the industry. . . ." [4]

If networks are licensed and if the responsibility for the service rendered is placed directly on their shoulders, where it should be, it does not appear feasible or desirable to treat them merely as program producing organizations. As we have noted many times, the concept of chain broadcasting involves stations—linking them up for the simultaneous transmission of the same program. From the standpoint of the advertiser this ability to deliver assured circulation over a large number of outlets is the most important consideration and the factor that permits chain broadcasting to compete with other advertising media. If the network company was not in a position to offer this assured circulation, some other agency, such as a "time" broker or the advertiser himself, would be compelled to secure it, despite the fact that the chain organization might be engaged to produce the program.

In short, distributional outlets appear indispensable to the network business supported by national advertising. If this premise is correct, therefore, the individual stations on the chain could not retain sovereignty over network programs under circumstances where the network itself was licensed. Obviously it would be impossible for both the network organization and the individual stations to have the final authority under the franchise for the same service. The network would have this responsibility, the stations

[4] *Ibid.*, p. 348.

being simply distributing points for the network's circulation, and the absolute assurance that the same program could be broadcast simultaneously would thus be achieved.

Synchronous[5] *Operation of a Network*

Furthermore, if each national chain was licensed and if the distributing outlets of each operated on a common frequency, many wave lengths in the standard broadcast band, which are now being used exclusively by only one station, would become available. This would allow an increase in the number of local broadcasting units and at the same time would make it possible for more national networks to be established. "The development of chain broadcasting and the congestion in the broadcast frequency range have naturally led to a consideration of the possibilities of operating a group of stations on a single frequency. The possible usefulness of such a system has resulted in a number of attempts to secure the additional coverage offered by the simultaneous operation of two or more stations broadcasting the same program on a common frequency." [6]

It is realized, of course, that a national system of synchronous network operation would represent a radical departure from the present establishment—one that would not be welcome to the present network industry because it would mean a great increase in competition in the chain broadcasting field, and one, therefore, that might have to be forced through appropriate governmental legislation and regulation. Moreover, the system could not be put into effect until the war is over and probably not for some years thereafter. In the meantime, however, its possibilities can be further explored and tested and arrangements made for its eventual adoption, if it appears desirable, as part of a sound, long-term plan for network broadcasting.

We will not attempt a comprehensive review of what should be done with the broadcasting establishment during the period before a national synchronous network system is adopted. On the other

[5] Although the term "isochronous," which signifies an identity of phase, is more exact, the two words—isochronous and synchronous—will be used interchangeably.

[6] G. D. Gillett, "Some Developments in Common Frequency Broadcasting," *Proceedings of the Institute of Radio Engineers*, August, 1931, p. 1347.

hand, it appears reasonable to suppose that a compromise arrangement could be worked out, if synchronous operation proves fully feasible and equally or more advantageous than single-frequency chain broadcasting, whereby the network organization would control only a specified portion of the time on the individual outlets during each broadcast day, and that in this controlled time the networks would transmit on a common frequency. It is also quite possible that an equitable division between the more desirable and less desirable broadcast hours can be devised, thus insuring that the vital functions of the local stations in their own communities would be preserved and protected.

Before discussing in detail the interesting possibilities of synchronous network operation, the writer wishes to mention two general considerations which are important to a final decision regarding the relative feasibility and merits of common-frequency broadcasting as opposed to the present system, in which each station on the network, if program interference with another station would result, operates on a separate frequency.

First, we are not comparing an ideal technical situation with something else. Our present broadcasting system is far from ideal. Serious distortion and interference occur in wide-spread areas; great numbers of people have no acceptable broadcasting service whatever and a larger number are entirely dependent upon sky wave propagation with its bad fading characteristics and generally unreliable quality; because of the extreme lack of frequencies in the present standard band, there is less competition in the network industry than is desirable; and finally, network program variety is seriously restricted because of this scarcity of wave lengths and can be greatly improved if some way is devised to permit more national chains to enter the business. In other words, the possibilities and ramifications of synchronous network broadcasting must be judged as against the serious shortcomings and failures of our present system.

Second, science usually can solve technical difficulties once its attention is focused on a problem. If intensive research and experimentation are directed to the matter, and if from the economic and

social standpoints synchronous network broadcasting is shown to be feasible and in the public interest, confidence is justified that whatever obstacles to its achievement exist today can be overcome.

The problem of synchronous operation of two or more stations transmitting the same program simultaneously is highly technical and has not received adequate study. Furthermore, much of the available data bearing on this question is based on the results of experimentation and analysis with only two stations in synchronism. Although in the monograph of P. P. Eckersley we have valuable evidence based on the actual operation of an eleven-station synchronously operated network in England, it is most unfortunate that to date common-frequency broadcasting has not been tested under actual network conditions to a greater degree. As we shall see later, this is particularly true because the principle of multiplicity of waves which would be present in a synchronized national chain offers promise of solving some of the difficulties when only two stations transmit on a common frequency.

It is clear from the above that the scientific literature bearing on the question of synchronous broadcasting is small. The writer has drawn on four principal sources in the discussion which follows:

(1) The study of G. D. Gillett of the Bell Telephone Laboratories, which gives the results of the synchronous operation on a standard frequency of WHO in Davenport, Iowa, and WOC in Des Moines, the two stations being 153 miles apart. In describing his study Gillett writes, "The paper describes the results of the simultaneous operation of radio stations WHO and WOC broadcasting the same program on a common frequency using independent crystal controlled oscillators. These stations had previously been compelled to share time on 1000 KC and each is now able to render full-time service." [7]

At another point in his monograph Gillett declares, regarding this study:

> Before approval was sought from the Federal Radio Commission for the full-time operation of these stations on a common frequency, careful surveys of the areas served were made by the engineers of the Federal Radio Commission, Department of Commerce, Central Broadcasting

[7] "Some Developments in Common Frequency Broadcasting," p. 1347.

Company, and the Bell Telephone Laboratories during their simultaneous operation on an experimental basis during early morning hours. . . . Nearly three thousand miles were covered by the radio test cars. Upon completion of these surveys the Federal Radio Commission immediately granted permission for the simultaneous operation of WHO and WOC during regular broadcast hours.

These surveys showed that the service rendered by the simultaneous operation of these two stations was substantially twice as great as the service given on a shared-time basis. The normal service area of each station was maintained and the night-time reception at points over a hundred miles distant from either station was improved by the partial limitation of rapid and selective fading as well as by an increase in the average field strength received.

This improvement in distant reception was confirmed by the letters received in response to requests, made during the tests, for reports as to the quality of reception. . . . Several hundred replies were received from outside the state of Iowa beyond the normal service range of either station. These were almost unanimous in reporting better reception with simultaneous operation. . . . This improvement apparently occurs wherever marked selective and general fading is experienced in the reception of either station alone.[8]

(2) The theoretical discussion of Charles B. Aiken, also of the Bell Telephone Laboratories, contained in his monograph "A Study of Reception from Synchronized Broadcast Stations" which appeared in the *Proceedings of the Institute of Radio Engineers* in September, 1933. Regarding the nature of his study, Aiken declares, "There has not thus far been brought to bear upon the problem the full power of a theoretical investigation, with the result that a complete comprehension of the significance of the various physical quantities involved has not been achieved." [9] And at another point he refers to his paper as an "extensive theoretical analysis."

(3) "The Simultaneous Operation of Different Broadcast Stations on the Same Channel," by P. P. Eckersley of the High-Frequency Engineering Company, Ltd., England, which was published in the *Proceedings of the Institute of Radio Engineers* in February, 1931. Eckersley writes:

At the end of 1928, eleven British stations were equipped with the necessary synchronization gear and shared an exclusive British national com-

[8] *Ibid.*, pp. 1358–59. [9] Page 1267.

mon wave. No two stations were closer together than 50 miles and the maximum distance between any two stations was of the order of 500 miles. The wave length used was 281.5 meters (a frequency of 1,140 kilocycles per second). The stations chosen to share this wave length were all of relative low power and were designed in any case only to serve large towns and cities . . . As theory indicates, it was soon found that their service areas were greatly increased when they radiated the same program and were synchronized on the same channel . . . In fact, towns and cities from 100,000 to 500,000 inhabitants were brought into perfect service area conditions by the application of the single wave length working method . . . A single channel was sufficient with the total expenditure of about 3 KW aerial power in ten stations to bring 10 per cent of the population of the British Isles service conditions of one program.[10]

(4) The experience of the National Broadcasting Company in synchronizing stations KDKA (Pittsburgh), WGY (Schenectady), and WEAF (New York); WTIC (Hartford) and WEAF (New York); WJZ (New York) and WBAL (Baltimore), which is given in a note by K. A. Norton, of the Bureau of Standards, Washington, D.C., appearing in the *Proceedings of the Institute of Radio Engineers* in September, 1934, and in testimony and statements by O. B. Hanson, vice-president and chief engineer of N.B.C.

Synchronous operation of a network, where the primary or secondary service areas of the outlets making up the chain overlap, requires that all the stations operating on the common frequency broadcast the same program at the same time. Otherwise, intolerable interference between different programs would result. Eckersley states in this connection, "This experiment . . . showed that, except in special cases, it is quite impossible to expect to set up any successful single wave length system (wherein the stations are reasonably close together) if different programs are radiated by stations sharing the same wave length. . . . No single wave length system can ever be practically successful unless all the stations sharing a wave length radiate the same program." [11]

The problem of synchronous broadcasting must be approached from two standpoints: (1) synchronization of the common frequency

[10] Pages 190–91.

[11] "The Simultaneous Operation of Different Broadcast Stations on the Same Channel," p. 185.

at the transmitters on a network; (2) synchronization of the common frequency at the receiving sets in the hands of the public.

SYNCHRONIZATION AT THE TRANSMITTERS ON A NETWORK

A sufficient degree of synchronization at the transmitters to render the system feasible from this standpoint has been and can be achieved, as the following statements indicate. Gillett writes in the summary of his monograph, "The exceptional stability of the crystal controlled oscillators used at each station is described. Since even these oscillators require occasional readjustments to maintain them in isochronism, a monitoring receiver was established midway between the stations and the resultant program is sent back by wire line to WOC to provide an indication for readjusting its frequency to exact isochronism with WHO. An audio oscillator used to modulate the carriers in the monitoring receiver provides a tone independent of the program for the guidance of the operator. . . ." [12]

Further on in his paper, having explained that the Bell Telephone Laboratories had developed a crystal controlled oscillator which does not permit the frequency at the transmitting points to differ more than one cycle in ten seconds, Gillett declares, "With this equipment in commercial operation, a checking of the frequency every ten minutes in connection with the regular routine inspection of the transmitter has been sufficient to maintain the carriers within an average of two cycles per minute of absolute isochronism." [13]

Eckersley writes, "When the stations were perfectly synchronized, then, service area conditions could be said to exist at any point, provided the field strength of one station at that point was more than five times the field strength of the other station at that point and provided each station radiated the same program." [14]

F. Gerth, of the C. Lorenz Laboratory in Berlin, declares in a note entitled "A German Common Frequency Broadcast System" which was published in the *Proceedings of the Institute of Radio*

[12] "Some Developments in Common Frequency Broadcasting," p. 1347.
[13] *Ibid.*, p. 1358.
[14] "The Simultaneous Operation of Different Broadcast Stations on the Same Channel," p. 183.

Engineers in March, 1930, "The three first common frequency transmitters, Berlin-Stettin-Magdeburg . . . have been in operation since the beginning of January. They are modulated from Berlin and controlled with the base frequency carrier wave." [15]

Norton points out in connection with the synchronization of WJZ and WBAL that this "is accomplished by means of an audio-frequency current transmitted to each station over a wire line and multiplied to the radio frequency of the station at the transmitter." [16]

In 1938 Hanson testified as follows at the F.C.C. hearings: "It was in 1928 and 1929 that N.B.C. engineers conducted a series of experiments in synchronizing two or more broadcasting stations on the same carrier frequency. Cooperation with the engineers of the Westinghouse Electric Company, the General Electric Company, and the American Telephone and Telegraph Company resulted in the exact carrier synchronization of KDKA, WGY and WEAF in September, 1929. This being purely experimental it was of course carried on after regular broadcast hours. . . . The success of these experiments culminated in broadcast operation of WEAF and WTIC on a common frequency from March 16, 1931, to June 15, 1932, when the Commission assigned a separate frequency to WTIC. Also WJZ and WBAL were synchronized for broadcast operation on March 16, 1931, and during certain hours these two stations are still synchronized on the same frequency." [17]

And in a letter which was written to the author on May 5, 1942, Hanson stated,

> This is in reply to your letter of April 27th inquiring about the synchronization of WJZ and WBAL.
>
> These two stations were synchronized for about eight years during which time the power of WBAL was 10 KW and WJZ was 50 KW. Within the last year WBAL built a new plant and has since operated independently on another frequency.
>
> Synchronization was accomplished by obtaining from the Bell Tele-

[15] Page 512.

[16] "Note on the Synchronization of Broadcast Stations WJZ and WBAL," *Proceedings of the Institute of Radio Engineers*, Volume 22, p. 1087.

[17] F.C.C. Hearings re Docket 5060, Transcript, p. 764.

phone Laboratories a four thousand cycle tone which was transmitted to both stations. This tone was obtained from their primary frequency standards and was very exact in frequency. By means of chains of multipliers its frequency was multiplied up to 760 KC. A tuning fork was provided in the system to insure stable operation during short interruptions in tone service and quartz crystal filters were used in conjunction with it. . . . During synchronization both stations used the same program . . .

The available evidence indicates that, from the standpoint of the carrier waves' being sufficiently isochronized at the time they leave the separate transmitters in the system, synchronous network operation is feasible. But this is not enough. Serious distortion may occur at receiving points even though the waves are in isochronism at each station. As Gillett states, "Wide spread publicity has been given to the misconception that the maintenance of the carriers in perfect synchronism at the transmitter would entirely eliminate this area of impaired reception." [18]

SYNCHRONIZATION AT THE POINT OF RECEPTION

Good reception at any particular point in a synchronous system operating on a standard frequency is subject to the same general conditions as single frequency broadcasting—man-made electrical noise and variable atmospheric conditions including, of course, sunspot activity. Furthermore, Aiken and others have shown that good reception of a program which is broadcast synchronously is a product of three other factors:

(1) The field intensity ratio of the carrier waves (Aiken uses the designation K for this factor).

(2) Modulation factors.

(3) Certain phase relations between the carriers and their accompanying side-frequencies. (a) The phase angle between the carriers at the point of reception (γ designates this factor); and (b) the angle, also at the point of reception, which a side-frequency vector in one wave makes with its carrier vector at the instant of time at which the analogous side-frequency in the other wave is coincident with its carrier (β designates this factor).

[18] "Some Developments in Common Frequency Broadcasting," p. 1362.

FIELD INTENSITY RATIO

Aiken declares regarding this question, "Radio broadcast systems involving the operation of two or more stations on the same carrier frequency, and with the same program used for modulation, have been put to considerable practical use, both in this country and abroad, and the list of such systems is now a long one. . . . It has been observed that the quality of reception is good where the field from one station predominates but is usually unsatisfactory in the middle zone between two stations where the field strengths are approximately equal. Experimental observations of these regions of distortion, both in the field and in the laboratory, have led to the conclusion that, if reception is to be of good quality, the voltage induced in the receiving antenna by the weaker of the two stations must not exceed K times the voltage induced by the stronger station. Estimates of the value of K . . . range from 0.2 to 0.5. These figures both refer to the case in which the difference in carrier frequency is zero, or is so small that it may be regarded as a slowly changing phase difference between the carriers." [19]

Further on in his article Aiken states, "A ratio which will protect speech from distortion under the worst conditions will also be about right for music." [20] And his final conclusion is that a carrier ratio of about 12 decibels is sufficient to reduce distortion to a just perceptible amount even under the worst practical conditions, provided the stations are not guilty of overmodulation.

As Aiken points out, there is no general agreement as to what the field intensity ratio should be in order to avoid distortion. For instance, Norton states on the basis of the experiments with WJZ and WBAL, "The average period of the fading is about one minute; it was observed on a receiver with automatic volume control that this slow fading did not introduce any serious distortion into the receiver modulation where the ratio of the intensities of the two ground waves was three to one. It is believed that no serious distortion would be introduced into the received modulation by the synchronization fading in that part of the primary service area of the two stations where the ratio of the intensities of their ground

[19] "A Study of Reception from Synchronized Broadcast Stations," p. 1266.
[20] *Ibid.*, p. 1293.

waves is about two to one or greater. The Federal Radio Commission states that a ratio of at least four to one in the intensities of the radio waves from two synchronized stations is necessary in order to prevent modulation distortion; this latter ratio is based on the average receiver in use; e. g. a receiver without automatic volume control." [21]

Gillett in the summary of his study says, "The impaired reception in the area midway between the stations and outside their normal service range is shown to be a function of the degree of modulation of each transmitter, of the field strength ratio, and of the audio phase angle and independent of the carrier phase at the transmitter. It is pointed out that reception equal to that from either station alone may be obtained in this area by the use of a simple directive antenna." [22]

Further on he declares that when the frequency difference is very small, closely approaching isochronism, unimpaired reception is assured provided the field strength ratio is at least ten decibels, but that as soon as the frequency difference is at all appreciable, the required field strength ratio for ordinary programs rises sharply to about 20 decibels and is approximately constant within the range from one to ten cycles per second. "Our field strength distribution surveys and studies show that, for 5 KW stations separated by 200 or 300 miles, a field strength ratio of 20 decibels is obtained only at points well within the normal service area of the station. On the other hand, the limits of the 10 decibel ratio lie for the most part outside the normal service range of the station. . . . If approximate isochronism is maintained, the service area of each of these stations should not differ materially from that which selective fading and interference would establish for that station transmitting alone." [23]

What is the probable approximate area of distortion between two synchronized stations that are fairly widely separated? No definite answer can be given to this question. Gerth estimates it at only 15 percent. "Experiments had shown that the width of the disturbed

[21] "Note on the Synchronization of Broadcast Stations WJZ and WBAL," pp. 1087–89.

[22] "Some Developments in Common Frequency Broadcasting," p. 1347.

[23] *Ibid.*, pp. 1351–52.

region between two stations amounted to only about 15 percent of the distance between the two." [24] Hanson declared in the letter which he wrote to the author and which has already been mentioned that distortion occurred only in a limited area when WJZ and WBAL were synchronized. "During the synchronization, there was distortion in a limited area where their field intensities were about equal. This occurred not far from Wilmington. . . . Synchronization of the two stations was conducted during the evening hours. It happens that the area where the distortion occurred was the approximate limit of the primary service area of the two stations."

Aiken points out that if the stations are close together, thus assuring that the electrical paths will be approximately the same, and if the waves are identically modulated, poor reception in this area, where the field intensity ratio approaches unity, will generally not be experienced at all.

> It is shown that if two synchronized broadcast stations are far enough apart and are of such powers that there are places where the signals from the two stations are of approximately the same strength and have traversed paths differing in length by more than about 10 miles, then distortion is at times bound to occur at these points. . . . On the other hand it is shown that if the two broadcast stations with synchronized carriers are fairly close together, that is, within about 25 miles of each other, there is no distortion in the middle zone between them if the modulated waves radiated from the two stations are identical. There may, however, be variations in resultant field strength. The effect of such variations may usually be eliminated by the use of automatic volume control in the receiving set. An exception must be noted at points where the resultant field strength falls below the noise level. At such points the use of a receiving antenna having slightly directive properties will eliminate this difficulty.[25]

It appears that the following conclusions can be drawn from the evidence with respect to the field intensity ratio: (a) Depending upon the degree of isochronism at the receiving point, good reception can be expected from synchronous broadcasting where the ratio is of the order of two to one or more; (b) In the area where the field strength of the primary waves approach equality distortion can be

[24] "A German Common Frequency Broadcast System," p. 510.
[25] "A Study of Reception from Synchronized Broadcast Stations," p. 1265.

greatly reduced if not eliminated through the use of a directional receiving antenna; (c) Modern receiving sets having automatic volume control reduce materially the area where poor reception would otherwise occur.

MODULATION FACTORS

Aiken states, "When the degree of modulation is decreased, the carrier ratio necessary to prevent distortion will be reduced. . . . A reduction in modulation gives rise to a reduction in the effective service area of a station. The improvement in the permissible carrier ratio is not sufficient to justify the reduction in modulation." [26]

PHASE RELATIONS BETWEEN THE CARRIERS AND THEIR ACCOMPANYING SIDE FREQUENCIES

Aiken declares concerning this question,

> γ will vary from point to point in space even if the phases of the transmitters are constant. . . . At a fixed point γ will vary only if there is a change in the relative phase of the carriers leaving the two transmitters, or in the difference in path length from the two stations to the receiving point. Variations in γ will be accompanied by variations in amplitude of the resultant wave and usually by changes in quality of the rectified signal, although if β is small the latter may not occur.
>
> β is dependent upon the phase and time delay inequalities which occur in the two complete electrical paths from the studio microphone to the receiving point, and upon the frequency of modulation as well. . . . β must be regarded as a completely and incurably random quantity. This being the case there is nothing to be gained by efforts to equalize lines or equipment as long as the inequalities are not so great as to give rise to echo effects. Even the modulations of the two stations need be only approximately equal.[27]

Although β may be incurably random it should be noted that Aiken's conclusions with respect to this factor are based in this instance on the operation of only two stations in synchronism. The principle of multiplicity of waves, which will be discussed presently, offers the distinct possibility that this randomness of β and the effects of variations in γ may be substantially nullified as serious

[26] "A Study of Reception from Synchronized Broadcast Stations," pp. 1291–92.
[27] *Ibid.*, pp. 1284–85.

factors of distortion when a large number of waves from synchronized transmitters arrive at a certain point. Aiken himself concedes that this may be the case. "The only factor tending toward improvement in reception of signals from widely spaced stations is the averaging effect which appears when waves are received over multiple paths. Both P. P. Eckersley and Gillett have concluded that this may result in a very important reduction of distortion in regions where both stations are received about equally well. Changes in polarization of the waves may also improve the quality of the resultant." [28]

Gillett states with respect to the phase relations between the carriers and their accompanying side frequencies that since the side-band frequencies must perforce differ in wave length from the carrier, they will arrive at any given point out of phase with the carrier, the amount depending on the distance from the transmitter, the side-band frequency, and, in the case of the sky wave, on ionosphere activity. "Thus the side bands will not for the most part be in phase opposition at the same points in space as are the carriers, and distortion will result from the elimination of the carrier while strong side band components are present. The magnitude of this distortion is primarily a function of the existing field strength ratio between carriers and, while the distortion occurs for only a small proportion of the fading cycle, it is extremely objectionable where the field strengths approach equality. Here the carrier is almost entirely eliminated momentarily and the resultant program consists mainly of second harmonics and other distortion products." [29]

THE PRINCIPLE OF MULTIPLICITY OF WAVES

Gillett describes the essentials of this principle and highlights its important significance from the standpoint of the practical potentialities of synchronous network operation. He writes:

> It has been generally accepted that fading . . . is due to the arrival of the signals along at least two different paths. . . . It will be possible to represent the fading signal received from a single station as the sum of at least two such vectors. It is then logical to assume that the signal re-

[28] "A Study of Reception from Synchronized Broadcast Stations," p. 1285.
[29] "Some Developments in Common Frequency Broadcasting," p. 1363.

ceived from two distant stations operating on approximately the same frequency is the summation of at least four of these vectors of constant amplitude and random phase relation. This assumption of random phase relation is valid for any of the common frequency broadcast systems now being developed commercially either here or abroad. . . . Even if the carriers of two stations were held exactly in phase at their respective antennas . . . the variations in the path lengths of the waves arriving at any given point would be sufficient to cause a random phase variation. . . .

As the number of stations is increased the percentage of time that the signal fades below a small value such as 5 per cent of its maximum should be decreased. Thus the percentage of time that bad quality will be received due to the elimination of the carrier should be noticeably reduced as the number of stations is increased. . . . The level of the signal received should remain near the mean for a much larger percentage of the time as the number of stations is increased. Thus a distant listener can set his receiver so that a normal level should be obtained for a much larger proportion of the time as the number of stations is increased. . . . The instantaneous rate of fading should also decrease as the number of transmitting stations is increased. Since the same arguments apply equally well to each of the individual frequencies comprising the side bands *it can be seen that the general tendency of increasing the number of isochronously operated stations is to improve markedly the satisfactoriness of the program received at a point distant from all the stations of the chain.*[30]

The engineering staff of the Federal Communications Commission itself supports Gillett's theory of multiplicity of waves. Stating that the ratio of desired to undesired signal is four to one for synchronized carriers, the *Standards of Good Engineering Practice Concerning Standard Broadcast Stations,* revised to July 20, 1940, declares in a footnote:

Two stations are considered to be operated synchronously when the carriers are maintained within one-fifth of a cycle per second of each other, either automatically or manually, and they transmit the identical program. While observations have been made on several synchronized stations, no definite standards as to ratio of desired carriers to undesired carriers have been established, inasmuch as the methods of operations have not been standardized and results vary appreciably. From the observations it would appear that for most types of synchronous opera-

[30] "Some Developments in Common Frequency Broadcasting," pp. 1359–61. (Italics added.)

tion a ratio of about four to one between desired and undesired carriers is necessary to avoid distortion. This ratio holds only when the audio modulation is in sufficiently close time phase to avoid echo effects.

In computing the interference in the primary service areas between the ground waves of two synchronously operated stations the ratio of four to one should be used. No complete information is available as to the required ratio between sky waves; however, it would appear that a ratio less than four to one can be tolerated without objectionable interference, first, because the standard of acceptance of a signal as satisfactory is lower for secondary service, and second, *because several waves with random relative phases usually make up each sky wave and the combination of two such synchronized waves generally causes less distortion. Synchronous operation of two or more stations may enable an extension of the coverage and service on a channel without any materially increased interference range beyond that one station would produce.*[31]

CONCLUSIONS

What general conclusions can be drawn from the evidence presented above with respect to synchronous network operation?

(1) That it is feasible from the standpoint of having the common frequency in a sufficient degree of isochronism at the separate transmitters.

(2) That through synchronous operation good reception from the standpoint of the ground waves, if the stations are fairly close together, is assured, except for limited areas where the field intensities approach equality, and at these points directive receiving antennae will eliminate the distortion. Even where the stations are widely separated but where their primary service areas still overlap, the areas of distortion will be reduced through automatic volume control, and poor reception at any particular point can again be materially rectified through the use of a directional receiving antenna.

(3) The principle of multiplicity of waves, which would be effective if synchronous broadcasting was applied to a national network, offers the distinct possibility that common-frequency broadcasting will improve the serviceability of sky wave propagation. Gillett's experiments with stations WOC and WHO support this conclu-

[31] Page 12. (Italics added.)

sion. This, however, is a problem that urgently needs further study and experimentation.

There is the added question which has been little analyzed as to what effect a multiplicity of sky waves coming in at night to a receiving set located in the primary service area of one or more stations will have upon the quality of reception and whether a directional receiving antenna will be able to eliminate or sufficiently reduce the undesired secondary carriers as well as the undesired primary carriers in order to prevent distortion in the area where the field intensity of the undesired to the desired signals approaches equality. The experience of the National Broadcasting Company with the synchronous operation of WJZ and WBAL at night is most encouraging and appears to indicate that this is not a major problem.

Here then is a possibility of accomplishing the very thing that the Federal Communications Commission is inclined to maintain is impossible, namely, making available for commercial network broadcasting a greater supply of frequencies in the present standard band. If the favorable implications of the conclusions stated above are substantiated by further research and tests, and if from the economic and social standpoints such a system is deemed feasible and superior to our present chain broadcasting establishment, each national network could be licensed on two clear-channel unlimited-time frequencies for synchronous operation. The stations on the chain serving highly populated areas could be fairly close together and could operate on lower power than those in less populated regions.

Two frequencies rather than a single frequency are hypothesized in order to give the network organization the flexibility to meet the advertiser's reluctance to purchase the entire chain. Forcing the advertiser to buy time on all of the stations is, of course, the ideal both from the standpoint of the listening audience and the network industry. Mr. Witmer of the National Broadcasting Company declared at the F.C.C. hearings, "The ideal from our standpoint would be that advertisers must all buy all facilities." [32] And Mr. Paley stated at the Senate hearings, "Of course, I should like to see a situa-

[32] F.C.C. Hearings re Docket 5060, Transcript, p. 2208.

tion whereby if an advertiser wants to put an advertisement on our network he must take every station." [33] It appears, however, that such a requirement will continue to be economically impractical for some time to come, and hence the necessity for two frequencies is indicated.

If the conclusions of Aiken and Eckersley that synchronous network operation is practically adaptable only to densely populated areas are substantiated, if in actual tests the principle of multiplicity of waves in providing an equally good or superior sky wave service is not corroborated, and if the full power of scientific research is unable to solve the distortion problems involved, each national network could be licensed on three rather than two clear-channel unlimited-time frequencies—two of these to be used for synchronous network operation in the more populated areas, such as the eastern section of the United States and the Pacific Coast. The remaining clear-channel unlimited-time frequency would be employed for providing network service to the rural areas through sky wave propagation by having a transmitter located at the most desirable point toward the center of the country and operating on the highest possible power. This alternative arrangement, of course, would also make available many frequencies, now exclusively assigned to one station, for the establishment of new national networks.

What results would follow from these hypothetical situations in which a national network is licensed on two or three clear-channel unlimited-time frequencies? The following appear to be the principal ones:

(1) National network operation and individual station operation would be entirely divorced.

(2) The national network organization would own or lease all of the stations on its chain and all of these outlets would give a continuous program service either commercial or sustaining during broadcast hours.

(3) Those of the network's stations which were synchronously operating on one of the frequencies at any particular time would, of course, broadcast an identical program. The remaining stations

[33] Senate Interstate Commerce Committee Hearings, Transcript, p. 367.

operating synchronously at that time on the other frequency would also broadcast an identical program. As between the two groups of stations, however, the programs would be different. In other words, the network organization would transmit either one program (if the advertiser purchased the entire network or if a sustaining program was carried by all stations) or two programs during the entire broadcast day. This does not take into consideration the alternative contingency of having each chain organization render service to the rural areas through one very high-powered transmitter broadcasting on a third exclusive frequency.

(4) All stations on the network would have to be capable of broadcasting on either of the two frequencies assigned by the Commission to that chain organization for synchronous operation. It would follow, therefore, that each station would use only one of the two frequencies at any particular time and that there would be a program available on only one of the two frequencies in each service area. It would be possible, however, to educate the listening audience regarding the two places on the dial where C.B.S. programs, for instance, were to be found and to instruct them to try the other frequency if the first was silent. Furthermore, of course, the same system employed today of publicizing in advance the time and frequency for each program could be followed.

These then seem to be the most significant results which would follow the adoption of a nation-wide system of network synchronous broadcasting. We shall not attempt an answer to the question as to whether these consequences would constitute such a concentration of control over commercial broadcasting by the chain organizations as to render the system contrary to the public interest. Nor shall we try to appraise the economic feasibility of these results from the standpoint of the present network companies. And finally, and perhaps most important, we shall not explore the repercussions of these resultants on the independent station unaffiliated with a network. Aside from the technical aspects of the problem, these questions are, however, the essential ones in any attempt to evaluate the relative merits of synchronous broadcasting as opposed to single-frequency broadcasting.

Although an analysis of the above matters will not be made, the

writer does wish to point out certain general considerations which are pertinent. A more clearly defined regulatory policy for network broadcasting, combined with the fact that more national chains would be in operation and hence more competition would be present, may hold the answer to the problems of monopoly and domination under a system of synchronous broadcasting.

With respect to the economic feasibility of such a system to the present network industry, the National Broadcasting Company, for instance, already owns five stations and they are considered absolutely essential. The general principle of ownership, therefore, is not only accepted but is insisted upon. Moreover, in a national synchronous system the great majority of stations on the network could be simply relay transmitters. The cost of operating these would be far less than is the case with the average station today with its elaborate studios and numerous and high-priced personnel. Ownership of all the stations on the chain, therefore, would not appear to be, from the operational standpoint, an insuperable financial hazard.

In addition, it should be noted that in our hypothetical situation the network organization no longer would be required to share the revenues of the business with individual stations. The F.C.C. Brief of 1940 states that the 160 stations in the United States which were supplied with N.B.C. network service during 1938 received from networks $12,762,892, the great bulk of which was paid to them by the National Broadcasting Company. Consequently, a very substantial saving would be involved which could possibly contribute in an important manner toward meeting the cost of acquiring control through purchase, lease, or the construction of new facilities of all of the stations on the network.

And finally with reference to the individual stations serving local communities which would not be outlets for any national chain, the further development of national "spot" advertising and the revenue which would be received from local merchants at least suggest the possibility that such individual stations could economically survive without network affiliation. It is conceivable that national "spot" advertising could become to the local independent station what national "live" program advertising means to the networks today. As we noted in Chapter 16, a majority of the 310 stations unaffili-

ated with a network organization even in 1938 operated profitably. Furthermore, the present quality and continuing improvement in the fidelity of electrical recordings might very well solve the economic and prestige problems of sustaining-program service, which would have to be rendered by the local independent stations.

The Communications Act in Section 303 (g) states that the Commission shall "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." Here then is the sanctioned challenge. When the war is over radio broadcasting will stand on the threshold of a dynamic future. Only through opening our minds and exploring the challenge of this expanding science can the possibilities of that future be fulfilled.

✕ *Appendix A* ✕

NEW NBC STANDARD AFFILIATION CONTRACT

NATIONAL BROADCASTING COMPANY, INC.

New York, N. Y., ..., 194.....

.....

.....

Radio Station .....

Gentlemen:

We are proposing in this letter the following plan of network co-operation between this Company and your Station .....

I. NETWORK AFFILIATION AND PROGRAM SERVICE

(1) In order that your station may continue to serve the public interest, convenience and necessity by broadcasting programs of a quality and character generally beyond the reach of individual stations, NBC will, at its own expense, extend its program transmission lines to your control board at your main studios and offer your station network programs of wide variety, including musical, educational, religious, sports, public affairs, international and special events programs. We will offer to furnish your station a minimum of 200 unit hours [1] of our

[1] Unit hours are computed according to the following table:

Local time	1 hour, unit-hour credit	¾ hour, unit-hour credit	½ hour, unit-hour credit	¼ hour, unit-hour credit
Weekdays:				
12:00 midnight to 8:00 A. M.	.333	.250	.167	.083
8:00 A. M. to 6:00 P. M.	.500	.375	.250	.125
6:00 P. M. to 11:00 P. M.	1.000	.750	.500	.250
11:00 P. M. to 12:00 midnight ...	.500	.375	.250	.125
Sundays:				
12:00 midnight to 8:00 A. M.	.333	.250	.167	.083
8:00 A. M. to 12:00 noon	.500	.375	.250	.125
12:00 noon to 6:00 P. M.	.750	.563	.375	.188
6:00 P. M. to 11:00 P. M.	1.000	.750	.500	.250
11:00 P. M. to 12:00 midnight ...	.500	.375	.250	.125

network sustaining and commercial programs combined during each 28-day period, or if we fail to do so we will pay you at the hourly rate of compensation set forth in Section II, Paragraph (1) sub-division (a) of this letter for network commercial programs for any time necessary to make up the difference between the service actually offered to your station and the minimum mentioned above. The network sustaining programs which we will offer to furnish are for sustaining use only and may not be sold by your station for commercial sponsorship or used for any other purpose.

(2) In return for the NBC network affiliation, including sustaining program service, you will waive compensation for 16 unit hours of our network commercial programs broadcast by your station during each 28-day period.

II. STATION COMPENSATION

(1) Beginning with the effective date of this agreement, we will pay you for each succeeding 28-day period, approximately 15 days after the close of such period, in accordance with the following provisions:

Your compensation for broadcasting our network commercial programs under this arrangement will be based upon an average unit hour rate computed for each 28-day period by dividing the total value at the network rate for your station of the network commercial programs broadcast from your station, by the total number of unit hours of such programs during that period.

(a) For the first 25 unit hours in excess of the 16 unit hours covering the network affiliation, NBC will pay you at the rate of 20% of your average unit hour rate for the 28-day period.

(b) For the next 25 unit hours, NBC will pay you at the rate of 30% of your average unit hour rate for the 28-day period.

(c) For all unit hours in excess of 66 unit hours, NBC will pay you at the rate of 37½% of your average unit hour rate for the 28-day period.

(2) The network station rate for your station, on which its compensation will be figured as provided above, will be $..... per full evening hour. This rate will apply between 6:00 P. M. and 11:00 P. M. local time at your station. Rates for other hours and for shorter periods will be as follows:

LOCAL TIME AT STATION	1 Hour Network Station Rate	¾ Hour Network Station Rate	½ Hour Network Station Rate	¼ Hour Network Station Rate
DAILY EXCEPT SUNDAY:				
12:00 Mid. to 8:00 A. M.				
8:00 A. M. to 6:00 P. M.				
6:00 P. M. to 11:00 P. M.				
11:00 P. M. to 12:00 Mid.				
SUNDAY:				
12:00 Mid. to 8:00 A. M.				
8:00 A. M. to 12:00 Noon				
12:00 Noon to 6:00 P. M.				
6:00 P. M. to 11:00 P. M.				
11:00 P. M. to 12:00 Mid.				

Rates for periods longer than one hour will be in exact proportion to the corresponding one-hour rate. Commissions to agencies and discounts and rebates to advertisers will not be applied to the foregoing rates in computing the average unit hour rate for your station. It is our policy, however, to allow advertisers using a block of time, even though it be broken into half-hour and/or quarter-hour contiguous periods for the purpose of advertising separate products, the benefit of the rate applicable to the entire block of time, in which event the rate for your station for such entire block of time will be used in computing the compensation due your station.

(3) NBC reserves the right to change at any time your network station rate to advertisers from that set forth in the preceding table. In the event of such a change, the station compensation due you will be adjusted as follows:

(a) If NBC increases your network station rate to advertisers above that set forth in the preceding table, such increased rate shall be used in computing the station compensation due you on business actually sold by NBC at such increased rate.

(b) Except as provided in subsection (c) of this paragraph, if NBC decreases your network station rate to advertisers below that set forth in the preceding table, such decreased rate shall be used in computing the station compensation due you, provided NBC has given you one year's written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within ninety days after the receipt of our notice to you to so reduce your compensation.

(c) If NBC decreases your network station rate to advertisers below that set forth in the preceding table and at the same time decreases the network station rate to advertisers of a majority of all NBC network stations, such decreased rate shall be used in computing the station compensation due you, provided NBC has given you ninety days' written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within thirty days after the receipt of our notice to you to so reduce your compensation.

III. NETWORK OPTIONAL TIME

(1) Upon 28 days' notice, your station will broadcast network commercial programs for NBC during any periods requested by NBC within the hours designated below as Network Optional Time, provided, that because of your public responsibility your station may reject a network program the broadcasting of which would not be in the public interest, convenience and necessity.

Network Optional Time will be as follows:

(New York City Time)

Weekdays	Sundays
10:00 A. M. to 12:00 Noon	1:00 P. M. to 4:00 P. M.
3:00 P. M. to 6:00 P. M.	5:00 P. M. to 6:00 P. M.
7:00 P. M. to 7:30 P. M.	7:00 P. M. to 11:00 P. M.
8:00 P. M. to 11:00 P. M.	

(2) We will give you at least 28 days' advance notice of the discontinuance of any scheduled series of network commercial programs, failing which we will pay you the compensation you would have received if the series had continued for 28 days following the receipt by you of notice of discontinuance, except that you will not be entitled to compensation for any discontinued program for which we substitute another network commercial program. Nothing in this paragraph shall entitle you to compensation as a result of our changing a network program, without 28 days' advance notice, to a time in network optional time for which your station is not already committed to carry a commercial broadcast.

(3) Because of the public responsibility of the network and its Associated Stations, NBC may at any time substitute for any scheduled network program a network program which involves a special event of public importance. No compensation will be paid for the cancelled program or for the substituted program unless the substituted program is commercially sponsored, when the regular compensation will be paid for it.

IV. ANNOUNCEMENT SERVICE

(1) You agree to supply upon order from us the services of such personnel and the use of such equipment as may be necessary to broadcast, either from your station alone or from your station and to a network of stations, any announcements we may request on any network commercial program broadcast from your station, provided such order is received by you not less than 48 hours in advance of the program on which the announcement is to be made.

(2) Either simultaneously with the placing of such order by us or as soon thereafter as possible, we agree to supply you with the text of such announcements, or a recording of such announcements, together with the necessary instructions as to the time and place in our network program during which we desire such announcements to be made (either by your announcer or by means of the recording) and you agree to make such announcements in accordance with our instructions. It is understood, of course, you may refuse to broadcast any announcements the broadcasting of which would not be in the public interest, convenience and necessity.

(3) We may cancel any such order for announcements without liability on our part provided we do so upon not less than 48 hours' notice to you, failing which we will pay you the compensation you would have received if the announcements had continued as scheduled for 48 hours following receipt by you of such notice of cancellation.

(4) During a network commercial program which you have agreed to broadcast you agree not to broadcast without our consent any commercial announcements from your station.

(5) As compensation for these announcement services we agree to pay you on approximately the fifteenth day of each calendar month, for each program broadcast by you during the immediately preceding calendar month on which such announcement services are rendered by you at our request, 7½% of your hourly network station rate, applicable to the hour at your station during which such program was scheduled to start.

V. GENERAL

(1) You will submit to NBC daily reports, upon forms provided by us, of all network programs broadcast by your station and of all announcements broadcast by you under the provisions of Section IV hereof.

(2) You agree to maintain for your station such licenses, including performing right licenses, as now are, or hereafter may be, necessary for your station to broadcast the programs which we furnish to you hereunder.

(3) Neither you nor ourselves shall incur any liability hereunder

because of our failure to deliver or your failure to broadcast any or all programs due to (a) failure of facilities, (b) labor disputes, or (c) causes beyond the control of the party so failing to deliver or to broadcast.

(4) In the event that the transmitter location, power, frequency or hours or manner of operation of your station are changed at any time so that your station is less valuable to NBC as a network outlet than it is at the time this offer is accepted by you, NBC will have the right to discontinue this arrangement upon thirty days' written notice to you.

(5) You agree to keep the operation of the broadcasting equipment of your station entirely under your control for the period during which you are licensed to operate your station. You agree not to assign your station license unless such assignment is expressly made subject to this agreement.

(6) You agree not to authorize, cause, permit, or enable anything to be done whereby any program which we supply to you hereunder may be used for any purpose other than broadcasting by your station.

(7) You agree not to authorize, cause, permit, or enable anything to be done without our consent whereby a recording is made, or a recording is broadcast, of a program which has been, or is being, broadcast on NBC networks.

(8) No waiver by either of us of any breach of any provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other provision.

(9) This agreement shall be construed in accordance with the laws of the State of New York.

(10) Any arrangement with your station relates only to NBC and your station is not related to any arrangement that exists or may later be made between NBC and any other station.

(11) This agreement shall become effective at 3:00 A. M., EST, on the ..... day of ....., 194...., and it shall continue for ..... years thereafter.

If, after examination, you find that the arrangement here proposed is satisfactory to you, please indicate your acceptance on the copy of this letter enclosed for that purpose and return that copy to us.

Very sincerely yours,
NATIONAL BROADCASTING COMPANY, Inc.

By .....

Accepted this ..... day of
....., 194.....
.....
By .....

✕ *Appendix B* ✕

FORMER NBC STANDARD AFFILIATION CONTRACT

[1935 form with substantive modifications to date of hearings in 1938]

NATIONAL BROADCASTING COMPANY, INC.,
New York, N. Y., January —, 1935.

Radio Station .....

GENTLEMEN: We are proposing in this letter the following plan of network cooperation between this company and your station .....

I. NETWORK AFFILIATION AND PROGRAM SERVICE

In order that your station may continue to serve the public interest, convenience, and necessity, by broadcasting programs of a quality and character generally beyond the reach of individual stations, NBC will continue to offer your station network programs of wide variety delivered at our expense to your control board at your main studios, including musical, educational, religious, sports, public affairs, international, and special events programs. Except when due to failure of facilities, we will offer to furnish your station a minimum of ..... unit hours[1] of our network sustaining and commercial programs combined during each 28-day period, or if we fail to do so we will pay you

[1] Unit hours are computed according to the following table:

Local time	1 hour, unit-hour credit	¾ hour, unit-hour credit	½ hour, unit-hour credit	¼ hour, unit-hour credit
Weekdays:				
12:00 midnight to 8:00 A. M.	0.333	0.250	0.167	0.083
8:00 A. M. to 6:00 P. M.	.500	.375	.250	.125
6:00 P. M. to 11:00 P. M.	1.000	.750	.500	.250
11:00 P. M. to 12:00 midnight ...	.500	.375	.250	.167 .125
Sundays:				
12:00 midnight to 8:00 A. M.	.333	.250	.167	.083
8:00 A. M. to 12:00 noon	.500	.375	.250	.125
12:00 noon to 6:00 P. M.	.750	.563	.375	.188
6:00 P. M. to 11:00 P. M.	1.000	.750	.500	.250
11:00 P. M. to 12:00 midnight ...	.500	.375	.250	.125

at the hourly rate of compensation set forth later in this letter for network commercial programs at the new rate to advertisers for any time necessary to make up the difference between the service actually offered to your station and the minimum mentioned above. The network sustaining programs which we will offer to furnish are for sustaining use only and may not be sold by your station for commercial sponsorship nor used for any other purpose.

In return for the NBC network affiliation, including sustaining program service, you will waive compensation for ..... unit hours of our network commercial programs broadcast by your station during each 28-day period.

II. STATION COMPENSATION

(1) The new basis of station compensation described below and the new basis of payment by your station for NBC service, including sustaining programs, will not be put in force until the effective date of this new arrangement.

(2) Beginning February 4, 1936, we will pay you for each succeeding 28-day period, approximately 15 days after the close of such period, in accordance with the following provisions:

Your compensation for broadcasting our network commercial programs under this arrangement will be based upon an average unit hour rate computed for each 28-day period by dividing the total value at the network rate for your station of the network commercial programs broadcast from your station, by the total number of unit hours of such programs during that period.

(a) For the first 25 unit hours in excess of the 16 unit hours covering the network affiliation, NBC will pay you at the rate of 20 percent of your average unit hour rate for the 28-day period.

(b) For the next 25 unit hours, NBC will pay you at the rate of 30 percent of your average unit hour rate for the 28-day period.

(c) For all unit hours in excess of 66 unit hours, NBC will pay you at the rate of 37½ percent of your average unit hour rate for the 28-day period.

The network station rate for your station, on which its compensation will be figured as provided above, will be $..... per full evening hour. This rate will apply between 6:00 P. M. and 11:00 P. M. local time at your station. Rates for other hours and for shorter periods will be as follows:

Local time at station	1 hour, network station rate	¾ hour, network station rate	½ hour, network station rate	¼ hour, network station rate
Daily except Sunday:				
Sunday:				

Rates for periods longer than 1 hour will be in exact proportion to the corresponding 1-hour rate. Commissions to agencies and discounts and rebates to advertisers will not be applied to the foregoing rates in computing the average unit hour rate for your station. New network rates to advertisers are being announced, effective February 4, 1935. These rates to advertisers are subject to change from time to time by NBC but the rate of compensation for your station as set forth herein will not be affected by such changes.

(3) Under our policies and commitments with our network advertisers some of the network commercial programs which we will supply to your station prior to February 4, 1936, will be paid for by our network advertisers at the old rate in effect prior to February 4, 1935. Therefore, your compensation between the effective date of this letter and February 4, 1936, will be computed for each 28-day period as follows:

(*a*) The total amount of time of network commercial programs broadcast by your station will be computed in unit hours and the number of such unit hours at the old rate to advertisers and at the new rate to advertisers, respectively, will be determined.

(*b*) For all network commercial programs broadcast at the old rate to advertisers, NBC will pay your station at your station's present rate of compensation.

(*c*) For all network commercial programs broadcast at the new rate to advertisers, NBC will pay your station at the rates of compensation set forth in (a), (b), and (c) of Paragraph II–2, above, provided however, that the number of unit hours specified in each of those compensation brackets will be reduced to the proportionate number of such unit hours that the number of unit hours of network commercial programs broadcast at the new rate to advertisers bears to the total number of unit hours of network commercial programs broadcast by your station.

(*d*) Your station will pay NBC the proportionate part of $\$\ldots\ldots$, the present sustaining fee pro-rated for a 28-day period, that the number of unit hours of network commercial programs broadcast at the old rate to advertisers bears to the total number of unit hours of network commercial broadcast by your station.

(*e*) Your station will waive compensation for the proportionate part of 16 unit hours that the number of unit hours of network commercial programs broadcast at the new rate to advertisers bears to the total number of unit hours of network commercial programs broadcast by your station.

III. NETWORK OPTIONAL TIME

(a) Upon 28 days' notice, your station will broadcast network commercial programs for NBC during any periods requested by NBC

within the hours designated below as Network Optional Time, provided, that because of your public responsibility your station may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity.

Network optional time will be as follows:

(New York City Time)

WEEKDAYS	SUNDAYS
10:00 A. M. to 12:00 noon	1:00 P. M. to 4:00 P. M.
3:00 P. M. to 6:00 P. M.	5:00 P. M. to 6:00 P. M.
7:00 P. M. to 7:30 P. M.	7:00 P. M. to 11:00 P. M.
8:00 P. M. to 11:00 P. M.	

(b) You will maintain and operate the broadcasting equipment of your station in such manner as to keep pace with the broadcasting art and will keep the operation of such equipment entirely under your control.

(c) We will give you at least 28 days' advance notice of the discontinuance of any scheduled series of network commercial programs, failing which we will pay you the compensation you would have received if the series had continued for 28 days following the receipt by you of notice of discontinuance, except that you will not be entitled to compensation for any discontinued programs for which we substitute another network commercial program.

(d) Because of the public responsibility of the network and its associated stations, NBC may at any time substitute for any scheduled network program a network program which involves a special event of public interest or importance. No compensation will be paid for the cancelled program nor for the substituted program unless the substituted program is commercially sponsored, when the regular compensation will be paid for it.

IV. GENERAL

(1) You will submit to NBC daily, in writing, reports for all network programs broadcast by your station, upon forms provided by us for that purpose.

(2) You agree to maintain for your station such performing-right licenses as now are, or hereafter may be, in general use at broadcasting stations.

(3) Your failure to broadcast a scheduled network program or our failure to deliver it to you, due to failure of facilities, will subject neither of us to liability to the other.

(4) In the event that the transmitter location, power, frequency, or hours or manner of operation of your station, are changed at any time so that your station is less valuable to NBC as a network outlet than it

is at the time this offer is accepted by you, NBC will have the right to discontinue this arrangement upon 30 days' written notice to you.

(5) The effective date of this arrangement will be the ..... day of ....., 1935. It will continue until 12 months after written notice from either of us to the other, of a desire to discontinue it.

(6) If any questions arise under this arrangement they will be determined in accordance with the laws of the State of New York.

(7) A similar plan is being submitted to each of our regular associated stations, but any arrangement with your station relates only to NBC and your station and is not related to any arrangement that exists or may later be made between NBC and any other station. Existing contracts, both yours and ours, may, of course, be carried out, although we are hopeful that insofar as they deviate from the plan herein proposed, they can be brought into conformity therewith by mutual consent. It is the policy of the National Broadcasting Company, however, to place its relations with its other regular network stations on the general basis outlined in this letter as far as practicable.

If after examination you find that the arrangement here proposed is satisfactory to you, please indicate your acceptance on the copy of this letter enclosed for that purpose and return that copy to us.

Very sincerely yours,

NATIONAL BROADCASTING COMPANY, INC.

By .....

Accepted ....., 1935.

.....

By .....

SUBSTANTIVE MODIFICATIONS IN 1935 FORM OF NBC STANDARD AFFILIATION CONTRACT

PROVISIONS FOR CHANGES IN NETWORK STATION RATES

NBC reserves the right to change at any time your network station rate to advertisers from that set forth in the preceding table. In the event of such a change, the station compensation due you will be adjusted as follows:

If NBC increases your network station rate to advertisers above that set forth in the preceding table, such increased rate shall be used in computing the station compensation due you on business actually sold by NBC at such increased rate.

Except as provided in the immediately following subparagraph, if NBC decreases your network station rate to advertisers below that set forth in the preceding table, such decreased rate shall be used in computing the station compensation due you, provided

NBC has given you one year's written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within 90 days after the receipt of our notice to you to so reduce your compensation.

If NBC decreases your network station rate to advertisers below that set forth in the preceding table and at the same time decreases the network station rate to advertisers of a majority of all NBC network stations, such decreased rate shall be used in computing the station compensation due you, provided NBC has given you 90 days' written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within 30 days after the receipt of our notice to you to so reduce your compensation.

If you accept from National advertisers net payments less than those which NBC receives for the sale of your station to network advertisers for corresponding periods of time, then NBC may, at its option, reduce the network station rate for your station in like proportion, in which event the compensation due you from NBC will be likewise reduced but the right of termination provided for in the preceding paragraph shall not thereby accrue to you.

PROVISIONS FOR CUT-IN ANNOUNCEMENTS

You agree to supply upon order from us the services of an announcer in your studios for the purpose of broadcasting, either from your station alone or from your station and to a network of stations, any announcements we may request on any network commercial program broadcast from your station, provided such order is received by you not less than 48 hours in advance of the program on which the announcement is to be made.

Either simultaneously with the placing of such order by us or as soon thereafter as possible, we agree to supply you with the text of such announcements, together with the necessary instructions as to the time and place in our network program during which we desire such announcements to be made and you agree to make such announcements in accordance with our instructions. It is understood, of course, you may refuse to broadcast any announcement the broadcasting of which is not in the public interest, convenience, and necessity.

We may cancel any such order for announcements without liability on our part provided we do so upon not less than 48 hours' notice to

you, failing which we will pay you the compensation you would have received if the announcements had continued as scheduled for 48 hours following receipt by you of such notice of cancellation.

During a network commercial program which you have agreed to broadcast you agree not to broadcast without our consent any commercial announcements from your station.

As compensation for these announcing services, we agree to pay you, approximately 15 days after the close of each accounting period, for each program broadcast by you during said accounting period on which such announcing services are rendered by you at our request, 7½ percent of your hourly network station rate, applicable to the hour at your station during which such program is scheduled to start.

PROVISIONS FOR NONLIABILITY IN CERTAIN EVENTS

Neither you nor ourselves shall incur any liability hereunder because of our failure to deliver or your failure to broadcast any or all programs due to (a) failure of facilities, (b) labor disputes, or (c) causes beyond the control of the party so failing to deliver or to broadcast.

PROVISIONS FOR CONTINUATION OF CONTRACT SHOULD STATION LICENSE BE TRANSFERRED

You agree to keep the operation of the broadcasting equipment of your station entirely under your control for the period during which you are licensed to operate your station. You agree not to assign your station license unless such assignment is expressly made subject to this agreement.

PROVISIONS FOR LIQUIDATED DAMAGES

In the event you substitute a program for a network program which you are obligated to broadcast hereunder you agree to pay us as liquidated damages a sum equal to the amount by which the total monies you receive for broadcasting the substituted program during the scheduled period of said network program exceeds the monies you would have received from us had you broadcast said network program. This provision is without prejudice to any other rights which we may have under this agreement arising from your failure to broadcast any of our network programs, and shall not be deemed to give you the option to refuse to accept such a network program by making the payments specified in the foregoing sentence.

LIMITATIONS ON USE OF NETWORK PROGRAMS

You agree not to authorize, cause, permit, or enable anything to be done whereby any other station may broadcast any program which we supply to you.

You agree not to authorize, cause, permit, or enable anything to be done without our consent whereby a recording is made, or a recording is broadcast, of a program which has been, or is being, broadcast on NBC networks.

PRESERVATION OF NETWORK IDENTITY

For the purpose of eliminating confusion on the part of the radio audience as to the affiliation and identity of the various individual stations comprising radio networks, you agree not to permit the use of your station's facilities by any radio network, other than ours, with which is permanently or occasionally associated any station serving wholly or partially a city or county of 1,000,000 or more inhabitants.

✕ *Appendix C* ✕

CBS STANDARD AFFILIATION CONTRACT

AGREEMENT

Between Columbia Broadcasting System, Inc.,[1] 485 Madison Avenue, New York, New York, and

.....

licensed to operate radio station [2] at .....
full time on a frequency of .....
with a power of .....

Columbia is engaged in operating a radio broadcasting network and in furnishing programs to radio stations on the network over program transmission lines leased by Columbia or otherwise. Some of such programs, herein called "sponsored programs," are sold by Columbia for sponsorship by its client-advertisers. All nonsponsored programs are herein called "sustaining programs." The Station and Columbia recognize that the audience regularly listening to the Station will be increased, to their mutual benefit, if Columbia provides that Station with programs not otherwise locally available, including broadcasts from the scenes of national and international events, presentations of music, drama, and other entertainment from the principal centers of talent, informative, educational, and cultural broadcasts of general interest and other programs of public acceptance and value.

Accordingly, it is mutually agreed as follows:

(1) Columbia will furnish to the Station for broadcasting by the Station all available network sustaining programs without charge, and Columbia network sponsored programs for which clients may request broadcasting by the Station and which are consistent with Columbia's sales and program policies. Columbia agrees that it will make available to the Station an average of at least 60 hours per week of network sustaining and sponsored programs. Network sustaining programs made available by Columbia are for sustaining use only and may not be sold for local sponsorship or used for any other purpose without the consent of Columbia in specific instances.

(2) The Station will broadcast all network sponsored programs furnished to it by Columbia during the time when the Station is licensed to operate; provided, however, that except in connection with occa-

[1] Herein called Columbia. [2] Herein called the Station.

sional sponsored programs of special events (such as World Series broadcasts) during periods of not more than 2 weeks each, the Station need not in any week broadcast network sponsored programs totaling more than 50 "converted hours" (as defined below, but for this purpose computed during the entire term of this agreement on the basis of the differences in rates at different hours specified in Columbia's Rate Card No. 23). The Station may require Columbia to give not less than 28 days' prior notice of the commencement of sponsored programs for new accounts. Either the Station or Columbia may on special occasions substitute for 1 or more of such sponsored programs sustaining programs devoted to education, public service, or events of public interest without any obligation to make any payment on account thereof, and in the event of such substitution by either party it will notify the other by wire as soon as practicable after deciding to make such substitution. In case the Station has 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. The Station will not make commercial spot announcements in the "break" occurring in the course of a single network program or contiguous programs for the same sponsor and will, at the request of Columbia, desist from making commercial spot announcements in the "break" occurring before or after specified network programs.

(3) Columbia will pay the Station for broadcasting network-sponsored programs furnished by Columbia at the rates for "converted hours" specified in Schedule A attached hereto and hereby in all respects made a part hereof. A "converted hour" means an aggregate period of 1 hour during which there shall be broadcast over the Station one or more network-sponsored programs for which Columbia shall charge its full nighttime card rate for the Station. An aggregate period of 1 hour during which there shall be broadcast over the Station one or more network-sponsored programs for which Columbia shall charge a fraction of its nighttime card rate, such as its daytime card rate, shall be the equivalent of the same fraction of a "converted hour." Fractions of an hour shall for all purposes be treated as their fractional proportions of full hours at the same time of the day.

Payment to the Station will be made by Columbia for network-sponsored programs broadcast over the Station within 20 days following the termination of Columbia's 4- or 5-week fiscal period, as the case may be, during which such sponsored programs were broadcast.

(4) The Station will maintain and operate its facilities in accordance with the best practice in the broadcasting art and conduct of the industry and in accordance with good engineering practice, and will have

such license or other agreements as shall be necessary to entitle the Station to broadcast copyrighted material included in programs to be furnished by Columbia.

(5) If the power, frequency, time, or manner of operation of the Station is changed, resulting in a substantial lessening of the value of the Station as an outlet for Columbia network programs, Columbia may at any time thereafter terminate this agreement on at least 60 days' notice to the Station.

(6) Columbia will whenever practicable provide in advance notices of the programs to be furnished to the Station. In the event of any change of programs, Columbia will notify the Station as soon as possible and the Station will make every effort immediately to conform with the substituted programs.

(7) Neither party shall be liable to the other for claims by third parties or for failure to operate facilities or supply programs for broadcasting if such failure is due to failure of equipment or action or claims by network clients, labor disputes, or any cause or reason beyond the party's control.

(8) Columbia will continue the Station as the exclusive Columbia outlet in the city in which the Station is located and will so publicize the Station, and will not furnish its exclusive network programs to any other station in that city, except in case of public emergency. The Station will operate as the exclusive Columbia outlet in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The Station shall be free to join occasional local, state-wide or regional hook-ups to broadcast special events of public importance.

(9) The obligations under this agreement are subject to all applicable laws, rules, and regulations, present and future, especially including rules and regulations of the Federal Communications Commission.

(10) If the Station applies to the Federal Communications Commission for consent to a transfer of its license or proposes to transfer all or any of its assets without which it would be unable to perform this agreement, it will procure the agreement of the proposed transferee that, upon the consummation of the transfer, the transferee will assume and perform this agreement, unless Columbia shall waive this condition in writing.

(11) If either the Station or Columbia fails to insist upon strict performance of any of the covenants or conditions of this agreement, such failure shall not be construed as an election or as a waiver or condonation of any breach, or as a waiver or relinquishment for the future of any such covenants or conditions.

(12) Any notice hereunder shall be sent to the parties at their respective addresses hereinbefore set forth.

(13) This agreement has been made in the State of New York and shall be governed by the laws of that State applicable to contracts fully to be performed therein, and this agreement is not subject to oral modification.

(14) As of the beginning of the term hereof, this agreement takes the place of and is substituted for any and all agreements heretofore existing between the parties hereto, subject only to the fulfillment of any accrued obligations thereunder.

The term of this agreement shall begin on ..... provided, however, that this agreement may be terminated at any time prior thereto by Columbia by sending written notice to the Station at least 12 months prior to the effective date of termination specified therein.

In witness whereof, this agreement has been signed by the parties and dated the ..... day of....., 19....

COLUMBIA BROADCASTING SYSTEM, INC.

By .....

.....

By .....

SCHEDULE A

[Attached to and forming part of Agreement between Columbia Broadcasting System, Inc., and ..... This Schedule A contains provisions supplementary to said Agreement and in case of any conflict the provisions of this Schedule A shall govern]

Columbia will pay the Station for broadcasting network sponsored programs furnished by Columbia at a rate for each "converted hour" in each week to be calculated as follows:

The Station shall not be credited for the first 5 "converted hours" in each week, but for each "converted hour" per week in excess of such first 5 "converted hours" per week, the Station shall be credited with fifty dollars ($50). The Station shall in each case be credited with proportionate sums for fractions of a "converted hour."

The total of the credits in each week shall be divided by the total number of such "converted hours" in that week and the result shall be the rate payable by Columbia to the Station for each "converted hour" in that week.

Thus as the Station's facilities become increasingly desirable to network advertisers, not only will the amount of network sponsored programs offered to the Station increase, but the rate for each "converted hour" payable by Columbia to the Station will also increase.

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VITA

Thomas Porter Robinson was born at Hartford, Connecticut, February 10, 1905. He received an A.B. degree from Williams College, 1928, and an A.M. degree from Columbia University, 1932.