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No1

ISSUES IN BROADCAST REGULATION

Broadcast Education Association

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Issues In Broadcast Regulation

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PREFATORY NOTE

This publication is the first in a planned series of Broadcast Monographs that we hope will provide a new service for our members and set a new standard of performance for the Broadcast Education Association.

Since much of our activity is concentrated in publishing as many worth items as our budget allows, the BEA Publications Committee constantly searches for new and useful ways to distribute the information it assembles throughout the year. For some time, they have planned to collect in monograph form the best material available on a common subject so that it could be adequately indexed and correlated with other material to be published in the future. A series of monographs would, over the years, cover most of the principle subject areas in broadcasting, and provide a valuable supplement to the primary publications of the Association--the quarterly Journal of Broadcasting, and the Feedback newsletter.

We hope this first effort planned by the Publications committee, and edited by Dr. Don R. Le Duc, will become a valuable beginning to the BEA Broadcast Monograph series. We welcome your comments, suggestions, literary contributions, and support.

Clark Pollock, President

Broadcast Education Association

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ISSUES IN BROADCAST REGULATION

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FOREWORD

The BEA (APBE) Broadcast Regulation seminars of 1969 and 1972 featured many of the most knowledgeable and influential men in the field of communication law: FCC commissioners, key administrative officials, noted broadcast attorneys, industry leaders and scholars with a wide range of regulatory research interests. While it has been impossible to reproduce these sessions in full, "Issues in Broadcast Regulation" is an effort to offer a number of the most valuable presentations in this selective and revised collection.

After reviewing all papers and transcripts available from the two seminars, the editor attempted to select material most useful in terms of issues covered, or unique in terms of information provided, returning these works to their authors with requests for revision. Thus the final papers, while reflecting the informal, candid style of the original presentations, have generally been modified to some extent by subsequent amendment or deletion. For this reason no alterations in the original seminar texts have been noted here, since these works are not being offered as "convention papers", but as final drafts of those earlier presentations.

In several instances the omission or substantial abridgement of a study was not a reflection of editorial judgement but of events beyond editorial control. Some speakers who worked only from notes were unable to reconstruct their studies from the fragmentary tape transcripts submitted to them, while others had already committed their work to other purposes prior to our request for publication rights.

Revision of 1969 seminar material was substantially more difficult because basic FCC policies or cases relied upon by those panelists had often been overridden or modified by subsequent actions. To allow use of some classic analysis from that session without imposing an impossible burden upon those authors, each of the 1969 studies bears the notation that it is based upon the status of the law at the time it was presented.

This rich resource of broadcast regulation research is largely the result of the efforts of one man, Harold Niven, Executive Secretary of the Broadcast Education Association, who established these excellent seminars and committed himself to doing everything possible to make them successful. In addition, his staff spent many hours taping and transcribing these presentations for this publication.

My sincere thanks for the opportunity to edit this Monograph, and to all the authors who made the task such a satisfying and enjoyable one.

I would also like to thank the Department of Communication Arts, University of Wisconsin, for generous budget and secretarial support during the revision stage.

I hope you'll agree after reading through this collection that the Publication Committee of the BEA made the right decision in providing funds so these studies could be preserved and be circulated among the wider audience they seem to deserve.

Don R. Le Duc
Editor

This work is dedicated to the memory of Walter E. Emery, who opened this field of research to us all, blazing trails for those who would follow, and charting each area of law we now claim as our own. His tireless pioneering expanded the boundaries of our knowledge, but his legacy to us runs deeper than this, for through his life of devoted scholarship he has left an example of dedication to inspire the highest efforts of those of us who remain behind.

PART I

THE REGULATORY PROCESS

Most of us find "broadcast law" a far more satisfying subject to teach and research than "broadcast regulation." Law offers the academic mind a philosophical system with principles that can be abstracted and analyzed in rational fashion while regulation requires an examination of the less systematic or logical process by which such principles are interpreted and applied in individual cases. In one sense, then these two diverse approaches to the same general body of knowledge seem to parallel two view points of an impressionistic painting, the first allowing the total image to be studied from a distance while the second focuses on the particular brush strokes which have created that image.

Unfortunately, the mass communication process we describe and evaluate in our work operates in a world of regulation, with broadcasters only dimly aware of the legal principles which underlie it. Thus, to understand that world and pass that knowledge on to our students, it would seem that we must venture beyond "law appreciation" to the "techniques of regulation" inherent in the second approach. The three studies in this section each represent a real pioneering effort in this area, and while their collective effect is only to illuminate a narrow aspect of this field, they reveal the substantial value promised by future explorations of this type.

In "The Process of Broadcast Regulation," Erwin G. Krasnow, a communications attorney with the firm of Kirkland, Ellis and Rowe, visiting professor at Ohio State University and co-author of the text, The Politics of Broadcast Regulation, emphasizes the human element in governmental supervision of communications. As he points out, we too often speak of an "FCC policy" or "OTP position" when in fact we are describing the attitudes of a small group of administrators during a particular period of time.

Professor Joseph Foley, Department of Speech Communication, Ohio State University uses statistics in an effort to isolate the issues which have caused the FCC to convene public hearings in broadcast license application cases. In essence, his "Broadcast Hearing Issues" is an effort to discover possible behavioral patterns in Commission procedures which might not emerge from intensive case by case analysis.

In the final selection, "Procedures Involved in License Renewals," Robert Rawson, former Chief of Renewal and Transfer Division, FCC, and now communications attorney with the firm of Fletcher, Heald, Rowell, Kenehan & Hildreth, describes those routine adminstrative problems and their solutions which when viewed collectively over an extended period of time become the product we call "FCC policy."

These three studies raise far more questions than they can possibly answer. Where, for instance, are the critical positions of power within the FCC and other governmental bodies which influence broadcast regulatory policy; on what issues does each come into play, and what are the regulatory opinions of those presently exercising this power? How effectively does each bureau or office within the Commission structure and shape the facts which form the basis for Commission decisions? How important are constant negotiations between communication law firms and the Commission staff in setting the terms and conditions of each regulatory pronouncement issued at Commission level? To what degree do these law firms, through their interpretations of FCC legal positions, influence the conduct of their broadcast clients, and what are the general attitudes of various firms toward a number of existing and proposed regulatory policies?

This is only a fragmentary list of the questions that should be asked and answered in the years to come if we are to understand the process we are attempting to describe. In these studies is at least a suggestion of the insights such research might provide.

THE PROCESS OF BROADCAST REGULATION

Erwin G. Krasnow

If you're teaching a course on how the FCC really operates, it would be misleading to focus only on the seven FCC Commissioners. You have to look at the role of other participants in the FCC policy-making process. There is a tendency to look at the various institutional participants as monolithic or unchanging entities, rather than groups of human beings operating in various structured roles. Lee Loevinger has said that there's no such thing as government regulation; there's only regulation by government officials...by people. Looking at governmental institutions only in abstract terms distorts the realities of the process of regulation. In this connection, I have passed out a "Name the Governmental Players Questionnaire."[1] The names and backgrounds of each of the institutional participants are of more than passing significance; these are the individuals who are the flesh and blood participants in the FCC policy-making process. And in recent years, the line-up of institutional participants has changed somewhat.

Office of Telecommunications Policy. OTP, headed by Dr. Whitehead, is an important new participant. In a sense, OTP is a brand new institution. For the first time, the President has a formal grouping in the White House which expresses the point of view of the Administration and exerts pressure to effect change at the FCC. In previous years, the institutional power of the President was much more amorphous. Prior to the creation of OTP, Presidents called upon the Director of Telecommunications Management in the Office of Emergency Preparedness and various assistants in the White House to work with the FCC and the Congress on communications issues. But, since April of 1970, the Executive Branch has had the Office of Telecommunications Policy, which has a three million dollar budget and a talented team of economists and researchers.

Has OTP had a significant impact? I think there's an easy answer to that question: yes. It has had a significant impact on the domestic satellite question. OTP played a key role in the forging of a compromise agreement on cable; Dr. Whitehead was instrumental in getting the cable, broadcasting, and copyright industries together to adopt the consensus agreement which led to the Commission's Cable Television Report and Order in February of 1972. De-regulation, or re-regulation, as Commissioner Wiley prefers calling it, was initiated by the Office of Telecommunications Policy. OTP prepared position papers on de-regulation and, as a result of their publicizing the idea, the FCC was forced to react (and perhaps wanted to react) by creating their own task force.

Using speeches, press releases, and formal filings with the FCC, Dr. Whitehead started a dialogue on the Fairness Doctrine, which subsequently led to the Commission's Notice of Inquiry on Fairness and panel discussions on this subject. OTP helped to design a new Civil Defense or Emergency Broadcast System.

Now that's in the past. In the future, OTP will probably play an important role in cable. In this connection, Dr. Whitehead holds another hat. He's head of the President's Task Force on Cable Television. Their report isn't out yet.[2] Another area that OTP probably will take an active role in is land-mobile radio. If you read the trade press, you know that OTP and President Nixon have expressed concern about network re-runs and will be active in that area. And, if there are going to be hearings on license renewal bills next year (as the NAB tells us), you can be sure that OTP will testify in support of some legislation that will give--the code word is "stability"--to broadcasters at license renewal time.

1. See Appendix A.
2. Subsequently released. See "Reaction Mixed as Whitehead Pries Loose Cable Report." Broadcasting, Jan. 21, 1974, pp. 32-37.

Office of Management and Budget. The next participant--it sounds very esoteric--is the Office of Management and Budget, the old Bureau of the Budget. OMB does a lot more than review FCC budget requests prior to their submission to Congress, although that's a very important function, so important that Senator Metcalf held hearings on a bill to take that power away from OMB. (Under the Metcalf bill, the FCC would bypass OMB and submit its budget request directly to Congress.)

OMB gets involved in a lot of different areas that most people aren't aware of. The FCC has to go to OMB for clearance on legislative proposals. For example, the most recent legislative proposal coming out of the FCC--and there aren't very many--is a bill to increase fines from $10,000 to $20,000 and to amend the Communications Act to allow the FCC, for the first time, to fine cable systems. Well, before the FCC could obtain a congressional sponsor of that bill, they had to receive OMB approval. The OMB reviews all forms that are sent out to broadcast licensees, CATV operators, common carriers, etc. Parts of Barry Cole's renewal package will have to go through OMB. (Perhaps Barry can give you some first-hand insight on working with OMB and industry advisory committees at OMB. It's a world unto itself.)

OMB in the coming year, in addition to reviewing renewal forms (if the Commission ever acts on that package) may be acting on proposed changes in FCC Form 395, the Annual Employment Report. According to a source in Commissioner Hook's office, the Commission wants to make changes in the reporting of minorities and female employees on that particular form. Such changes would have to be approved by OMB before the FCC could send a revised form to licensees.

The FCC has about a 31 million dollar budget. OMB in 1971 impounded over a million dollars of the FCC's budget, forcing he Commission to negotiate with the White House for the release of the funds. First, the FCC got a release of about $600,000 to conduct monitoring studies. With respect to the over $400,000 remaining, the FCC was successful in using some of that money for phase II of the AT&T rate investigation.

OMB, lastly, works in another area that has an impact on the regulatory process, although it seems very remote. And that is assisting the FCC in developing a sophisticated systems approach in the processing of applications. Dean Burch complained recently that the FCC has to process 850,000 applications a year. OMB assigned a top-level task force to come up with a master plan for reorganizing the FCC and speeding up the flow of paperwork at the Commission. The most controversial part of the OMB plan is the proposed reorganization of the Chairman's office. Under the OMB plan, the office of the Chairman would have a much stronger role in establishing priorities and controlling the ebb and flow of the application process.

The Solicitor General. The Solicitor General of the Justice Department plays a very important role. It's a role that's not very visible to most people. He decides what cases the government should appeal. Now this power has crucial significance. Let's take the Citizens Communication Center case where the Court of Appeals struck down the Policy Statement on Comparative Renewal Hearings. Well, the Solicitor General made the decision on whether the government would appeal that case. He decided not to. Another case, BEM--Business Executives' Move for a Vietnam Peace--the Solicitor General decided to file an appeal. And, by the way, BEM, which should be a very important case when it is decided by the Supreme Court, is going to be argued on October 15.

The Solicitor General also selects those cases where the government will

litigate against the FCC. Now the classic example of the government going against the FCC is a case that is titled "United States v. Federal Communications Commission." That was the appeal by the Justice Department of the FCC's approval of the ABC-ITT merger. This past spring, the Justice Department intervened in a Court of Appeals case against the FCC concerning reimbursement of expenses by KTAL-TV, Texarkana, Texas. I think the Justice Department's intervention in that case had an impact on the Court's decision. The Court basically agreed with the citizen's group and the Justice Department that the FCC erred in refusing to allow the Texas television station to reimburse the legal fees of community groups who challenged the station's renewal application, and the Court remanded the case to the Commission to come out with a decision more in line with the Court's thinking.

Antitrust Division. Another active participant, I think surprisingly successful, is the Antitrust Division of the Department of Justice. Why do I say "surprisingly successful"? Let's take the one-to-a-market proceeding and other multiple ownership proceedings. Many people predicted that it was very unlikely that the FCC has prohibited local cross-ownership of radio and television stations--partly because of the Justice Department's intervention in that proceeding. The FCC has also agreed with the Antitrust Division by imposing an outright ban on CATV-TV local cross-ownership. (The FCC has not yet acted on petitions filed over two years ago requesting reconsideration of that rule.)

The Justice Department turned around the one-to-a-market proceeding, Docket 18110, to include the issue of newspaper ownership of broadcast stations. As a result of the Antitrust Division's filing, other parties felt compelled to focus on the issue of newspaper ownership. The Antitrust Division has also been very active in FCC proceedings involving interconnection, specialized common carriers, and domestic satellites. The Antitrust Division has been very effective in filing ad hoc protests against renewal and assignment applications. Cheyenne, Wyoming, and Beamount, Texas, are instances where the Antitrust Division has filed petitions, and has been instrumental either in discouraging the parties from going any further or getting the FCC to designate the matter for hearing.

To get the story complete, the Antitrust Division isn't always successful. They were unsuccessful a few months ago in a small community, Festus, Missouri, where the Antitrust Division objected to the application of a local newspaper to buy the only radio station in town. The FCC disagreed with the Antitrust Division in that case.

But that's the past. What about the future? I think we can look for greater activity by the Antitrust Division in cable. The Antitrust Division is not only looking at ownership questions, but they are now getting into the questions of distant signals, access, and pay cable. They're concerned about the competitive aspects of cable television operations.

I think we can look for continuing activity by the Antitrust Division on prime time access. This is in addition to the Justice Department suit against the networks that was filed at the time of the NAB convention last year. We can look for some more ad hoc petitions on acquisition. Especially because the whole multiple ownership question is one that is not resolved--as I mentioned, petitions for reconsideration are still pending before the Commission on local cross-ownership of cable and television, and there is still pending Docket 18110, the one-to-a-market proceeding--I would expect the Antitrust Division to keep very active in that area.

Court of Appeals. Now, let's look at the next participant in this line-up, and that's the United States Court of Appeals for the District of Columbia Circuit,

which Broadcasting magazine has referred to as "broadcasting's pre-emptive court." For a flurry of cases, it has been an activist court. The WHDH and the Citizens Communications Center cases are examples. 1971 was an activist year. That was the year of BEM, Friends of the Earth, and the CBS case that involved the Fairness Doctrine and political questions. And it was also the year that the Court of Appeals was remanding program format change cases to the FCC.

This past year was a year of equilibrium on the Court. There were a lot of affirmances in 1973: WAIT Radio in Chicago, the Chuck Stone-WMAL case, the Dorothy Healy case. As we look back, it seems that the Court is not as activist as it was in 1971. The equilibrium may be just a coincidence. The Court necessarily waits for cases to come to it. It doesn't say, "Ah, there's a decision of the FCC that we would like to review." The judges wait for citizens groups, stations, the Justice Department, and others to bring cases to them. And so it's fortuitous as to what cases they do get. The Moline decision, a comparative hearing case mentioned earlier, would have presented some difficult questions for the Court of Appeals. But that case was settled. So the Court of Appeals never had a chance to speak on it.

What do we look for in the future as far as court action? Well, I mentioned that on October 15 oral argument will be held in the Supreme Court on BEM. On October 24 there will be oral argument on the drug lyrics case, Yale Broadcasting. Both cases raise difficult First Amendment issues. Also, there was a recent decision involving Carl McIntire's station where the Court of Appeals upheld the FCC. We hear that the attorneys for Carl McIntire will ask for a rehearing of the full Court of Appeals.[3] There are a number of cases coming up involving renewal applications. And WMAL guidelines, I think, are just interim guidelines. Other cases may present tougher questions on license renewal standards.

Just let me interject one thought about the Court of Appeals' affirmance of the Commission's WMAL decision. Since I was among those who predicted that the WMAL case was going to be reversed, I have to find some justification, some rationale, as to why the Court affirmed. In my opinion, if WMAL were a television station in Wisconsin or out on the West Coast, the Court might have reached a different decision. And my theory is that here's a District of Columbia television station which the District of Columbia judges watch. And if you've watched WMAL in the last few years, you can see a tremendous--I won't say improvement--but a tremendous amount of local public affairs programming, of black programming. And I can't help but think that the Court was influenced by the good job that WMAL has been doing and that factor somehow entered into its decision of saying, "No, we don't think this is the right case for the FCC to hold a hearing on."

Congress. I'll give the last participant only brief attention and refer you to an article I'm writing which is going to provide a detailed analysis of what the Ninety-Second Congress has done in the area of legislation, hearings, investigations, and reports.[4] I think you'll find that the Congress does a lot more than you would think. Members of Congress exert a direct impact on the FCC in a wide variety of ways, including enacting legislation (the Federal Election Campaign Act), holding the purse strings (the appropriations process), confirming FCC Commissioners and judges, scheduling hearings on special subjects, or issuing press releases, such as Senator Harris's holding a press conference to complain about the FCC's interim

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3. In each case the initial FCC decision was ultimately upheld.
4. See Krasnow, "Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission," Harvard Journal on Legislation, Vol. 10, No. 2, February, 1973; and reprinted in Federal Communications Bar Journal, Vol. 26, No. 2, 1973.

decision to drop phase II of the AT&T investigation. And this article will show that there are over 25 committees and subcommittees of the Congress that have held hearings during the Ninety-Second Congress on subjects related to the FCC's jurisdiction.

I would like to focus now on what the Congress has not done. There are three areas in which Congress did not act that perhaps are of greater significance than the areas where action was taken. Congress enacted no cable or copyright legislation, even though the FCC has been begging for legislative guidance for years. Chief Justice Burger in Midwest Video Corp., the program origination case, said, "The almost explosive development of CATV suggests the need for comprehensive reexamination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the court." Well, despite the pleas of the Supreme Court, the cable industries and the FCC, Congress did not enact any cable legislation and, since 1909, hasn't enacted any new copyright legislation.

The second area of significant congressional non-action involves the First Amendment rights of journalists. The subject was debated in the House, which refused to cite Dr. Frank Stanton for contempt for the failure of CBS to provide outtakes or unused film clips involving a documentary, "The Selling of the Pentagon." And I think the question of the extent to which the work product of journalists should be kept confidential will probably be coming up again in a different form in the next Congress. It's an area that the House Investigation Subcommittee has assigned staff people to investigate fulltime. And surely by 1973, there will be something that will be similar to the "Selling of the Pentagon" controversy or the intimidation of journalists, which will force Congress to focus on that issue.

A third important area where the Congress did not act is license renewal legislation, despite the introduction of bills on renewal procedures by over 200 members of Congress and despite Judge MacKinnen's dissenting opinion in the Citizens Communications Center case where he pointed out that the FCC's policy statement on comparative renewal hearings would only be lawful if Congress amended the Communications Act.

That points to areas for next year and the Ninety-Third Congress. I think we can look for congressional action on the most poorly written federal statue that one would ever want to read, the Federal Election Campaign Act. The Act contains contradictory provisions within the same sentence and is an impossible document to fathom. Perhaps it was really designed to give lawyers work trying to answer questions! The whole area of election reform will be up for reconsideration, and Congress has an obligation to patch the Act up. Another area will be license renewals, and that's going to be very, very interesting to see how Congress reacts to broadcasters' concerns--and I think they're legitimate concerns--and to citizens groups' concerns about the renewal process and the standards in comparative renewal hearings. And we can look forward next year to continuous fights between Congress and the White House about the Corporation for Public Broadcasting.

BROADCAST HEARING ISSUES

Joseph M. Foley

When the Federal Communication Commission receives applications which require more than routine processing, it holds public hearings to gather evidence on selected aspects of the applications. These hearings are conducted by FCC Hearing Examiners and typically are attended only by attorneys for the Commission and for the stations involved. These hearings are the Commission's most important way of inquiring into the practices of its licensees. The issues on which these hearings are held illustrate the amount of emphasis the Commission gives to various aspects of broadcasting.

Some applications are designated for hearing because they raise particular problems; other applications automatically scheduled for hearings. Most of the hearings investigate the relative merits of competing applications for the same frequency, or investigate the merits of applications whose signal areas overlap.

Prior to each hearing, the Commission publishes a list of the issues on which it will gather evidence in the Federal Register. These issues determine the course of the hearings by defining the topics on which evidence will be collected. Examining the issues raised over a period of time shows the types of problems which the Commission finds in applications. Some of these problems arise from conflicts between applications; others are under the control of the applicant and could have been avoided, if the applicant had been more careful in his practices. A survey of the issues designated for hearing provides a list of the kinds of difficulties which are commonly experienced by broadcasters in their dealings with the FCC.

Methodology

This survey is based on an analysis of all FCC broadcast hearing notices published in the Federal Register in 1971. In each hearing notice the Commission states a brief background for the case, evaluates potential hearing issues, and finally lists the issues on which evidence will be gathered in the hearing. These issues were categorized into the general classifications discussed below. The tabulations report the number of notices mentioning each type of issue.

A total of 104 notices specifying issues for broadcast hearings were published in 1971. These notices applied to applications for AM, FM, and television frequencies. They included new applications for unused frequencies, competing applications for existing frequencies, and occasionally investigations of individual stations which apparently had committed substantial violations of the Commission's rules.

Each type of issue in each notice was tabulated. Issues were counted once for each notice in which they were listed. If a single issue was specified for a number of applicants in a single notice, that issue was counted only once. For example, if a financial qualification issue were specified for each of several applicants for a contested frequency, it would be tallied as one issue. If the issue were specified in several different notices, it would be tallied for each notice in which it appeared.

Results

The hearing issues can be classified best by identifying two broad categories: summary issues, and specific issues. The summary issues are broadly framed and provide the basis for making a decision on the merits of the application. The specific issues are drawn much more narrowly and relate to particular parts of the application or to some aspect of the applicant's previous behavior.

Summary Issues

Most of the summary issues related to the conclusions to be drawn from the evidence gathered in the discussions of the specific issues. Typically these issues describe the basis for the judgement which must be made in granting or denying the application. The two examples below are typical issues of this type.

> To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.[1]

> To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether the applicant herein has exercised reasonable licensee responsibility in the management of the station and possesses the requisite qualifications to continue to be a licensee of the Commission.[2]

The 1971 hearing notices specified 140 summary issues.

Specific Issues

The vast majority of the issues specified in the notices were specific issues. These issues dealt with the details of the proposal made in the application, with the applicant's past record of service. In hearings on competing applications, the same issues often are identified for each of the applicants, however there are usually also some additional unique issues for each applicant. Competing applicants frequently seek to have issues which will be damaging to their opposition added to the hearings. The reasons for including or rejecting each issue proposed for a particular hearing are stated in the notice published in the Federal Register. The issues discussed below are the issues which were actually added to the hearings; they do not include the many additional issues which applicants requested be included in the hearings.

Table 1 classifies the specific issues into five general categories. The numbers indicate the number of notices specifying each issue. The percentages are based on the total of 247 specific issues designated in the hearing notices.

Table 1: Major Specific Hearing Issues

Category	N	Percent	
Technical Issues			
Projected coverage area and interference	40	16.2%	
Past violations of rules	13	5.3	
Transmitter site	7	2.8	
Tower a potential hazard	6	2.4	
Change of studio location	3	1.2	
Other technical issues	9	3.6	
Subtotal		78	31.6%
Financial Issues			
Availability of funds for proposal	31	12.5	
Basis for cost estimates	15	6.1	
Misrepresentation in filings	9	3.6	
Advertising charges	4	1.6	
Changes in investors or principals	3	1.2	
Other financial issues	6	2.4	
Subtotal		68	27.5
Programming Issues			
Ascertainment and proposals to meet needs	24	9.7	
Local service	12	4.9	
Contests	6	2.4	
Advertising practices	4	1.6	
Other programming issues	2	0.8	
Subtotal		48	19.4
General Business Issues			
Violations at other broadcast properties	10	4.0	
Non-broadcast activities	6	2.4	
Subtotal		16	6.5
Procedural Issues			
Failure to file complete and accurate information	24	9.7	
Failure to follow Commission processes	13	5.3	
Subtotal		37	15.0
TOTAL		247	100.0

Most of the Commission's emphasis was on the technical feasibility of the proposals and on the applicant's ability to finance the proposal. Much less emphasis was given to issues related to programming. The discussion below reviews the issues in each category.

Technical Issues

These issues deal with the engineering aspects of the applicant's proposal. Most of the emphasis is on whether the signal strength will be adequate to cover the proposed area, and on whether the signal will interfere with other stations. Some applicants found themselves in difficulty because they had a history of violations. Most of the violations cited in the issues dealt with failure to have a qualified operator on duty, failure to keep the tower lighted, or failure to make the required meter readings.

The issue of the possible hazards posed by an applicant's tower was frequently introduced at the request of competing applicants. The concern was whether the tower would be a hazard to airplanes. The issues dealing with the transmitter site questioned the general suitability of the terrain and the actual availability of the site for construction.

Throughout the notices, there were many instances of issues which were added because of applicant errors in preparing filings. One of the most extreme examples of this was a hearing which inquired into the accuracy of the tower location identified in maps and aerial photographs. Either the applicant was very careless in preparing his application, or he did not want the Commission to know the actual location of his tower.

Financial Issues

In these issues the hearings investigated the applicant's financial ability to complete the proposal. Typically these issues were very detailed, inquiring into the availability and terms of particular loans, or ascertaining the extent to which the backers listed were willing to support the proposal. Many of these issues appeared to have been introduced by competing applicants who had conducted their own investigation of the resources cited in the application.

At times, the hearings would also investigate the accuracy and reasonableness of the cost estimates on which the proposal was based. These issues often were very specific--inquiring into the costs of various pieces of equipment, or into the extent to which the applicant had included reasonable salary and overhead expenses in his proposal. For applicants with limited resources, and increase in their cost estimate could lead to a finding that they were not financially qualified.

Among the most serious issues specified in the notices were the issues dealing with misrepresentations in filings with the Commission and with unreported changes in the investors or principals for the proposal. At times broadcasters found themselves faced with a host of such issues related to their current application, to their previous dealings with the Commission, or to both. An extreme example is found in the issues listed below, which are all concerned with same applicant:

> To determine whether _____ misrepresented his financial condition to the Commission in connection with his earlier proposal ....
>
> To determine whether the financial condition of _____ was further misrepresented in his notarized statement of ....
>
> To determine the reason for the discrepancies between the balance sheets submitted on two different dates.
>
> To determine whether _____ misrepresented security interests ....[3]

The issues dealing with advertising practices investigated double billing and the use of allegedly discriminatory rate practices.

Programming Issues

The issues related to the programming aspects of the proposals were raised much less frequently than the issues dealing with the technical and financial areas. Most of the programming issues were phrased as a standard issue exploring the ascertainment conducted by the applicant:

> To determine the efforts made by _____ to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.[4]

The local service issues dealt with whether the applicant would provide a service to his community of license and whether he would provide service to all the significant groups of his community. The following examples are from a notice for an applicant who apparently had a questionable record of service.

> To determine whether Applicant has followed a racially discriminatory policy in its overall programming, thereby failing to serve the substantial black community in its service area.
>
> To determine whether the Applicant has failed to serve the needs and interests of its community of license with respect to its policy of suppressing news coverage of local events.
>
> To determine whether Applicant has complied with the Fairness Doctrine by affording a reasonable opportunity for the discussion of conflicting views on controversial issues of public importance to its community.
>
> To determine whether Applicant has afforded reasonable opportunity for the use of its broadcasting facilities by the significant groups comprising the community of its service area.[5]

Although these issues probe to the heart of the broadcaster's past service,

it is important to note that they were usually only a small proportion of the issues designated for any hearing.

The issues relating to contests typically investigated whether a contest had been conducted or promoted in a misleading manner. The advertising practices issues related to the possible influence of economic pressures in determing whether a station would or would not carry advertising on a sensitive area. Often these cases were based on various labor union advertisements.

General Business Issues

These issues investigated other business dealings of the applicant. Nearly all of them looked into the facts surrounding violations of Commission rules, at an applicant's other broadcast properties, or at alleged legal violations of an applicant's non-broadcast businesses.

Procedural Issues

Theses issues related to the applicant's past history of dealings with the Commission. Usually these issues referred to inadequacies in a specific filing. However, at times, the statement of the issue suggests some Commission staff annoyance with the applicant.

> To determine the facts and circumstances surrounding the applicant's failure to file timely Commission reports and applications, and to respond to official Commission correspondence ....[6]

> To determine whether _____ made any misrepresentations to the Commission or was lacking in candor in connection with his responses to the Commission.[7]

Occassionally, the phrasing of these issues becomes much stronger, implying that the Commission staff has had continuing problems with an applicant.

> To determine whether, in light of the evidence adduced ... the applicant herein, in operation of his station, engaged in conduct which reflected suc negligence, carelessness, ineptness, or disregard of the Commission's processes that the Commission cannot rely upon the applicant to fulfil the duties and responsibilities of a licensee.[8]

Importance of the Issues Designated

The issues designated in these hearing notices provide an accurate indication of the concerns of the Commission. Since the majority of the issues deal with the technical or financial aspects of the applications, it is reasonable to conclude that the Commission is more interested in these areas than it is in the programming aspects of the proposals. This is probably because the inadequacies of the technical and financial areas are frequently more glaring than the inadequacies of the programming areas.

There are two ways to interpret this emphasis. It may be that these are the areas in which the broadcasters have the most difficulty staying within the Commission's guidelines. This would suggest that there are relatively few problems in the programming area. An alternative explanation, which I think is more reasonable, is that the Commission and the station lawyers have come to place more emphasis on the technical and economic portions of the applications. I suspect that if the application forms required programming proposals to be as specific as the technical and financial arrangements, there would be far more issues related to programming proposals. In the process of the hearings, everyone may be more comfortable with issues which can be related to clear-cut evidence.

The general tone of the notices indicates that the worst error a broadcaster can commit is to fail to file complete and accurate information with the Commission. Each time words such as "misrepresentation" are used in specifying issues at a hearing, it appears the applicant will have a difficult task to assure the Commission that his request should be granted.

Notes

[1]E. g. 36 FR 639.

[2]E. g. 36 FR 23094.

[3]36 FR 1291.

[4]36 FR 5815.

[5]36 FR 4910.

[6]36 FR 8272.

[7]36 FR 14348.

[8]36 FR 7552.

PROCEDURES INVOLVED IN LICENSE RENEWAL

Robert Rawson

Most of the problems we have with broadcasters are of their own making in the sense that when they file their renewal application, they are careless. They fail to answer questions properly. Sometimes they don't even answer questions. If the question is a three-part question, they may only give us the answer to two parts or maybe one part.

They submit to us, as you know, a composite record for three years, and this not only includes their programming logs, but also their transmittal logs that are kept on a daily basis. Our examination of those transmittal logs--in 25 or 30% of the applications--demonstrates that there is something wrong with the station operation.

Now, if they wanted to pay attention to what were the transmittal readings on these logs, they could discover their problems long before we discover them, and they could probably cure them; but unfortunately, it doesn't often happen. The result is delay, and of course, it is one of our most substantial reasons for the backlog in broadcaster renewal applications. This is primarily in the standard broadcast field. It doesn't occur in television, or very often in the FM services.

In processing these renewal applications, we go back and pick up the prior renewal application. In other words, if it is a '69 renewal, we pick up the renewal which we considered and processed in '66. We go over that carefully and we compare that with the application that was filed in '69. We do this, and if we find any discrepancies we raise these issues with the licensee, seeking their explanation for these discrepancies.

This not only applies to the programming field, but also to representations concerning the commercial matter that they propose to broadcast in that last renewal application. This has not been much of a source of delay. We get our letters of inquiry out as soon as possible and licensees generally answer this type of letter rapidly so we can settle the situation before the renewal period.

In connection with the renewals we also read every word that is submitted with respect to questions 1-a, -b, and -c of the program form which is the ascertainment of community needs. This is gone over very carefully, and it has been quite a source of difficulty for the staff. As a matter of fact, this probably takes the major part of our processing time; and also we write probably as many letters in connection to the answer to this question as we do with any other part of the application including engineering. It just about equals the engineering problems we have had.

The difficulty seems to be a lack of understanding on the part of the licensee, which I think is primarily a reflection of an unwillingness, on the part of some licensees, to do what the commission has suggested they should do. This, strangely enough, is not a major cause of the delay of the renewal because here, again, we screen these particular surveys immediately, and if the problem cases are set aside, we may wind up with 40 or 50 or 60 cases. Then a group of us will sit down and go over the problem cases, and we will screen them some more and send out form letters. Most of the time licensees make a further survey of their needs, and they submit these promptly, so we are able to grant the renewal application within the prescribed time.

This 1969 study has been selected for publication because it provides a unique view of specific FCC staff procedures during the time the author served as a Commission administrator. It is not offered as a totally accurate description of similar agency procedures today.

In response to a question on programming percentages acceptable under present Commission standards, it seems to me that, to begin with, the judgment in this area initially is the responsibility of the licensee. He has the responsibility to program and to broadcast program what he believes meets the problems in his area, public affairs programming, maybe some religious programming. He has to make the judgment of what he believes in good faith his audience wants and should have. He will be carrying news, unquestionably and he will be carrying some programming in the public affairs field. Whether it amounts to one percent or more, I suppose depends on his judgment. He will probably, in some instances be carrying "other" programming which consists of religion, education and agriculture; those are the three categories under "other."

Now, most licensees will get about, say a total 4 or 5% figure. Of course, when you are dealing in percentages you are dealing in quantity, but not necessarily quality. We look towards what the licensee said he was going to do, whether this is apparently a good faith effort on his part; and we will come in to see whether he fulfilled this on his current renewal application. We have no specific percentage requirement. We do have Commissioner Cox, who has a very strong feeling that a station should carry 5% news, 1% public affairs, 4% "other," that this is the minimum amount--the minimum amount that any licensee should carry in order to fulfill his responsibilities to his public.

Commissioner Cox combines the 1% public affairs and 4% of "other" to see if it reaches (with news) the 10% figure he finds acceptible. Now the majority of the Commission has never bought that position, but we do send to Commissioner Cox each renewal period, a list of those stations, with the call letters, who do not meet these standards; and of course, he automatically issues a dissent. He and Commissioner Johnson, automatically dissent, but the Commission staff, in considering these matters, doesn't weigh them in that fashion. We try and determine to look more for quality, and even that is difficult because there is no way you can determine quality by looking at program blocks.

QUESTION: What percentage of renewal are granted by the staff in a routine fashion:

Well, as long as you define what you mean by "routine fashion" as a "delegated grant," I will accept that. But, I want you to know that there is no such thing as a routine grant of a renewal because these renewals are processed very, very carefully, and we may have resolved some very difficult problems at the staff level with the licensee, and after, we have been satisfied--then, I may grant these by delegation. The only cases that we bring to the Commission would be those that raise serious policy questions that may involve questions in violation of the rules, where we think that a one-year renewal is warranted, or a forfeiture is warranted, or we want to designate on for hearing. All we can do is attempt to use good judgment in deciding what I think the Commissioner would want to know about. Now, this not only is true in the renewal field, but it is even more so in the transfer field because in the transfer field there are many cases that I have sent to the Commission that I could normally act on under my delegated powers. But I just feel that there has been such a change going on here that its in my own self-interest to be extra careful, so I make sure that I bend over backwards and send those up to the Commission.

Part II

THE BROADCAST LICENSE: CHALLENGE AND RENEWAL

The broadcast license forms the primary building block for the entire broadcast regulatory structure. It is the granting of this privilege to certain select applicants that justifies the FCC's unique supervisory role in this area of communication and the process by which such privilege is granted or withdrawn which provides the basis for exercising this power.

"The airwaves belong to the public" may be an edifying declaration, but it is not a particularly enlightening description of the actual legal relationship existing between broadcasters and audiences. It is true that the public holds ultimate title to a broadcast spectrum "trust" imposed by law and managed in its name, but it is the broadcaster who is the immediate beneficiary of this trust arrangement, and the FCC which bestows or withholds the right to profit from its use.

If a broadcast license can be revoked at the slightest sign of public displeasure, broadcasters will tend to be subservient to the demands of every pressure group. Yet, if a broadcast license is virtually a perpetual grant, broadcasters will tend to be insensitive to the legitimate needs of the public. Given the cumbersome nature of administrative proceedings and the difficulty of accurately assessing the various interests of the public, can some standards be established to protect the basic integrity of each broadcaster while safeguarding the rights of each audience to receive programming best suited to its needs?

There can be no easy answers to a question this complex, and yet the quality of the values invested in and drawn from the public's airwaves is and will continue to be strongly affected by the quality of the process selecting those who will discharge this trust. In the first selection of this section, Lawrence W. Lichty, a professor in the Department of Communication Arts, University of Wisconsin, contends that the present license renewal system is little more than a ritualistic ceremony to sanctify the perpetual nature of the grant. Lichty maintains that existing procedures do not have the capacity to evaluate the performance of the broadcaster accurately, and thus simply re-affirm the status quo.

On the other hand, Howard Roycraft, communications attorney with the firm of Hogan and Hartson, argues that in the WMAL case, in which he represented the defendant station, the status quo deserved to be maintained because his client had established an enviable record prior to challenge in the area of minority programming and hiring practices.

Professors Robert Smith and Paul Prince of Boston University explore another aspect of this question often ignored by legal commentators, the quality of broadcast service emerging in the aftermath of a famous judicial decision, in this case the WHDH decision which resulted in new ownership and management taking over an existing television channel. Often in the heat of battle the question of "who won" obscures the fundamental issue of what the public gained or lost by the victory or defeat, and this selection attempts to put that broader issue in proper perspective.

"Public interest" is an ephemeral phrase, but Thomas Bolger, station manager of WMTV, Madison, Wisconsin, describes some of the techniques his station employed in the late 1960s to try to give the term clearer meaning. Dr. Herschel Shosteck, head of the broadcast research firm in Silver Spring, Maryland, then offers a broader analysis of methods for determining and meeting audience needs.

In the final selection, Barry Cole, adjunct professor at the University of Indiana and consultant to the FCC, discusses programs, policies and procedures the Commission has considered and is considering to make its license renewal process more effective. Perhaps there is no way to allocate a scarce resource equitably among competing claimants, but the quest goes on.

THE MYTHS OF BROADCAST LICENSE RENEWAL: AN ESSAY IN OUTLINE

Lawrence W. Lichty

We often are more comfortable with myth than with reality. The myths of the regulation of broadcasting are only a small part of the general ideology of our country. The broadcasting business and broadcast regulation operates within these larger ideologies of American society.

1) The individual and individualism is all important. We have given our consent to be governed with equality and by contract. Thus, legal, social and moral contracts protect the rights of the individual.

2) The right to individualism is protected by the right to private property.

3) Use of property--body and estate--is best controlled in the free market place by competition.

4) Individual choice is best protected by the limited role of the state. This is accomplished by keeping government diffused, weak, and without planning--that is checked and balanced.

5) From the idea of scientific specialization, we are convinced that if we study, or care for, the parts of anything, the whole will take care of itself.

This analysis is not mine but by Professor George C. Lodge of the Harvard School of Business.[1] It is not important to present his argument and proof here, but rather to understand that such ideology is used both to defend or challenge the existing order. There are, of course, other ideologies--"material growth," "the frontiersman," and "Horatio Alger," that lead to a myth of "progress."

Government By Interest Group

Within this larger framework, American government seems most often to function by trying to resolve the demands of various interest (pressure?) groups. The government's job is to respond to "their cause, be it subsidies, protection, regulation and control"--as Professor Lodge puts it.

A recent and most fitting example is found in the Burch/Whitehead compromise hammered out among the cable industry, broadcasters and copyright (really programming) owners.[2]

As Commissioner Charlotte T. Reid stated:

> While I do not find myself in complete accord with each and every item set forth in the new Rules, the fact that these rules reflect the consensus agreement reached by the principal parties (cable television system owners, broadcasters and copyright owners) are far better than no rules at all. It, therefore, seems clearly in the public interest to give implementation to the compromise agreement and for that reason, I concur with the results of the Commission's action.[3]

If interest groups do not get their way with the FCC, there is Congress. Saying that Congress was not likely to get into the broadcaster-cable conflict, FCC Chairman Dean Burch noted "most Congressmen have friends in the cable-TV industry and among over-the-air broadcasters."[4]

MYTH AND REALITY

The Licensee is "Responsible"

In fact, the licensee is actually responsible for such a small part of its programming that there is no responsibility at all. Networks, program packagers, news services, phonograph companies, and many others really control programming.

Most licensees are investors, not owners/operators. Few stations, especially not those serving the largest audiences, even have an identifiable "owner."[5]

Responsibility is so diffuse that the buck stops nowhere. This is the nature of all bureaucracies and mass communications requires formal organization, specialized jobs and roles, and large amounts of capital.

"Promise vs. Performance"

At renewal time, the FCC virtually never compares a station's past performance with its promises.

No station has ever had its license denied or revoked solely because it did not fulfill its programming promises.[6]

Only very, very few stations ever show their programming promises to employees who must implement these goals. Aside from the fact that many would laugh themselves silly, it might be interesting for station personnel to know what is expected of them.

Program Balance

What "categories" of programming should be balanced?[7] In license renewal applications station operators and their lawyers may deliberately misrepresent a station's programming, use stock descriptions, or rationalize the use of particular programs after the fact.

The Public Interest

What of the public interest, convenience, or necessity which we so glibly trip off the edge of our tongues as PICON? The language was suggested by utility and transportation regulation.[8] It seems relatively easy to determine whether a train goes through your city, if it does so with some regularity and adherence to schedule, and has a rate that is "reasonable." When the regulation of broadcasting began--really with the commerce department, not the FRC--we lived in a very different society. In 1930, we were 50% rural (and half of that farms). "Public interest" was a signal that could be picked up, market (agricultural and financial) reports and weather information. Broadcasting grew from personal (point to point) communications. Evaluating these safety and other services is simpler.

The intent was that "broadcaster" (stations--not networks, program packagers, advertising agencies, and others) would be allowed to use a scarce resource for their private profit. For this privilege, they would provide certain services.[9]

There have, of course, been proposals to sell, rent or periodically auction off frequencies--the best known by economist Milton Friedman.

Judge (later Chief Justice) Burger noted:

> After nearly five decades of operation, the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.[10]

But what is the duty, and when has there been termination?

Ascertainment

The history of the FCC's requirement for "Ascertainment of Community Problems" is complex and leads one to suspect that it came about almost by accident.

The FCC's use of ascertainment data is clear. It is nil.

Several commissioners recently liked to insist that stations should provide a minimum of 5:1:5--5% news, 1% public affairs and 5% other programs, in addition to entertainment.

If a broadcasting station did not meet this minimum, then at the least this should be justified by the station on the basis of ascertainment. In a recent renewal application, one broadcaster in the South stated that his station should provide much more news because it was in a college town and his survey showed respondents wanted more news programming--which was below 5%. The FCC granted the renewal without question saying that even though the 5% was not met, the ascertainment study had been well conducted.[11]

Transfers and Trafficking

Under the "Avco Rule" growing out of the transfer of WLW, Cincinnati, the FCC tried to require competitive bids for stations that were for sale. However, the rule was repealed and nearly a decade later the Congress even amended the Communications Act prohibiting the commission from consideration of any transfer other than the one picked by the owner.

All of this notwithstanding broadcast stations (really almost totally the license) is real estate. Licensees are evaluated as real property and should be studied as such. There are various formulae for computing the worth of a licensee based on a multiple of base rate, gross, and other economic indicators. Many broadcast stations have "depreciated" to zero, yet are worth millions of dollars.

But, the law says there is not vested interest in a licensee.

(I was criticized by a broadcaster friend on the above; he argued that stations were not real estate. The next day, he asked a question of FCC Commissioner Wiley beginning, "Those of us who manage properties...")

Ex Parte

Outside contacts to commissioners or staff members is a joke. If you live in Alaska and are involved in any case that might come before the commission, then you cannot even send a carbon of a letter to a commissioner. Yet, lawyers that represent stations move in and out of jobs with the commission with regularity, play golf (now tennis is apparently more popular).

Commissioners and staff regularly go to industry representatives to get specific information and opinion.

All of this may be inevitable and even necessary--then why the facade.

Equal Standing

There is no way a citizen group, consumer representatives or any other individual can have equal standing before the Commission. Indeed, until order by Judge Burger, the FCC insisted that no person could have standing in a renewal case unless he was financially or technically involved.

Most citizens cannot afford the legal aid necessary. The FCC does not make information equally accessible. Citizens cannot get a renewal hearing unless they can present substantial evidence that license might not be renewed. It is difficult to accumulate some of that substantial information unless stations are required to tell the truth. In one instance a station refused to reply to citizens' letters for several years requesting information on the number of news persons that are employed by the station.

Only recently has the commission required stations to maintain a public file with certain basic information. Persons have been refused the right to see that public file--in one instance this apparently led the FCC (finally) to require that it be available during regular office hours, without an appointment. Stations have asked--"who do you represent?"--or attempted to harass those who seek to look at the public file. (One station manager tried to stop a citizen from taking notes.)

At this writing (February 1973) stations are not required to make their regular logs open to the public.

Financial Data

New stations are required to show financial capability; from then on it is secret. Over the years, the FCC has provided virtually no analysis of the finances of the industry--except on a market by market basis.[12]

An analysis of financial data on 27 California stations showed that the proportion of total expenses spent on programming ranged from 0.4% to more than 60%. Income divided by programming expense ranged from stations with a loss to one with a profit of 631% of the amount spent on programming.[13]

It is not clear what this means. Certainly it deserves further study. Programming is the essence of broadcast service; this is tied to the financial status of the station. The Commission on Violence recommended:

> Although we cannot accept involvement of the FCC in making judgments whether a news and public affairs programming is good or bad, it does seem appropriate for the Commission to examine the expenditures on this kind of programming. The correlation between cost and quality is hardly precise, but it is an appropriate index for consideration so long as its infirmities are recognized. Finally, it is clear expenditures on news and public affairs programming ought not be evaluated in the abstract. The adequacy of such expenditures should be judged against profitability of the station...[14]

Programming Data

In 1938, the FCC prepared a fairly complete analysis of radio programming, and a smaller one was done in 1942.

The FCC at renewal time receives both financial and programming data (both sketchy at best) from stations. Yet, nothing more than the most simplistic analysis has ever been done with any of this data.

Upgrading

The FCC rules clearly state: "A renewal applicant,...must run on his past record in the last lecense term. If, after the competing application is filed (or a petition to deny directed to program service), he 'upgrades' his operation, no evidence of such upgrading will be accepted or may be relied upon."[15]

Nonetheless, any station challenged will file volumes listing their changes, improvements, new staff, new equipment, new programming, consultants just hired, on and on.

Other Matters

--the world is grandfathered. With few exceptions, current practices, no matter how bad, are etched in stone.

--comparative hearings mean little. After 13 years of hearings, the FCC awarded a TV channel in Indianapolis to one applicant chosen as best on the the basis of ownership diversity; the winner promptly sold the grant to the loser, and the FCC approved.

--New York City is not Indian Wells, California. Stations come in various types and sizes; all forms and reports must be identical.

--the FCC often says it can't consider programming. Yet, from the beginning (even the commerce department) has outlined and defined content.

--audience, thence rates, thence profits are said to be correlated with programming. While there is no revenue or profit data to study, AM stations rates are most closely correlated with daytime power; FM and TV with population. Five percent of TV stations (virtually all in top ten markets) make 50 percent of the profit.

--the FCC acts in almost total ignorance. It is interesting that the FCC has studied networks, satellites, reruns, program control, ratings, and many other matters. Yet the central responsibility of the FCC, licensing has received little self attention.

THE RENEWAL PROCESS

In sum, the renewal process is--as Sydney Head has written--the FCC, lawyers and applicants "going through a set of expensive motions without for a moment believing in what they are doing."[16]

Communications lawyers reach into their card file of pat answers and stock replies, pull out a boilerplate reply to Form 999, and have their secretaries type away.

FCC staff members want to move up the GS-ladder so will rarely rock the boat. Or they want just enough experience and contacts for a good job on the outside.

Congress will not act--some members own stations, others are influenced by lobbyists, and all need broadcasting to campaign for reelection.

As David Brinkley said of the FCC, "They're just another bunch of bureaucrats."

My criticism is not of all of this, however. It is of those of us who teach and write about broadcast regulation in colleges and universities.

Broadcast regulation is little more than pious theories and bureaucrats. But then where could an academic find a more comfortable home?

Notes

[1]George C. Lodge, "The Utility of Ideology for Environmental Analysis," Harvard Business School, mimeo 4-373-006. Note particularly how this has led us to expect that American business can solve all problems that plague us through "social responsibility." See Professor Lodge's application of his analysis to General Motors.

[2]"Cable Television Service; Cable Television Relay Service," Federal Register, Vol. 37, No. 30 (February 12, 1972), Part II, pp. 3252-3341.

[3]"Cable Television Rules Statements by Commissioners," Washington: Federal Communications Commission 82156, February 28, 1972; or "Final Cable Television Decision," Television Digest, 1972, p. 151.

[4]Broadcasting, February 12, 1973, p. 68.

[5]Several disgruntled employees of a medium market TV station called me asking who owned the station where they worked because they wanted to appeal to the owner directly. Some had worked there years and did not know any of the owners.

[6]See John D. Abel, Charles Cliff III and Frederick A. Weiss, "Station License Revocations and Denials of Renewals, 1934-1969," Journal of Broadcasting, Vol. XIV, No. 4 (Fall 1970), pp. 411-421.

[7]See the dilemma of "public service" vs. "entertainment" in Gary A. Steiner, The People Look At Television. New York: Alfred A. Knopf, 1963, pp. 241-243.

[8]Specifically see Darrel Holt, "The Origin of 'Public Interest' in Broadcasting," Educational Broadcasting Review, I:1 (October 1967), 15-19; and Jane Noel Magruder, "Development of the Concept of Public Interest as it Applies to Radio and Television Programming," Ph.D. dissertation, The Ohio State University, 1959.

[9]See, for example, Nicholas Johnson, "Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation," Law and Contemporary Problems, Vol. XXIV, No. 3 (Summer 1969), pp. 505-534; especially p. 533.

[10]359 F. (2d) (1966), p. 1003; or see Sydney W. Head, Broadcasting in America. Boston: Houghton Mifflin Company, 1972, p. 459.

[11]Information from an FCC staff member. See the Journal of Broadcasting for a number of studies on ascertainment, particularly Vol. XVI, No. 4 (Fall 1972).

[12]See Tracy A. Westen, Brief for Petitioner, U. S. Court of Appeals for the District of Columbia Circuit, No. 71-1779, Alianza Federal de Pueblos Libres, v. Federal Communications Commission (re: KOAT) and Reply Brief for Petitioner.

[13]Dissent by Commissioner Johnson to Staff Action on California Renewals, Washington: Federal Communications Commission, December 15, 1971, Mimeo #77988.

[14]David L. Lange, Robert K. Baker and Sandra J. Ball, Mass Media and Violence, Vol. XI, Washington: Government Printing Office, 1969, p. 158.

[15]Policy Statment on Comparative Hearings Involving Regular Renewal Applications, FCC 70-62, 40869, 18 RR 2d, 1902.

[16]Sydney W. Head, Broadcasting in America, p. 455; also see other instances of myth vs. reality, pp. 456-461. Professor Head concludes that it is all "no more than a facade of pious theories."

THE WMAL CASE

Howard Roycroft

I'm here, I hope, not to perpetuate another myth; that being that as a lawyer representing a segment of the broadcast industry, that we protect a conglomerate of robber barons and shield them from the enlightened point of view of a group such as this that's uncorrupted by any economic special interest. The fact is, we do. (Laughter.)

The WMAL decision is, of course, a landmark decision in the area of license challenge. It's a landmark decision for a number of reasons. First, the petition that was filed against the station in 1969 was one of the original such petitions filed by a minority group against a broadcast station license. It was a prototype of a number of petitions that were to follow. And some one hundred were filed in the three year period that intervened from the date of the filing of the WMAL petition and the date of the court of appeals' opinion resolving the matter.

The petition was filed in September of 1969. And I'm going to simplify aspects of it, because in certain of its aspects it dealt with a resolution of certain factual matters which I don't think you would be particularly interested in. I will focus, therefore, on the matters of minority employment, minority programming, substantial service, and the questions that have been discussed by this group previously.

The petition alleged that the station's ascertainment was inadequate because it did not include representative black leaders. The black leaders to whom the station had gone were not determined by the petitioners to represent a broad range of black thought. Secondly, in the area of programming, it was alleged that because the station is allocated to a community which has a seventy percent black population, that there should be a closer equation of--equating of the station's programming with that fact of ethnic composition.

A corollary of this was in the area of minority employment where it was alleged that the station's--the number of black employees was insufficient when geared to the--because of a lack of dealing with the seventy percent black population of the community.

Those were the principal points in the case. There were others which, as I've indicated, dealt with facts and disputes of facts, which really don't involve long-range or broad questions of policy, which I'll disregard. The station responded to these charges contending that it had, indeed, contacted in its ascertainment process a representative number of black leaders, disputed frontally these charges, and the commission agreed that this was--that their ascertainment was adequate.

In the area of black programming, the station identified what it had done over the range of three years, having made a threshhold argument that how does one define what is and what is not a black program. In this instance, the petitioners were talking about a relation to the community as a whole of the not particularly black problem, problems which are identifiably black, such as the situations of discrimination that a black person suffers in our society, not a

community problem of solving the social interrelationship as such, but, rather, cultural programming which depicted a black life style or showed, with some high level of accuracy, the situational context of the black American; that kind of programming.

As I mentioned, WMAL TV, after making the threshhold argument that it was impossible to make precise judgments in this area, nevertheless went on to identify a number of programs which it had broadcast which it felt met this responsibility. The commission agreed on both counts that this was not an area where the commission should intrude in determining whether programs were or were not black, and they were satisfied that the station had discharged its responsibilities in the programming that it had carried, which really dealt with community problems more than the cultural type of programming that was referred to by the petitioners.

In the area of employment--and this has perhaps become since the court decision one of the most controversial areas to emanate from this activity--the station had indicated that it had an affirmative action program that the commission had required. It indicated that it had hired a number of black employees. It conceded that it did not have the seventy--it did not have seventy percent of its total staff made up of minority representatives. It argued that the area from which it drew its employees was not the inner city of Washington, D. C., which is seventy percent black, but rather the total metropolitan area where, when the suburban areas are considered, the minority population is approximately twenty-four percent black. And this was also a gauge that was relied upon to evaluate its programming method.

The commission agreed and said that the seventy percent benchmark was inappropriate, that, to the extent that any benchmark should be used, it's the twenty-four percent benchmark. And in any case, the station's employment practices did not evidence a pattern of discrimination by the station.

Finally, and perhaps the area that I find most personally interesting in light of the direction of regulation in the renewal area, was the effort made in this case to come to grips with "substantial service." I agree with the comment that Barry Cole made concerning what might not have happened had the statistics, which I don't quarrel with--had those statistics been different in the case of the station. An institute here, the Institute for Policy Studies, made a comparative evaluation of all television stations in the Middle Atlantic Region. And it concluded that WMAL TV's statistics, as compared with other stations, were poor, that they did not have adequate news service or public affairs programming, or other non-entertainment programming at the same level, quantitatively, as other stations had. I suspect that (if) WMAL TV had run higher in that study, this petition would not have been filed against it, but it would have been filed against someone else.

There's a danger in this that I would allude to. After I got into this, I realized that not all stations type their programs in a uniform fashion. In saying this I'm not suggesting any dishonesty by the licensee. I'm only saying that they do it differently. There were programs called public affairs programs by stations that were not called public affairs programs by WMAL. For example, a station in Norfolk, Virginia called a local teenage beauty contest a public affairs program. WMAL TV did not do that and would not do it, A free army film that's available to most--to all broadcast television licensees called "The Big Picture" was called by many licensees, typed by many licensees as a public affairs program. WMAL TV characterized or typed it as a program in the, quote, "other category." So because it took a more perhaps conservative approach in identifying programming it carried, it suffered in this comparison. And as I

say, I think it probably--that was a factor that, I suspect, was influencial in the filing of a petition.

In any case, a petition was filed; it was answered. There was a--while this was pending before the commission, the commission changed the rules of the road in the process of ascertaining community problems. Larry characterized this in a manner which I strongly disagree with. The station was not upgrading its ascertainment. It was conducting an ascertainment as the commission directed it to do in response to a changed manner of doing this, which was associated with the issuance of the now famous ascertainment primer, a practice which the court of appeals found to be appropriate and not unlawful. The commission's decision was issued. It was appealed to the court of appeals where the petitioners felt, as did most people acquainted with the--court of appeals' watchers acquainted with petitions the court had been issuing which had been uniformly hostile to the commission, felt that the case was certain to be reversed. I have to say that in my most optimistic moments while the case was pending before the court my optimism was very guarded.

In any case, the court, the panel of the court hearing the case, led by Chief Judge Bazelon, affirmed the commission in what has been regarded as one of the most surprising developments in the 1970s in broadcasting regulation. I think the case was affirmed by the court because the facts--the petitioners simply could not prove the broad sweeping, generalized allegations that they made against the station. Most of these allegations were unsubstantiated; they were highly conclusionary; they were, if anything, criticisms of the television industry as a group, an entity, rather than the assertion of a legal--a dereliction of a legal responsibility by a single station.

The legal significance of this case I think is really within that observation. The decision itself did not chart any new law. If anything, it reiterated traditional legal concepts, which are spelled out in Section 309E of the Communications Act. And that is, in a petition to deny, you must allege material, substantial facts raising material questions. That was not done in this case.

The principal effect of this case, I think, is psychological. It has given the broadcasting industry some reassurance that petitions filed in a somewhat willy-nilly fashion, which I think it's fair to say was done after this petition was filed, will not be routinely granted and set for hearing in wholesale fashion as the industry has feared. Rather, these petitions will be evaluated in accordance with tests which are present in the Communications Act and which have been applied in situations unrelated to license challenges.

Before leaving the legal significance, however, I would make two points which have a very close relationship with the psychological impact of this case. I don't think the case is going to retard the filing of challenges at all. If there is a deflation here by the people who are in the business of filing these petitions, it is clearly simply a temporary condition. As was mentioned, this decision came out of the court of appeals on Friday. WMAL TV filed its renewal application for the subsequent three year license term the following Tuesday. One month after that, it was filed again by two groups, one of which contended that the station had too many black individuals on the air, that it was too much of a black station; it should be a white station. It was insensitive to the problems of the suburban areas. It was paying too much to the inner city, which had to be one of the most ironic aspects of the decision, of the whole experience.

There are two footnotes which I think have not been given sufficient attention by those who are students of this area which have, I think, a very dramatic impact, perhaps more so than the text of the opinion itself. I say the opinion itself simply is a reiteration of traditional legal concepts. Two of these footnotes, footnote twenty-one and footnote twenty-four (sic), state that, first, the WMAL ascertainment, initial ascertainment, did not comport with what subsequently became the law and that the court didn't feel that the commission should, or it should, penalize a licensee for this because it had the beneficial effect, the remedial effect, of--the petitioners' activities had a remedial effect of prodding the station into doing more. And I think that is clearly to encourage petitioners to continue their filings. As a matter of fact, not only was WMAL TV filed against, but I think every television station in the city of Washington was filed against. One was filed against in Baltimore, and there were seventeen petitions, I believe, filed against all of the television stations in Richmond, Virginia. This was in the immediate wake of the WMAL TV decision.

Footnote forty-four makes reference to some thought the commission might give to a further refining of its ascertainment process. The ascertainment process, as Barry mentioned to you, deals exclusively with the ascertainment of community problems. Footnote forty-four says that the commission might broaden this, and they might consider looking into cultural values of particular ethnic groups to determine whether those are deserving of programmatic treatment. This is precisely the argument that was made by petitioners in the WMAL case. Although it's not presently part of the ascertainment process, the court is suggesting that it should be. And I personally agree with this.

WHDH: TWO ISSUES

Robert Smith and Paul Prince

The WHDH case has been celebrated because of the length of the proceeding, the peculiar ambiguities of the FCC's behavior, its possible value as a precedent and the sheer fun of watching major corporate entities contend for a license valued at $50 million. In this paper we will limit our discussion to the two issues which have implications for the industry at large: renewal policy and the problem of defining ex parte contacts in a regulated industry.

Before we describe the issues, a brief note concerning the major participants in the proceedings may be useful. Although Greater Boston Television initially won the hearing examiner's approval, it was eventually limited, in large part because of a perjury charge against one of its officers. CBS, DuMont, The Boston Globe, Mass. Bay Telecasters and others participated in the hearings. The issues with which we are concerned involved three groups, and it is these three which we will describe.

WHDH Inc., licensee of WHDH-AM-FM-TV, was owned by the Herald-Traveler Corp. This Boston based corporation was headed during the 1950's and early '60's by its controversial president Robert Choate. After his death, he was succeeded by George Akerson and, in 1968, by Harold Clancy. Mr. Akerson resumed the presidency in August 1972. The Herald-Traveler newspapers were sold to Hearst's Record American shortly after the license was awarded to Boston Broadcasters Inc.

Boston Broadcasters Inc. (BBI), the present operators of WCVB Channel 5, is a group of local business and professional people. BBI has not other media holdings. BBI has promised the FCC diversification, integration, and 40 hours/week local programming. WCVB is presently operating on program test authority.

Charles River Civic Television Inc. was based on an area radio station and a policy of non-profit. Charles River was less strong on diversification and integration but did promise a substantial amount of local programming with any profits going to charity.

I. RENEWAL POLICY

Since this is the longest case on FCC record, it provides in itself a history of renewal policy. It was in 1947 that applications were first made for Boston's channel 5. Before a decision could be made, the freeze began. It was during the freeze that an important policy was promulgated in Hearst Radio Inc. (WBAL). This decision established a precedent that an incumbent licensee with satisfactory program service, absent gross violations, was to be given preference over competing applicants. In 1956, the hearing examiner granted channel 5 to Greater Boston Television Corp., a local group. However, certain misrepresentations were discovered, and in 1957, Greater Boston was ordered out and the award was made instead to WHDH, Inc., owned by the Boston Herald-Traveler Corp.

It was during this period that questions of ex parte arose in connection with a number of cases, WHDH among them. Consequently, no license was granted. In 1962, the FCC sought to reopen hearings. A four month "license" was granted WHDH, but at the same time, the commission stated that in the impending hearings "the existing temporary licensee will not enjoy a preferred position...." Upon granting the temporary license, the FCC invited competing applications. It was in answer to this invitation that Boston Broadcasters Inc. (BBI) Charles River Civic Foundation, and Greater Boston TV Co. were formed.

While the case rebounded between Commission and courts, the 1965 Statement on Comparative Hearings was promulgated. This was held to apply only to new applicants, not to incumbents, but it did clarify the Commission's emphasis on diversification and integration of ownership. Finally, on August 10, 1966, Hearing Examiner Sharfman found in favor of WHDH and recommended license renewal. Throughout the hearings, the parties appeared to assume that WHDH was a renewal case.

It was not until nearly three years later that the commissioners made their decision based on Sharfman's hearings. The hearing examiner's recommendations were rejected on January 22, 1969 by a 3-1 vote (Bartley, Wadsworth, and Johnson in favor and Lee dissenting). The authorization for channel 5 was given instead to BBI.

Since the time of the WBAL decision, no challenger had unseated a reasonably good incumbent. The WHDH decision was at first held to be a normal case by Johnson and others, perhaps a precedent setting case. A few months later, the FCC backed down from its bold stance and qualified its decision to affirm that WHDH had never been a real licensee so was not protected under the WBAL precedent. The case was held to be unique, sui generis. It is felt now that WBAL still holds as precedent.

But broadcasters were alarmed, and Sen. Pastore introduced S.20004 to set up a two part renewal procedure. Part one would consist of a hearing of the incumbent. Only if the licensee were found wanting would competing applications be heard. In response to Pastore, Chairman Burch offered a counter policy. The 1970 policy statement on comparative hearings did not include the two part hearing procedure but nevertheless gave a built in edge to the incumbent. Pastore's bill never reached a vote.

The WHDH case continued with appeals to the FCC and to the courts throughout 1970 and into 1971. At this same time, the Citizens Communications Center (CCC) was challenging the 1970 Renewal Policy in the courts. In June 1971, Judge Skelly Wright's DC appeals court overturned the 1970 Policy holding that it violated section 309 (e) of the Communications Act in that it effectively denied challengers full hearing on merits of their applications. As Broadcasting put it, "It's 1969 all over again."

Meanwhile, in early spring of 1971, suit was brought against one of BBI's principles, Nathan David, alleging illegal stock transactions. The allegations were taken up by both the Massachusetts courts and the SEC. Not until August did the FCC request remand of the case from the appeals courts to allow oral argument on the issue of the stock transactions. The court of appeals, in December, refused to remand. Judge Leventhal held that the proceeding was closed at the commission level and that the issue did not seem sufficiently compelling to reopen this already drawn out case.

As January 21, 1972 having no further options, the FCC ordered WHDH to cease operation and BBI to begin effective March 19, 1973, at 3 a.m. It was further ordered that Nathan David separate himself from active management of the station pending decisions on the suits against him. The passions of the case were still high as Burch declared the situation an "unconscionable injustice" and held open his option to bring recent allegations of misrepresentation into open hearings "to the extent necessary" at the time of license granting or renewal. Further FCC decision apparently awaits SEC action.

II. EX PARTE

The ex parte issue, insofar as it relates to the WHDH case, is both basic and complex. The issue arose when the House Subcommittee on Legislative Oversights released a report on a hearing in which FCC Chairman George McConnaughty described two lunches he had with Mr. Robert Choate, president of WHDH. During the lunches, according to McConnaughty, they discussed his position on the proposed Harris-Beamer bill which would have provided anti-trust protection for newspapers with broadcasting interests. Supposedly, WHDH was not mentioned in the discussions.

At any other time, the conversations might not have been the suject of public interest. The revelation occurred, however, at a time when the Commission was under criticism for practices related to the Channel 2, Miami, Florida case. Thus, because of its timing, WHDH came under closer scrutiny than might have been expected. The FCC requested Justice Horace Stern, retired Chief Justice of the Pennsylvania State Supreme Court, to hold hearings on the ex parte issue. In addition to WHDH, Mass. Bay Telecasters, Greater Boston, the Boston Globe, DuMont and the Department of Justice participated. On September 23, 1959, Justice Stern reported insufficient evidence to support the ex parte charges. WHDH considered this a significant victory and argued that the charges against Mr. Choate were no longer of interest in the case.

In July, 1960, the FCC found that Choate's conduct, aimed at convincing the Chairman that Choate was a substantial and reputable citizen, weakened the WHDH application, although it did not provide grounds for absolute disqualification. The FCC called for a comparative hearing including all applicants, while allowing WHDH to continue on temporary authority. The FCC's ambiguous action on this issue thus allowed the ex parte issue to open the door to competing applicants although not precluding an eventual award to WHDH. All of WHDH's subsequent problems stem from this curious Commission action. Consequently, although not used as the basis for eventual disqualification, the ex parte issue was the primary cause for the hearings.

The ex parte issue was not limited to the Choate/McConnaughty luncheons, however. WHDH noted that FCC Commissioner Robert Bartley had been employed by the Yankee Network in Boston during the period from 1939 until 1943. They claimed that disagreements over news policy between the network and publisher Choate caused the Commissioner to harbor a strong anti-WHDH bias. They pointed to his consistent voting record against WHDH as evidence of his prejudice. Curiously, although WHDH argued against Comm. Bartley in one public statement by the president of WHDH, and often referred to it publicly, they did not attempt to disqualify the Commissioner. Bartley's experience does not, of course, constitute any violation of the ex parte rules. It does, however, point to the difficulty of describing the impact of non-legal material in forming judgments on the case.

The ex parte issue is further complicated by the employment pattern of

attorneys who practice before the regulatory commissions. It is not uncommon to find a young attorney leaving the Commission staff to practice before it. In the WHDH case, the legal assistant to one of the Commissioners was employed by counsel for BBI before entering Commission service. The counsel for one of the applicants was a former assistant to Chairman Rosel Hyde. To further complicate it, the general counsel for one of the applicants, and an officer of corporation, formerly practiced before the Commission.

Clearly, none of these experiences constitutes a violation of the ex parte rules. Yet, equally clearly, a man who successfully practices before the Commission may establish himself as a substantial and responsible citizen over a period of time and find it working to his advantage when a decision concerns him. Is this a violation of the ex parte rules? No. Could it influence a commission decision? Obviously, yes.

These comments are not intended as an apologia for Mr. Choate, nor as an attempt to discredit the Commission or those who practice before it. The point is that, in an environment in which Commissioners meet broadcasters regularly, in which legal counsel moves from commission to client with astonishing frequency, the ex parte rules are far too removed from the realities of broadcast regulation to provide an adequate guide for the evaluation of the behavior of either broadcasters or Commissioners.

III. IMPACT

What has been the impact of these years of hearings?

1. As a precedent...none. The 1970 Policy Statement holds WHDH to be sui generis. The 1965 Policy applies to new applications only, though the precents apply more generally. But despite Johnson's contention that the January 1969 decision "opened a door," WHDH is not a normal renewal, the 4-month license issued in 1962 was not considered valid in the sense that it could be renewed.

2. The 1970 Policy Statement was overturned by the court in the CCC case. That case in itself may be considered an important result of WHDH, tangentially.

3. The Herald-Traveler am and pm papers, the 150 year old Republican voice of Boston, folded on June 29, 1972 and was purchased by Hearst's Record American for $8 million. Had WHDH-TV not been lost, these two papers would have shared printing facilities and been more competitive against the Globe. But the Herald's losses could be offset best by the approximately $7 million annual revenue of WHDH-TV. When the TV license was lost, the newspaper deal was meaningless and Hearst picked up the pieces.

4. The Herald-Traveler Corp. folded in August, leaving WHDH, Inc., running the AM-FM stations. The TV plant and facilities were left unsold. WHDH was fighting the case up to the last moment and refused to sell anything to BBI. BBI built its plant a few miles west of Boston and was fully equipped to go on the air on March 19, 1972.

5. Harold Clancy, the Herald-Traveler president since 1968, was allowed to resign and left the company with a healthy settlement.

6. CBS, concerned over the new stations' clearances with proposed 40 hours of local programming per week, switched affiliation to WNAC, RKO General on

Channel 7. ABC debated to a UHF, even considered buying a dark UHF, but made the smart money decision and affiliated with Channel 5.

7. WCVB (Channel 5 Boston) is programming over 40 hours local weekly including 24 hour service, public affairs six days in the prime time access and a daily children's show which is far above the usual "Capt. Cartoon" fare. WCVB has no other media interests or conflicts, and the principle of integration of ownership and daily management is being upheld.

8. The first point was that as precedent, WHDH has no impact. That is as a legal and regulatory precedent...we submit that as an emotional impact the Channel 5 decision does set a precedent.

IV. CONCLUSION

One cannot complete any discussion of WHDH without asking what the importance of the case is for other broadcasters. Broadcasters now enjoy an informal guarantee that similar cases will not recur, so its value as a precedent is of little moment. Several items, however, may help gauge its importance.

First, WCVB, the new Channel operator, is now limiting commercial minutes, operating 24 hours a day several a week (the only station in the market to do so), does not charge for political broadcast time and has a sophisticated method for ascertaining community needs. If it maintains all of these practices, and proves profitable, other stations may imitate it. Thus, it may become a source of innovation in the industry.

WHDH demonstrates what can happen when a licensee falls into one of the pitfalls presented by unpredictable and intense public feeling on a specific issue. WHDH was one of the victims of--or participants in--the problems the Commission was having with the ex parte rules in the early 1950's. Later, when diversification was an issue of public interest, WHDH was there, ripe to be diversified.

Finally, WHDH proves that the unlikely can occur, that an applicant with an ambitious local-live and public affairs schedulecan survive competition with a conventional broadcaster. It is worth noting, however, that the most innovative proposal, by the Charles River group, was denied. That proposal would have resulted in the profits from a commercial station being given to charities (not related to educational institutions). A novel proposal, whose merits have not yet been tested.

Yet if WCVB can demonstrate that such revolutionary concepts as localism, diversification, integration, and heavy local programming can pay off, this lesson will not be lost on other broadcasters. This is the emotional impact of which we spoke. Such living proof of the practicability of the FCC's public interest doctrine may have greater lasting effect than any result from the 25 years of regulatory and legal by play.

A BROADCASTER'S VIEW OF AUDIENCE

Thomas Bolger

I may be wrong, and I am not speaking for all broadcasters, but it seems to me that up to five years ago, when you had the percentages for use on your renewals and applications, it was kind of any easy way of doing the job. Although the Commission never said specifically how many percentage points you had to have for any category, I think it was pretty well understood by your legal counsel in Washington what you had to have. If it wasn't "2 percent," and he felt it should be "5 percent," he let you know and you could kind of adjust accordingly. When they came out with the new renewal form, I believe that it was the general consensus of broadcasters that the survey that they were asking for on ascertainment was almost a program survey. I think many broadcasters went out and said, "What kind of program do you think we should have on our station in this community?"

It is the responsibility of the general managers of the individual stations in our corporation to make up the renewal forms. There is naturally legal advice used. We have McKennan Wilkinson here in Washington, but we do not use any other outside firms.

There is an article in Broadcasting today about the rash of firms that have started to come up that do make market surveys for broadcasters, and I suppose this is natural. I certainly don't argue with the concept, but we have always felt that we can do a better job than anybody else because we know the territory.

In going over the form 303, the renewal, I think the most important part of it, naturally, is the section 4B, Part I A, B, C, D, where they have the ascertainment of community needs. The first section is the methods used by the applicant to ascertain the needs and interests of the public served by the station. Such information shall include the major communities or areas which an applicant principally undertakes to serve and identification of representative groups, interests and organizations which have been consulted. This is basically the first thing you are faced at renewal time.

There are different approaches that the various stations that are in our company take. At WMTV, we have what we call our Community Advisory Committee. This is a group that has been organized for the past four years. We did meet annually; now we meet twice a year. Also, we are in constant communication with these people by phone and also by mail. We try to get, of course, representatives from various groups. We have the mayor, the superintendant of schools; we have representatives from the Catholic, Jewish and Protestant religions; we have the head of AFL-CIO; we have the head of the NAACP. These people meet with us, and when they do meet, we try to extract from them what some of the problems are; but also, we feel it is incumbent upon us to inform the people a little more about broadcasting.

For example, the last time we had a meeting, we invited Carl Burkland, who is the General Manager of the Television Information Office, to come out and speak to the group. This is usually about a 2½-hour luncheon, and what we try to do at lunch is have some type of presentation which will provoke some comment

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This 1969 presentation describes some of the techniques being employed at that time by a television station in one of the smaller "top-100" markets to determine the needs of its audience.

from the people so it gets to be two-way communication rather than just a "give" or a take.

So this is one thing we do. Another thing we believe is, of course, complete and total involvement. In some larger markets with large staff stations, they, many times, will have a separate department that will handle the public service or the community relations area. In a smaller station, of course, this is not practical; it is not financially possible. Therefore, it is up to the general manager to be able to serve in that role.

We have done some odd things in trying to find out community needs and also in particular segments. Of course Madison, Wisconsin has about 36,000 students. I suppose half the age of Madison, Wisconsin is under 25 years old. So to make the programming relevant to this part of the community, we have done such things as hired consultants who are students. The most recent case in point, there is a gentleman from the university who is a graduate student, and he received a great deal of note last Spring when he produced Peter Pan partially in the nude. The guy is a very creative individual. So we hired him.... He has done an awful lot of unusual things. Anyway, we hired him to spend the month of October viewing our station and coming up with ideas. He was, I think, a little taken back when he asked "what kind of budget do I have; what kind of budget should I be thinking about?" We said, "no budget, just go; be creative." With your relationship with the student body, hopefully we can come up with some ideas. Of course, our news director could immediately see himself taking off his coat on the air, but we told him we would not go quite that far.

Other items that we do that I think are standard with most stations. We have a speakers bureau, and we try to get out to different organizations and get feedback from them. Usually when we go to these groups, we try to encourage this conversation, two-way conversation, and we honestly tell them why we are there. I am here to talk about programming in television, or we are here to talk about news and public affairs or editorialization. But we want you to talk to us because we are trying to ascertain what the community needs are. We do not try to hide this under a barrel; we bring it right out in the open, because we feel this way: they are going to be much more responsive to us.

Another think that we do, I get a phone call from a viewer or whenever we get any information, I will take these notes down on my pad, and I save these year after year. Then when we go up for renewal, I will go ahead and go right through the book day by day and then note exactly who we talked to and about what. This is very helpful. If I lose the calendar book, then I have problems, I realize that, but it is one way of being able to refresh your memory of what was done.

Anyway, these are some of the things that we do just in a fast recap. We have the Advisory Committee that we use. We believe in total involvement, not only the management but also of the staff. We have the questionnaires where we try to survey the people. We not only have the surveys that I talked about such as rating books and Better Broadcasting groups and your CATV's and your Stu Gordons, but also we try to have speakers bureaus and ask the manager type shows where we build up communications.

ASCERTAINMENT PROCEDURES: RULE AND REALITY

Herschel Shosteck

As Professor Foley has observed, the Federal Communications Commission is more concerned with issues centering on the technical, engineering, and financial qualifications of broadcast license applicants than on those concerning ascertainment of community needs and the programming developed to meet those needs. This focus of Commission concern offers an intriguing point from which to begin our discussion. Why, exactly, is such a situation so?

In general, we might assume that bureaucrats like to deal with procedures and because of this proclivity gravitate toward the more routine questions concerning the technical expertise, engineering skills, or financial viability of a license applicant. However, accepting such an assumption begs the question of why even routine ascertainment problems are ignored; why they are not treated in the same routine manner as are others.

I think that the answer to this question -- of why the Commission pays so little attention to ascertainment -- rests with the fact that members of the Commission, their staffs, and broadcast attorneys know virtually nothing about the meaning of "community needs", are completely ignorant of the research procedures which can readily identify such needs and, I might add, have precious little awareness of the programming alternatives which can effectively serve those needs.

As an "expert" in the field, I am very open in saying that I know very little about it. When it comes down to analyzing actually what we are doing and why, we find that we are on very dubious ground. Fortunately, in recognizing this, I think we become well situated to initiating more meaningful ascertainment procedures and, in so doing, not only better serve a listening community but increase station profits as well.

A good place to start an analysis is with what is being done now. During the discussion which we have just completed, we observed that individual law firms have stock answers to the FCC license renewal and application questionnaires. These stock answers have not previously been questioned by the Commission. Thus, in using them, broadcast attorneys are assuring their station clients a smooth passage through the renewal procedure and are, thereby, protecting their short term interests, at least.

Note carefully that the criterion of success is to minimize aggravation to the broadcast client. It is not to aid the broadcaster in better ascertaining and serving the needs of a community nor is it to aid the broadcaster in profiting while doing so.

Objectively, if the Commission neither has nor expects expertise in these areas, broadcast attorneys cannot be required to provide it. Thus, broadcasting attorneys certainly are not at fault. Nonetheless, even if no single party may be culpable, the situation is so structured that all parties involved--Commission, attorneys, and broadcasters--find it more convenient to hobble along following established procedure rather than exploring new, potentially more fruitful, approaches to ascertainment.

As I shall demonstrate below, this failure has frustrated the opportunity for stations both to better serve the listening communities and, by so doing, to increase their profits.

I have been involved in broadcasting and related research for over seven years. During this time, I have undertaken ascertainment studies in about a dozen markets. I have been retained by some of the leading Washington law firms to provide expert testimony on the adequacy of ascertainment and related surveys.

My observations today are based primarily on this experience--reflections on what we did, could have done, and, most importantly, should have done.

When the Primer on Ascertainment was first published, in 1970, I studied it thoroughly. On the basis of this study, I prepared what I considered a thoughtful response. This response was ignored by the Commission as were others which attempted to treat the substance, rather than the form, of the subject.

At the time, I was surprised at this treatment because I thought (and still think) that my response raised fundamental questions that would have to be resolved if ascertainment were to become a feasible procedure and not, instead, degenerate into contentious squabbles between broadcast and community interests. As we are all aware, the history of ascertainment has proven my expectations. Nonetheless, in retrospect, it was inevitable that the Commission ignored these questions. For, as I observed initially, despite their considerable abilities in the general field of electronic communications, neither the Commissioners, their staffs, broadcast attorneys, nor broadcasters have the skills needed to effectively conceptualize, implement, analyze, and act upon an ascertainment effort which can effectively define the needs of the community served by the station.

The immediate reason for this is that no one, to my knowledge, has ever analyzed in depth the basic questions of what is meant by "the community served by the station" or what is meant by "needs." The result of this failure has been the adoption of a vacuous and substantively meaningless ascertainment procedure. Inevitably, the lack of substance has encouraged -- let me emphasize that -- the myriad challenges to license applications which have become a bane to the broadcaster's existence.

Let us examine, and begin to analyze, some aspects of this current situation.

When we read the present Primer we see that it asks for definition of community needs and problems through "consultations." It does not ask for surveys.

The Commission has never defined what is meant by "consultations." Nonetheless, the practice regarding an acceptable "consultation" has

evolved to the point where, de facto, some sort of crude opinion survey is undertaken among leaders of the community by the principals and/or management of the station, and usually an equally as crude opinion survey is undertaken among the general public.

Given the practice of these de facto opinion survey procedures, we are drawn into coping with embarassing substantive questions raised at the beginning of this discussion but so far ignored by the Commission.

Stations undertake a survey of their community, but nowhere is there a definition of what that community is. Nowhere. Stations are usually expected to serve more than the political jurisdiction in which they are licensed, particularly if that jurisdiction is small and the station's signal is powerful. We have adopted the phrase, "service area," to indicate the "community" to be served. But what is a service area? Generally, it is used analogously to the "coverage area" of the station. But realistically, this usage of the term is, at best, limited. In the case of a clear channel AM station, the signal can cover half of the country. Is that station supposed to ascertain the needs of half the entire nation and then program to meet those needs? I doubt it.

Nonetheless, what has happened is that early in the ascertainment game, a broadcast attorney trying to cope with the problem advised his client to designate his "service area" as the coverage area of the station. The client complied. The Commission did not question. Other attorneys and stations followed suit. A precedent became established. And never did anyone ask the fundamental question of what is the specific community the station is really serving? Is it a given geographical area? Is it a specific ethnic group? Is it a specific demographic group?

In the case of one or two low-wattage independents broadcasting from a small isolated Midwestern farming community the question doesn't have to be asked. Effective coverage and service areas are the same. But when we examine a very large market, such as Washington, D. C., which has over 30 radio stations, or New York City, which has over 40, the question of what is the "community" being served becomes very germane; in these cases there is such a fragmentation of the market that it seems eminently reasonable for a station consciously to choose to serve one specifically delineated segment -- such as the silk stocking district of Manhattan or to program in such a manner that the bulk of its audience comes from this group. Indeed, in view of modern broadcasting and marketing practices, it makes good sense for station management to pursue such a programming policy, to program to this group, to meet the needs of this group and to discount all other groups -- or communities -- in reaching programming and sales strategies.

And this is precisely what is happening among the exclusively ethnic stations, those which program exclusively to the Black or Spanish communities residing within those stations' coverage areas. Programming content, including news content, is directed solely toward attracting specifically Black or Spanish listeners. No one would argue that such ethnic stations serve the residents of their entire coverage area. Indeed, in the case of the Spanish language station, trying to program to the Anglo majority would be impossible.

Thus, in the case of ethnic groups, stations already consciously program to members of a community defined by criteria other than geographical residence. In so doing these ethnic stations consciously and unambiguously discount, ignore, and fail to serve members of other groups residing within their "service area." Given this situation, it seems logical that broadcasters and Commission, alike, should recognize it. With such recognition, broadcasters could be free to define the communities they choose to serve based on ethnic, demographic, and social -- as well as geographical factors.

With such clear specification of their characteristic audience, station managers would be more able to program all aspects of their station format -- music, talk, news, editorials and public service announcements. All of these, I submit, are not specific to a general market, but to specific market segments and sub-segments. In the parlance of the Commission, an unambiguous definition of community based on ethnic, demographic, and social factors would encourage station owners to broadcast to the diverse and varied communities which truly live within any geographical region. The outcome of such a step would be better service to the communities, as well as greater profit to the station. By formally defining the sub-segments of the market to which they program, the stations would be able to sell their advertising more efficiently than is presently the case.

By crystalizing the meaning of community, both broadcast stations and the Commission would profoundly improve the ascertainment process.

Up to now, this procedure has been an exercise in expensive legalistic minutiae, serving little more purpose than to increase the blood pressure of broadcasters and with it the enmity they feel toward the Commission.

Up to now, ascertainment has seldom been more than a vacuous ritual. The stations which use ascertainment as a means of developing programming material are the rare exception rather than the rule. And, as I have already emphasized, to expect more is unrealistic, since without an understanding of "Community", it is virtually impossible to ascertain meaningfully either its "needs" or the "problems" it faces.

For instance, many ascertainment surveys use the stock question, "What are the three major problems facing this community (or city or area) today?" In substance, this is the same question used by Gallup or Harris in their national opinion polls. As such, it offers a certain legitimacy. Unfortunately, the Commission staff, communications attorneys, or broadcasters who employ such a question fail to recognize that the purpose of Gallup and Harris is to develop 500 words or less of copy for a nationally syndicated column. By no stretch of the imagination are Gallup and Harris trying to analyze the ills of the "national community" or to define policy alternatives for dealing with them. Thus, the purpose of a Gallup or Harris effort is far different from that of a broadcaster. Yet, for lack of a suitable alternative, broadcast ascertainments usually follow the Gallup-Harris model. The outcome must be a disappointment to all concerned.

This is not to mean that asking for the three problems facing a community will fail to elicit responses. We will get answers -- "the economy", "the energy crisis", "unemployment", "dirty streets", "inadequate housing", etc. But such answers provide an excruciatingly superficial understanding of the "problems of the community." To ascertain meaningfully requires extensive interviewing designed to probe, in-depth, the multi-faceted manifestations of the diverse concerns of a homogeneous group. And before such a probing can be accomplished successfully, it is necessary to undertake a preliminary study in order to identify the major problems which should be probed.

Nor is in-depth probing all that is required. Equally as important is to return to the original question of what is meant by "community." For whom -- for members of which communities (as defined by ethnic, demographic, social, or geographical criteria) -- are the problems important? Are unemployment, dirty streets, inadequate housing, etc. problems felt equally by all persons within an area or do they disproportionately affect members of just one group? By failing to ascertain "for whom", stations can be completely mislead on the scope of problems faced by the audiences they serve. Such a faulty ascertainment is worse than useless.

Unfortunately, even major stations in major markets, such as WCBS in New York, fail to comprehend this in undertaking their ascertainment efforts. The result is that what can be a worthwhile enterprise becomes an empty exercise in form. This sad state of affairs does not have to be so, provided that those who undertake ascertainments come to grips with the fundamental question of what they mean by the community they are trying to serve.

Let me provide an example of what an ascertainment effort can be -- a superb example of cooperation between broadcaster and community.

In 1968 I was privileged to plan, direct, and analyze the ascertainment effort sponsored by the then WFBM (now WRTV) stations in Indianapolis, Indiana. Eldon Campbell, then general manager of the stations was committed to the concept that the broadcaster holds the airways as a public trust. Mr. Campbell was intensely desirous of serving his community. He sincerely felt that broadcasting can play a positive role in community affairs by uncovering problem areas and, in turn, encouraging local government to solve them.

At this time civil unrest was sweeping the country. To act upon his convictions, Mr. Campbell -- on behalf of the WFBM stations -- commissioned what proved to be a visionary ascertainment effort to study the needs and problems of the Black community of Indianapolis, with a partial emphasis on the role television played in influencing these needs and problems.

This ascertainment effort produced two volumes, The Negro in Indianapolis and The Impact of Television on Civil Unrest. Together, the data presentations and their analysis totaled almost 400 pages. A summary of the latter effort was published in the Journal of Broadcasting; it was entitled "Some Influences of Television on Civil Unrest" and appeared in the Fall, 1969 issue.

Despite the greater circulation which this latter aspect of our effort received, from the viewpoint of ascertainment research, the former was the more important. For the first time it systematically defined the problems of the Black community as seen from the eyes of its members -- not those of the White majority.

This systematic definition catalyzed three subsequent events. First, in ascertaining needs from the viewpoint of the Black community, it uncovered openly festering problems of which the White community -- including then and current mayor Richard G. Lugar, his assistants, and even the Black "leaders" who served as the liaison between the municipal government and the Black community -- were totally ignorant. Second, because of the combined shock effect of the research findings and the efforts of the WFBM stations, the mayor's office took affirmative steps to alleviate these problems. Third, on the basis of these actions, the municipal and station leaders came to believe that Indianapolis was able to avoid a major outbreak of racial violence and, in so doing, become the only major city of the country which did not burn during the rioting of the 1960's.

The extent to which WFBM's ascertainment efforts saved Indianapolis from immolation is not central to our discussion. What is central is that because of this ascertainment effort -- and the follow-up efforts of the stations -- the municipal government took positive steps to meet municipal problems which up to that time had remained unrecognized.

What were these problems, solutions to which had such monumental impact? They were neither esoteric nor complex; if anything, these problems stood out because of their simplicity. They centered on poor municipal services. We had examined these specifically in our ascertainment efforts. By so doing we were, in turn, able to isolate them precisely: refuse and garbage collection in Black neighborhoods was poor; street cleaning was poor. These were simple problems with obviously simple solutions. Nonetheless, because the city had failed to recognize them up to this point, their continued existence had created seething resentment among the Blacks who had to live with them.

To dramatize the problem conditions, WFBM camera crews followed sanitation trucks through the Black neighborhoods. They documented that the crews frequently ignored refuse piles sometimes standing four feet high. The visual camera coverage of the refuse non-collection tied to "hard" ascertainment data on opinion of Black residents regarding it, provided the basis for a four-part series of half-hour documentary presentations aired by the station during prime viewing time. Thus, using ascertainment as a tool, the WFBM stations affirmatively defined community problems and programmed to meet those problems, through documentaries, local news coverage and supporting editorial commentary. This, in turn, stimulated municipal government action.

I think it tragically unfortunate that this example has not been emulated. The reason for this unfortunate failure rests with the failure either to ask or answer the questions raised in the beginning of this presentation. Almost universally, ascertainment is considered an odious burden. It has been grossly neglected by the Commission, by broadcasting attorneys, by the broadcasting industry, and, indeed, by broadcast educators. No one , to my knowledge, has made a conscientious effort to point out

what can be done in ascertainment and how that can be translated into effective radio and television programs.

Whether this neglect is more benign or malevolent is not at issue. Regardless, the outcome is the same: stations consider ascertainment a burden; their application is viewed as an onerous exercise; station managers see little or no relevance of ascertainment to their programming.

This is shortsighted -- as much from the point of view of meeting community needs as from that of increasing station profits. Our own media research has shown consistently that for both television and radio, effective local news, local editorials, and local documentary specials lead directly to higher station ratings.

The continuing problem for the station news director is to identify which local news events are most important, which editorial topics stimulate most interest, and which specials have most meaning for the local audience. Here is where ascertainment is key. By identifying the major concerns of the community, it enables the news staff to focus on those news topics which are most relevant to the station audience. In so doing, the station is able to maximize the appeal of its informational programming and, thereby, increase its audience together with its profit position.

One may argue that using ascertainment findings to select news stories or editorial topics interferes with professional editorial judgment. Just the opposite is the case. By clearly delineating audience concerns, ascertainment shows those, of the many potential stories from which a news director must choose, will be most relevant to station listeners or viewers.

By serving as a guide in the basic selection decision that every program manager must make -- what local news stories to cover, what specials to choose, what editorial subject to focus on, and even what public service announcements to air, ascertainment can provide a viable function not only in terms of better public service but as a means to greater ratings and, thereby, greater profits to the station.

In summary, ascertainment is a stepchild of the broadcasting industry. It has become and remained such because no one has seriously asked the fundamental question of what do we mean by "community" and defining "community needs." I have suggested that an answer to this question must center on clearly delineating "community" (or target audiences) in terms of ethnic, demographic, and social as well as geographical considerations. In this day of the fragmented market, served by scores of stations, the concept of "service area" taken as a synonym for "coverage area" is absolutely inadequate.

Through their tacit acceptance of the ethnic station, both broadcasters and the Commission have recognized de facto that "community" means more than any persons residing within a station's coverage area. It is now time to expand this recognition to include all audience segments and all station formats. So doing will provide a relevant and useful meaning

to the concept of "community," or what might be better phrased as a station's "broadcast community;" it will facilitate a feasible ascertainment procedure and, in turn, encourage the use of ascertainment findings to serve the station's broadcast community and in so doing enhance the station's profit position.

LICENSE RENEWAL AND REFORM

Barry Cole

Today I will discuss the Commission's renewal proceeding designated Docket 19154. In this proceeding, the Commission is attempting for the first time to define the "good" or "superior" broadcaster. Until now, the Commission has, in effect, been using a pass/fail grading system at renewal time and no distinction has been made between the licensee who has been minimally acceptable and the licensee who has done a magnificent job. They both receive a three-year renewal, and must come back again for another one three years later.

In reviewing Docket 19154, I will explain briefly why the Commission thinks it desirable to attempt a definition of the "good" or "superior" broadcaster, the problems the Commission is having in this attempt, and the problems which will still remain if the Commission ultimately decides to adopt the Docket 19154 approach.

I think that in order to understand Docket 19154, we must begin by citing the WHDH case, because Docket 19154 stems from the success of the competing application filed against WHDH and a desire to protect a good number of encumbents from such successful challenges in the future. The January 1969 WHDH decision led to the Pastore Bill (S2004), introduced later that year which was aimed at protecting encumbent licensees. The Pastore Bill stipulated that if the Commission decided the encumbent had served the public interest, his license should be renewed without a hearing, even if a competing application were filed. The simple test was: did the encumbent serve the public interest? The Bill made no reference to the question of defining the good broadcaster as opposed to the minimally acceptable broadcaster, and, in fact, avoided that issue entirely.

In January 1970, with the Pastore Bill's future very much in doubt, the Commission issue its 1970 Policy Statement which said if a competing application was filed "on top of" a renewal application there would be a hearing, but the hearing would be in two stages. In the first stage, the Commission would look at only the encumbent, and if the Hearing Examiner concluded that the encumbent's performance was "substantial," the hearing would be over. However, should there be some question about the encumbent's performance, the hearing would go to a second stage; and questions regarding what the challenger might do if he got the license would be considered. The encumbent might still be renewed, but only after the second stage to the hearing - the comparative stage of the hearing - had been concluded in his favor.

The Commission made it clear in its January 1970 Policy Statement that the Statement was meaningless unless the term "substantial" was defined; in fact, the first stage of a hearing could not be carried out without such a definition. The Commission used Webster's Dictionary definition of "substantial" -- "large, ample, of considerable value and merit" -- and pledged to clarify what was meant by "substantial" program service in future Notices.

The Policy Statement came under bitter attack from the Citizens' Communication Center (CCC), since Section 309(e) of the Communications Act requires a full hearing if a competing application is filed. CCC argued that the 1970 Policy Statement and its two-stage hearing concept was not, as the Commission contended, simply a clarification of policy, but was, in point of fact, a change in the law. CCC appealed to the Commission to not adopt the Policy Statement. The Commission refused this petition as well as a later petition for reconsideration, and again promised to define what constituted substantial service. CCC then appealed the Commission Policy Statement and its concept of the two-stage hearing to the courts. Meanwhile, in November 1970,

a special report of a House committee concluded that the Policy Statement was, in effect, a change in the law. At the very least, this report put pressure on the Commission to expedite its clarification of substantial service and the conditions in which a second stage of the hearing would be necessary.

In February 1971, the Commission issued a Notice of Inquiry designated as Docket 19154. The Notice cited two areas considered by the Commission to be basic to its allocation scheme and the whole philosophy of broadcast regulation in this country. The first area is local programming. The Commission cited Sections 307(b) and 303(s) of the Communications Act and discussed the decision of Congress that this country should have a large number of local stations providing local service rather than a few high-powered stations which could blanket the entire country. The Commission indicated that this is why so much spectrum space was allocated to broadcasting and why it believed a broadcast licensee could not be rendering substantial service without serving in a substantial manner as a local outlet.

In the notice, the Commission proposed to establish percentage guidelines which, if met by the encumbent, would have the effect of shifting the burden of evidence in a hearing from the encumbent to the competing applicant. For example, in a hearing, the encumbent would be presumed to be rendering substantial service, if 15 percent of his total programming had been local, and if 15 percent of his prime-time programming -- that is, between 6:00 and 11:00 p.m. -- were local. The challenger would have to prove that although the encumbent met the percentages, the quality of the programming was inadequate or was not geared to the needs of the community. Conversely, if the encumbent did not meet the percentages, he would have to prove that despite this, his programming was so exceptional he should nevertheless, be considered to have rendered substantial service.

The Commission recognized that there might be difficulties in requiring every television station in the country, regardless of financial resources, to do the same percentage of a specific category of programming. Consequently, it decided to propose a percentage range. At the bottom of the range would be stations with revenues of less than one million dollars; at the top, stations with revenues of more than five million dollars. The range for local programming would be 10 to 15 percent of total programming and 10 to 15 percent of prime-time programming. In other words, if the licensee earned less than one million dollars in revenues, he would be presumed to be rendering substantial local programming service if 10 percent of his total and also his prime-time programming were local. Stations earning more than five million dollars would have to provide 15 percent local programming to be considered substantial. Stations earning between one and five million dollars in revenues would fall proportionately between the requirements of 10 and 15 percent for local programming. If the encumbent met those percentages applicable to it there would be a prima facie indication that he was rendering a substantial local programming service.

The second area which the Commission said it considered basic to its allocation scheme is the extent of a licensee's contribution to an informed electorate. In its Notice of Inquiry on Docket 19154, the Commission referred to a 1949 editorializing report, among other things, and indicated that programming of news and public affairs should be of primary relevance in considering whether or not a licensee was rendering substantial service. The Commission then proposed percentage ranges for evaluating news and public affairs programming. The range proposed for substantial services in news coverage was from 8 to 10 percent of total programming and 8 to 10 per cent of prime-time programming: 10 percent, if the station made more than five million dollars in revenues. In the area of public affairs the proposed ranges were 3 to 5 percent of total programming and 3 to 5 percent of prime-time programming.

Needless to say, when the Notice of Inquiry in Docket 19154 was issued in February 1971, it proved very unpopular with almost all broadcasters. As will be discussed later, the situation has changed significantly since then. An increasing number of broadcasters now feel that the 19154 approach is perhaps the best solution, and I think there is a 50-50 chance that the Commission will adopt it.

The Commission vote in February 1971 to issue the Notice of Inquiry in Docket 19154 was 5 to 2. Of the 5 yes votes, four were concurring opinions which indicates the uncertainty most Commissioners felt about how, exactly, the term "substantial" should be clarified. However, the Commission was under pressure to do something to give meaning to the 1970 Policy Statement, particularly after having twice indicated it would do so and the Policy Statement having already been appealed.

In June 1971, the Citizens' Communications Center Decision of the U.S. Court of Appeals for the District of Columbia was released, which ruled the 1970 Policy Statement invalid. The Court held that Section 309(e) of the Act requires that if a competing application is filed against an existing licensee, the challenger is entitled to a fullscale hearing. In order to change this procedure, Congress would have to amend the Act by amending Section 309(e).

Although declaring the Commission's 1970 Policy Statement invalid, the Court encouraged the Commission's attempt to describe what constitutes substantial service. The court indicated that even though a full hearing must be held if a competing application were filed, the Commission should provide an incentive for the encumbent to provide good service. The Court suggested that if all licensees were equally susceptible to challenge every three years, many might well decide simply to make all the money they could and take their chances at renewal time. The Commission was urged to formulate a definition of "superior" (not "substantial" service) which if provided by the encumbent in the current license period would give him a "plus of major significance" in any hearing resulting from a competing application.

In May 1972, the Court clarified its decision by saying "superior" meant "far above average" and it was the superior encumbent who should be protected. The Court further suggested various criteria the Commission could use to determine whether or not a licensee was superior. These included (1) the extent to which the licensee reinvested profits (a suggestion the Commission would resist), (2) the extent to which diversification of media ownership would take place if the license were given to a challenger (that is, if the encumbent had concentrated media holdings in the service area and the challenger had none, this could be considered to be a plus for the challenger), (3) the presence or absence of loud and deceptive advertising on the licensee's station, (4) "licensee freedom from government intrusion in First Amendment," (5) the quality of the programs aired. The Court, in effect, was saying to the Commission, "We are not telling you what to do, but here are some things which we feel could well be considered in determining whether a station is, in fact, superior."

In the same month, May 1972, oral argument was held on Docket 19154 before the full Commission. When the Notice of Inquiry was issued in February 1971, only two broadcasters had supported the concept of establishing percentages in local programming, public affairs and news as primary indicators of the licensees who are rendering substantial service and should, therefore, be given preference over any competing application. The two supporters filing comments were NBC and Westinghouse (Westinghouse is often in disagreement with the rest of the industry, very much to their credit, according to some people). Westinghouse said the approach was fine and the

percentages were reasonable. NBC reluctantly supported the approach as the best possible alternative, but contended that the proposed percentages were too high. NBF suggested that all its affiliates were rendering substantial service, but was willing to accept percentages which would indicate that one-quarter of the stations were not superior. This, of course, is probably not what the Court had in mind when it indicated that only the "far above average" stations were those who should be given a "plus of major significance" if challenged by a competing application.

By May 1972, however, half of the broadcasters or broadcast attorneys giving testimony at the oral argument supported 19154. Why, despite the fact that the 1970 Policy Statement (the genesis for Docket 19154) was now invalid and a full hearing was required if a competing application was filed, had many industry representatives changed their positions and were now supporting, albeit reluctantly, the 19154 approach?

The first reason is that hearings resulting from the filing of competing applications are, like most FCC hearings, terribly lengthy and expensive. KHJ, the Channel 9 old-movie station in Los Angeles, was challenged in 1965 for inadequate performance between 1962 and 1965. It is now 1972 and there is still no decision at the Commission level; and once the Commission decision is handed down, a court appeal is likely. WPIX in New York was challenged in May 1969. Thus far, over 5000 pages of transcripts plus documents have been gathered during more than 100 days of testimony. The case is now almost three and a half years old and it may well be another three and a half years before the case will go through the hearing stage, the review board stage, Opinions and Review, the Commission decision and the almost inevitable appeal to the Court. A Los Angeles group which had filed a competing application against KNBC but then decided to back out was reimbursed by KNBC for the 100,000 dollars the group had reportedly paid in legal fees during one year of simply preparing for the comparative hearing, a hearing which was not even held. A classic case illustrating the inordinate length of these hearings was given at the oral argument on Docket 19154. One attorney referred to some ex parte photographs which his colleague had sent to one of the Commissioners. The first photograph sent was of the attorney's son riding on a tricycle. The following photograph showed the same son now in high school. That was several years ago and the hearing is still going on. These examples illustrate the problems of hearings resulting from a competing application in terms of time and money. The hearings are open-ended, and they are usually at least as bad as the comparative hearings involving applicants for a new station have been all these years.

So, one reason there was increasing, even though reluctant, support for the Docket 19154 approach was a real desire to get some kind of grip on a hearing and to say "Okay, here is what we are talking about. Did the licensee meet these percentages or not?" If it did, then the burden shifts the other way, and the challenger must demonstrate that the programming was in some way deficient. The comparative hearing would not be concerned, as have some in the past, with the number of toilets at the station or the number of parking spaces in the station parking lot.

The second reason for the grudging support given the 19154 approach at the May 1972 oral argument was the desire to alleviate the industry's fears (which some considered to be unjustified over-reaction) regarding the WHDH case. If, in effect, broadcasters can be told that if certain programming percentages are met, the licensee will have a very good chance in a hearing situation, their constant fears of challenge will be alleviated and industry stability will be promoted.

A third reason for the industry's support of the 19154 approach stemmed, somewhat ironically, from the perception of the Commission's extreme reluctance to take a license away from an encumbent, and, in effect, to repeat the WHDH situation. The Commission was viewed as fearing that if it ever again gave the license to a competing applicant, the outcry and the concern over the stability of the industry would be perhaps even greater than had been the case with the WHDH decision. As a result, the FCC made decisions such as the one involving WQAD, Moline, Illinois. That case should be carefully studied because it suggests what happens when the Commission does not want to take a license away from an encumbent and has difficulty justifying its decision to let the encumbent stay on the air. For example, in obtaining its license, WQAD had promised twelve local prime-time public service programs, each week; it did none. The Commission said in its decision that this was considered to be only a slight demerit: first, because few licensees had fulfilled promises made in order to receive their licenses; second, because WQAD did not get its license primarily on the basis of programming promises. Both arguments were considered rather weak by many observers and many broadcasters were relieved when an appeal of the Commission's decision was averted by a rather large out of court settlement.

Its reluctance to take away a license makes the Commission's decisions vulnerable to Court reversal, especially if the Commission continues to favor encumbents without articulated guidelines for its decision making processes. There was a real fear that the Commission would have lost an appeal of the WQAD decision, especially if the Court of Appeals panel had included judges like Judges Bazelon and Wright. Commissioner Nick Johnson attached to the WQAD decision a draft of a lengthy Opinion and Order which argued that the challenger should have received the license. Thus had the appeal not been withdrawn, the Court would have had the opportunity of examining both a detailed majority and minority opinion and which opinion the Court would have supported is very uncertain. The Court did not have to hear the case because the out-of-court settlement was made. However, there are other WQAD-type cases coming up and the Commission is very much concerned. The next case will probably be that of KHJ in Los Angeles, an old movie station on Channel 9. Their major argument is, in effect, "We promised old movies, we gave old movies. If you do not like old movies, why did not you take the license away at renewal time?" The challenger contends that while that argument is not sufficient if there is a challenger willing to do more than to show old movies. If the Commission does find in favor of KHJ, it may have difficulty finding solid supporting arguments, especially since RKO which owns KHJ is involved in serious anti-trust litigation.

So without guidelines the Commission is vulnerable at the Court of Appeals, the same Court which has told the Commission to go ahead with Docket 19154. This then was a third reason for the support given the 19154 approach at the May 1972 oral argument.

A final reason for the growing support of Docket 19154 was the decreasing possibility of new renewal legislation. Of course, from the broadcaster's point of view, the ideal would be to have the Act amended to, in effect, make it very difficult for a competing applicant to take over a license from an encumbent. However, by May 1972, it was clear that no renewal legislation of any kind would be passed in that year and the prospects for 1973 were very uncertain. Thus there was a feeling by May 1972 that, at least in the interim, perhaps the best thing would be to go ahead with the 19154 approach, particularly since the Court directed the Commission to determine what programming service an encumbent would have to provide to warrant a "plus of major significance" in a hearing involving a competing applicant.

What specific objections have been raised regarding the 19154 approach and what counter-arguments could be offered? The first objection is: What do percentages tell us about programming quality? Answer: nothing, but the hearing would bring those matters out, and with the percentages, there is at least some guidance regarding who should bear burden of evidence and which programming areas are to be considered.

A second objection is: What do the percentages tell about responsiveness to community needs? Answer: again, the hearing would provide a full exploration of response to community needs. These percentages simply shift the burden of evidence; they are not conclusive in themselves. Another answer is that as the result of Docket 19153 there will be a requirement that each year television stations must list in some detail the problems of the community and the programs that were broadcast to meet each problem. If the broadcaster must complete this list (Docket 19153) and, if he must broadcast a certain percentage of news, public affairs and local programs to protect himself from a competing applicant (Docket 19154), then the news, public affairs and local programs will probably be directed towards, and hopefully be responsive to, community needs.

A third specific objection to the 19154 approach is the concern that to meet the percentages, broadcasters will have to reduce the quality of their programming. Ninety-nine percent of the stations in this country would have to increase their news, public affairs and/or local programming to meet all the proposed percentages. Although many stations meet several of the proposed percentages, only one percent of the television stations in the United States meet all of the percentages proposed in Docket 19154.

The answer to this criticism, that an increase in quantity of news, public affairs and local programs will result in a decrease in quality, is the theory that there is an economic incentive for licensees to do the best possible quality programming in order to obtain the largest possible audience. If all licensees will be required to have more public affairs, news and local programming, then there is an economic incentive for each licensee to maintain quality higher than that of his competitors in order to enlarge, or at least retain, his share of the audience.

There are, of course, other criticisms of the 19154 approach. Opponents argue it limits licensee discretion and will result in stereotyped programming. They point out that numbers are easy to juggle and there is nothing to prevent the Commission from raising the percentages in the future. For example, four years from now the Commission could decide that 50 percent local programming constitutes substantial or superior service. To this argument, one response is, as Storer Broadcast noted, for the broadcaster to say to himself "Well, we are going to have to take our chances." Moreover, there must be reasonable limits regarding amounts of local, public affairs and news programs beyond which the public and the Congress would never let the Commission go.

One final objection is: Will the public really be served by these large percentage increases with 99 percent of the stations having to increase their non-entertainment programming? The Commission would respond (if it decides to adopt the 19154 approach) that it has a responsibility to set the guidelines, and local programming for an informed electorate are of such importance that such programming should be presented in reasonable amounts if the licensee in question wishes protection against a competing applicant.

There are some other key questions which will arise if the 19154 approach is adopted. Bob Wells, the Kansas broadcaster who was a Commissioner when the Notice of Inquiry and Docket 19154 were issued in February 1971, has asked, what happens

when all the stations meet the percentages? What then? It is a very interesting question. There is general agreement that if the 19154 approach is adopted, all stations will immediately meet the percentages simply to avoid possible danger. Will this, in effect, close the challenge door? If every licensee met the percentages, would anyone challenge, and if not, would the public really benefit from such a system? Another significant question is: Will the hearings really be shortened? Or, in reality, will the Commission simply be shifting the burden of evidence in what will continue to be an open-ended hearing which would revolve on matters of program quality?

Are the proposed percentages too high? Various citizens' groups feel they are far too low. They think the proposed percentages suggest mediocre, rather than substantial, let alone superior, program performance. This, of course, is central to the Commission's dilemma. If the Commission were to think in terms of the A, B, C, D, and F academic scale, and wished to protect the encumbent, what would happen to the B and C stations? The Citizens' groups would argue that only an A station is superior and the Court has said only the superior or "far above average" encumbent should get a "plus of major significance" in a hearing. Thus a B station should be almost as vulnerable as a C station. Most industry spokesmen, however, would argue that all B and C stations definitely should receive protection. As mentioned earlier, although NBC expressed willingness to acknowledge that 25 percent of the stations were not superior, it argued that the other 75 percent were. Citizen's groups have in no way agreed with NBC's percentages.

What about the categories of programs that should be used if the 19154 approach is adopted? Should news and public affairs be combined into one non-entertainment category? Action for Children's Television wants the addition of a children's programming. The office of Economic Opportunity says the broadcaster should have a certain percentage of "Informational Services" programming directed to minority groups and to the disadvantaged in order to be considered substantial or superior. The National Association of Better Broadcasting thinks the substantial or superior station should do so much cultural programming. The National Association of Religious Broadcasters maintain that the categories selected should permit the inclusion of religious programming.

Should the current prime-time classification of 6:00 to 11:00 p.m. be retained? If one defines prime-time as being between 5:00 p.m. and 11:30 p.m., then the great bulk of television stations in this country satisfy the 10 percent requirement of news. If one defines prime-time as 6:00 to 11:00 p.m. and do not include newscasts between 11:00 and 11:30 p.m. or between 5:30 and 6:00 p.m., then only one-third of the VHF affiliates in the top-50 markets program 10 percent news, and less than one-third of VHF independents meet the 5 percent news requirements proposed for such stations.

What about the concept of percentage ranges? To stipulate that a station making less than one million dollars in revenues may do less news, local, or public affairs programming, is to penalize the station making more than five million in revenues. Many people at the Commission have long felt that by definition the station best serving the public interest is the one with the largest audience, and such a station usually has high revenues. Moreover, if stations with more revenues should do more local, news, and public affairs programming what happens when a station begins to lose audience and revenues? Is the station's public interest responsibility reduced, even though the reasons for loss of audience may be that the station broadcasts poor quality, ineffective and unresponsive programming?

Suppose the licensee in question met all the percentages but one? Suppose he met the percentages in news, in prime-time news, in public affairs, in prime-time public affairs, and in total local, but did not meet the percentage in prime-time local programming? Would he get a plus of major significance? Would he still be considered superior or substantial? Suppose the licensee met all the percentages, but was found guilty of a minor violation of the Fairness Doctrine, or a slightly inadequate ascertainment of community needs? Could he still be superior? Does the licensee with other media holdings which could generally be categorized as constituting a media concentration in a given service area have to be an A broadcaster? In other words, should we force a WHDH type encumbent with newspaper/television holdings in the same service area to to a little bit more in order to be protected from a competing application? The Court seems to say yes.

These then are vitally important questions which the Commission must answer if the Docket 19154 is ultimately adopted. What are the alternatives to taking such a numbers approach if, in fact, the Commission wants to clarify which encumbents should be given some protection against a competing applicant? The NAB has argued (in supporting renewal legislation) that the test should be whether or not the licensee has made "good faith efforts" to ascertain and program to meet the needs of the community. The encumbent would not have to demonstrate that it actually met the needs and thus served the public interest, merely that it had made a "good faith effort" to do so.

Even if the public interest standard were changed to a standard of "good faith" there would be perhaps as many problems with the good-faith approach as with a 19154 approach. How many people must be ascertained to demonstrate a good faith ascertainment effort? Over how long a period does the ascertainment have to take place? How in-depth does each interview have to be? How many community needs have to be listed as a result of the ascertainment? How many programs have to be broadcast to meet each community need in order to constitute a good faith effort? One could go on and on with problems resulting from a "good faith efforts" test.

The alternatives to the 19154 approach that have been suggested pose equally troublesome problems. Consequently, I would now say that the chances of the Commission's adopting the 19154 approach are about 5 in 10, whereas a year ago I might have said the chances were 1 in 10.

It is interesting to speculate what would be the effect of adopting Docket 19154 on the filings of petitions to deny renewal applications, as, for example, the petition filed against WMAL-TV which will be discussed later this morning. WMAL, instead of broadcasting 15 percent local, broadcast during the 1969 composite week, 7.12 percent local; instead of broadcasting 10 percent news, that station broadcast 5.7 percent news; instead of broadcasting 5 percent public affairs, it broadcast 1.2 percent public affairs. If Docket 19154 had been adopted before 1969, and if WMAL (wanting to meet all the percentages so that it would be in a better position if challenged by a competing applicant) had doubled local programming, trebled public affairs, and almost doubled the amount of news; and if Docket 19153 had been adopted, encouraging WMAL to deal with community problems in very specific terms -- perhaps the additional public affairs, news and local programming would have gone into programming serving the blacks of Washington, D.C., and perhaps the 1969 petition to deny would not have been filed. It is an interesting question.

What will be the reaction of the Courts if the Commission adopts the proposed percentages in Docket 19154? The Commission says it should be protecting those encumbents who render "substantial" programming service. The Court says the Commission should protect only those encumbents who render "superior" service. If the Commission adopts percentages which would protect too many stations, and/or if

the Commission refuses to recognize re-investment of profit as one consideration, what will the Court's reaction be?

And what will be the reaction of Capitol Hill? Will it be renewal legislation? And if so, what kind of renewal legislation?

To conclude, the issues raised by Docket 19154 are very difficult ones for all Commissioners, regardless of their individual regulatory philosophies. Nick Johnson must be wondering if he would be helping to close the door on competing applications if he supported Docket 19154, given the high probability that all stations would quickly meet the percentages adopted or come very close. However, he might conclude that in forcing 99 percent of the stations in this country to do more local programming, more news, and more public affairs, Docket 19154 would be doing something positive which the FCC has never done at renewal time, and probably would never do. A Commissioner with a somewhat more industry-oriented philosophy may wonder whether adopting Docket 19154 would really give broadcasters the security they think they are going to get once they have met the percentages. Full hearings will still have to take place if a competing application is filed. These hearings will probably still concentrate on the quality of the programming of the encumbent and the proposed quality of programming of the challenger, and will thus probably still be lengthy and costly.

And finally, will the public -- not the organized citizen groups, but the general public audience -- really benefit from a nationwide, simultaneous increase in the amount of local programming, the amount of news, and the amount of public affairs broadcast on commercial television stations? This is another difficult question which may make you thankful you are not one of the seven Commissioners.

PART III

THE BROADCASTER AND CONTENT CONTROL

Those who declare that there should be no "censorship" of any kind imposed upon the informational and cultural messages flowing through broadcast channels seem unaware of either the meaning of the term or the nature of broadcast programming. Through customary usage "censorship" has come to mean only those alterations government causes in communication content, but from a standpoint of audiences the crucial question is not who makes the alteration, but whether it is founded upon factors relevant or irrelevant to the quality of the message. Thus if the term includes, as it should, any modifications in content dictated by factors unrelated to truth or artistic merit, then the broadcast industry itself is continuously engaged in this practice when processing the reality and fantasy it delivers making its program packages as attractive, and thereby as profitable as possible. The day's events certainly do not merge automatically into 21 minute segments of national news, nor does drama come pre-fabricated in proper format, with syndication values firmly in place.

Since only an infinitesimal quantity of that which has happened or that which has been created will be selected and shaped to fit within the narrow confines of each broadcast day, a more accurate way of stating the issue would be to ask not "whether government should censor programming", but whether any judgment other than the broadcaster's should be involved in determining the social attitudes and beliefs which will dominate the public airwaves. Stated in this fashion the question becomes far more difficult to answer, but far more useful to ask.

As is typical in an issue this complex, few experts argue in absolute terms. Those who support a broader federal role in program supervision generally admit that the broadcast industry has not been inclined to use its awesome power for nefarious ends, but criticize the dominance of economics as the primary determinant in program creating and selection. Those who urge broad broadcaster autonomy in this area are equally willing to admit that existing programming is often banal and superficial, but question the capacity of a federal agency to instill any greater value in such programming through its leadership.

Former FCC Commissioners Lee Loevinger and Kenneth Cox open this section by setting these outer perimeters. Loevinger, now practicing with the law firm of Hogan and Hartson, argues for minimum intervention by the federal government generally, while Cox, an attorney with the firm of Haley, Bader and Potts, suggests that at least in matters involving the "Fairness Doctrine," the FCC must act to fill a vacuum resulting from broadcaster inactivity.

Attorney Martin Gaynes of Cohn and Marks analyzes recent trends in the "Fairness Doctrine" while John Summers, chief counsel for the National Association of Broadcasters outlines objections broadcasters have to recent legislation limiting spending for political radio and television advertising.

W.M. (Bill) Roberts, former president of RTNDA and now deputy press secretary to Vice President Ford, describes the functions of the Radio and Television News Director's Association to maintaining the integrity of broadcast news, and Stockton Helffrich, Director of the NAB Code Authority, illustrates the way his organization attempts to aid broadcasters in making responsible decisions about program content.

No one attempts to delineate at what point FCC "concern for public interest in programming" merges into public censorship, or when "responsible and concerted action by broadcasters" may constitute private censorship, but at least these general discussions by those expert in this area isolate some of the factors each of us must consider when evaluating which way the balance between these two forces may be shifting.

THE FCC AND CONTENT CONTROL

Lee Loevinger

The topic of the regulatory powers of the FCC, I confess, is one that rather appalls me. It is a little bit like being asked to talk about the problems facing modern society, and when you get through, give us a few hints on interior decorating or something like that. As a matter of fact, there are some who think that the topic of the problems facing modern society is virtually the same as the topic of the regulatory powers of the FCC. I think that the regulatory powers of the FCC may be one of the main problems of modern society today.

The real crux of FCC regulatory power (so far as social problems are concerned, and the things that do or should concern you) are those which essentially revolve around program content control, the Fairness Doctrine and program regulation alike. As to these, I expect a certain ambiguity of attitudes in most people. Almost everybody is in favor of free speech except the kind that he does not like.

Actually, the Supreme Court, by its rhetoric as much as by actual holding, has held that there is a very wide area of discussion in which expression is constitutionally protected by the First Amendment against any governmental interference.

However, although the area of constitutionally protected expression as delineated by the court is very wide, it is not unlimited, and the court has said that free speech is subject to some limitations arising from the necessities of the case. .

In 1942, the court said, there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include: the lewd and obscene, the profane, the libelous, and the insulting or fighting words, those which by their very utterance are likely to incite an immediate breach of the peace. Now, while the court has said that the exceptions to the First Amendment are well recognized and well defined, in fact, they are neither. Obscenity is certainly not within the area of constitutionally protected expression because the court has said it is utterly without redeeming social importance. But this rationale gives us very little guidance in defining what has or does not have redeeming social importance. It is merely a verbal formula which gives us some, but slight guide.

Today it is highly doubtful that blasphemous or profane statements remain outside the scope of First Amendment protection. A group libel statute has been sustained by the Supreme Court as valid, but the libel conception generally has been narrowed as the court has held that even libelous statements about public officials are protected unless actual malice is proved. The government may constitutionally prohibit lotteries, and speech presenting a clear and present danger of substantive evils of the kind that Congress has

Although this selection from the 1969 seminar has been revised for this collection, it is founded upon the status of the law at the time of presentation.

a right to prevent. But overall, the general rule clearly is that all kinds of verbal expression, as distinguished from action or threat of action, are protected against government suppression, with increasingly narrow exceptions in the fields of obscenity, libel, and incitement to breach of the peace. However, the application of these principles to broadcasting is considerably more complex than first impression suggests.

There is to date no case squarely holding that broadcasting is within the scope of the First Amendment. However, I distinguish here between holding and dictum, which may be a distinction that is appealing to lawyers and is not so appealing to others, and I have little doubt that clear dicta by the court are as influential as holdings in this area. And in dicta, the court has said that the principles of the First Amendment apply to all media of expression and that "we have no doubt that moving pictures, like newspapers and radio, are included in the press, whose freedom is guaranteed by the First Amendment."

The reasoning by which the court reaches this conclusion regarding motion pictures inescapably applies as well to broadcasting. The court reasons that motion pictures are a significant medium for the communication of ideas whose importance is not lessened by the fact that they are designed to entertain, because their production and exhibition is a large-scale business conducted for private profit, or because they possess a greater capacity for evil, particularly among youth, than other modes of expression.

I recently reviewed a book written by an author who formerly worked for one of the networks, who casually tossed off somewhere in the middle of the book, the view that, of course, the First Amendment and freedom of speech has nothing to do with programming -- with broadcast programming -- because that is merely an entertainment medium and only applies to the reporting of news. Now, clearly, this is completely contrary to the position that the Supreme Court, quite rightly, I think, takes. However, the court also says that the alleged capacity for evil may be relevant in determining the permissible scope of community control. Now, there is a real waffle for you.

In any event, the Communications Act apart from the Constitution explicitly forbids the FCC to engage in censorship, and the court has said with reference to this particular provision of the Communications Act, that in this usage, the term censorship connotes any examination of thought or expression in order to prevent publication of objectionable material. This no-censorship provision has received, what is to me, surprisingly little discussion or attention in FCC decisions.

In two early cases under the Federal Radio Act, which contained a similar provision, the Commission denied the renewal of broadcast licenses mainly because of the broadcasting of objectionable programming. These are, I am sure, familiar to you, because they are the cases continually mentioned and, even today, cited by members of the Commission and its legal staff and all of those who would have the Commission take a more activist role in respect to programming. The first case involved an apparent medical charlatan who operated his station as an adjunct to the business of selling patent medicines for the public. The second case involved a minister who used the station's

license through a Trinity Methodist Church exclusively to broadcast his own brand of villification and extremism. He had been convicted of contempt of court for defamation and used his broadcasting station as an instrument of blackmail.

There was in the record in that case evidence that the minister would call up individuals, prominent individuals in the community, read to them an item that he proposed to broadcast and suggested if they made a specified monetary contribution to the station the item would not be broadcast; and that upon receipt of the monetary contribution, the item was, in fact, not broadcast; and in the absence of its receipt it was in fact broadcast.

On appeal from the Commission decision, it was held that refusal to renew the license in these circumstances was not an interference with the right of free speech, and the court said, "but merely an application of the regulatory powers of Congress in a field within the scope of its legislative authority." Again, if that is a legal rationalization for anything, I am damned if I know what logic means.

The Court of Appeals said the issue simply was whether there was a reasonable exercise of governmental control for the public good. As the court stated the facts, it was obvious that the operation of the station did not serve the public good, so denial of the license was held proper.

There has been no subsequent case under the Communications Act presenting precisely the same issues as the Trinity Methodist Church case. Nevertheless, I hazard to guess that both the Commission and the court would reach a similar result on similar facts today. However, I think there would be a much more rigorous analysis of the First Amendment issue in an effort to fit the facts within the sections of the First Amendment or decide the case on other grounds. In any event, the distinction between the Trinity Methodist Church case and Near v. Minnesota was not explored in the opinion in Trinity Methodist Church and has never been analyzed by the court, or for that matter, by the Commission.

In the Near case, a state court enjoined publication of a newspaper as a public nuisance under a state statute. Virtually the entire content of the newspaper consisted of malicious, scandalous and defamatory articles, many obviously false. The injunction was issued after trial and was based on consideration not of any single article, but of the newspaper's overall record of performance. Does that sound familiar? The court held that, despite a legislative finding that a publication of this type was against the public interest, the statute authorizing its repression was unconstitutional, and the court said that this decision rests upon the operation and effect of the statute without regard to the question of the truth of charges contained in the particular periodical.

The impact of the initial government action in both the Trinity Methodist Church case and the Near case was exactly the same: to prevent further public speech by the parties involved. In both cases, the grounds for action were the same: a finding, after full hearing, that the overall record of past expression by the parties involved was scurrilous, defamatory and contrary to the public interest. In neither case was the party involved constrained as to his private expression. Only the means of public expression were involved, a radio station in one case, a newspaper in the other.

Whatever the logical distinction between the cases may be, it is neither self-evident nor clearly stated in any opinion. The obvious difference between newspapers and broadcasting stations is that the latter require a license to operate because the nature of broadcasting is such that without some authoritative assignment of frequency, power and location and other technical parameters, mutually destructive interference results. However, the necessity for the control of the technical aspect of broadcasting does not logically imply either the necessity or the propriety of control of the content of broadcasting, much less suggest the right to suppress particular types of expression which are within the scope of First Amendment protection when published in print.

The common argument offered to bridge this logical gap is one attributed to the NBC case. Since radio spectrum is so limited that only a few, and not all who wish, may broadcast, it is necessary for government to choose those who are to be so licensed. In making this choice -- the service offered or to be offered -- the public interest can and should be taken into account. Program service is the essence of the service offered to the public. And therefore, the government should grant or withhold licenses on the basis of a judgment of the programming.

The difficulty with this argument is that the chilling effect of government suppression is precisely the same whether it is achieved by issuing a prohibitory injunction, or by denying the renewal of a license and forbidding public inspection without the license. It is precisely such suppression, on the basis of judgment as to social value, that the Supreme Court has said is forbidden by the First Amendment. The scarcity argument with respect to broadcasting facilities logically militates as strongly against government suppression to the licensing power as in favor of it.

The theory and spirit of the First Amendment, as previously stated by the Supreme Court, is that government action must not be exerted to suppress any expression, no matter how hateful or noxious in the view of an official, except within certainly very narrowly limited and defined categories. Where the opportunity for expression is unlimited, as in private speech or writing, government action to suppress some particularly objectionable expression may have a relatively limited effect on the general discourse. But where the opportunity for expression is limited and requires a government license, any action by government to suppress expression on the licensed facility, or to favor or disfavor particular kinds of expression, will necessarily have greater influence and greater impact on all expression over similarly licensed facilities.

Since the First Amendment commands government neutrality with respect to the content of all types of expression, government action to control the content of expression on limited and licensed facilities seems peculiarly inappropriate. Unfortunately, First Amendment principles are usually tested in situations where the natural sympathies of normal and decent people tend to be engaged by the noble aims and decent purposes of the government officials seeking to exercise control, and to be repelled by the ignoble goals and unworthy purposes of those whose freedom is at issue.

You are all familiar, of course, with the cases of the attempts to suppress the communists and the Nazis and the fascists whose views are certainly uncongenial to any true believer in constitutional government. There can be no true

contention that there is any real social value in speech of the kind involved in the Near case or the Trinity Methodist Church case. But as the court has repeatedly pointed out, it is not the function of government to make such judgments of social value, and the First Amendment commands legal toleration of ignoble as well as noble sentiments.

It is difficult to escape the feeling that government should not permit, by license or otherwise, such public speech as was involved in Trinity Methodist Church. But it is even more difficult to find a wholly logical distinction between government suppression in the Trinity Methodist Church case and in the Near case. In any event, under the Communications Act of 1964, government suppression of speech has generally remained at a relatively low level of informal administrative action with acquiescence by compliant licensees, and there has been no court decision similar to the Trinity Methodist Church under the 1934 Act.

However, in 1941, in the Mayflower case, the Commission held that licensees could not express their own views, regardless of what they were, in editorials, and it reached this conclusion in the name of free speech. The Commission said: "Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented," which I think is a fairly obvious proposition. And then it went on and said, "a truly free radio cannot be used to advocate the cause of the licensee." What relation there is between the first sentence and the second, I do not see, and the Commission never explained. The Commission said radio cannot be used to support the candidacies of the licensees' friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

The issue, as usual, however, was not joined, since the applicant, to avoid the hazard of its license, submitted an affidavit undertaking full compliance with the Commission's position. Applicant's promises were accepted and the license was renewed. This, unfortunately, is the common course in administrative proceedings, although appellate courts seem quite unaware of this reality.

As you know, in 1947 the Commission on its own motion undertook to review the prohibition against broadcast editorializing, and after lengthy proceedings issued a report modifying, but not overruling the Mayflower rule. The 1949 editorializing report did not explicitly overrule Mayflower. The report, in fact, cited the Mayflower case on the proposition that "in the presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise." This is a proposition for which they cited Mayflower. It gives you some measure of the accuracy with which legal citations are used in FCC writings. Without expressly overruling Mayflower, the report concluded that overt licensee editorialization within reasonable limits and subject to the general requirements of fairness detailed above is not contrary to the public interest.

The reasonable limits of licensee editorialization have never been defined, imposed or challenged, but the Fairness Doctrine that broadcasting facilities

must be made available for contrasting views of all responsible elements in the community, has remained effective. In 1959, Congress, as you know, in amending the statutory requirements of equal time in Section 315, added that this constituted no exception to the obligation of licensees to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. And in June of this year, the Supreme Court held the Fairness Doctrine valid and constitutional. While the Fairness Doctrine concerns program content, it does not involve any element of suppression, rather requiring the expression of all conflicting views on issues of public importance.

This distinction between suppressing certain types of expression and requiring certain types of expression, underlies two distinct lines of authority in FCC development, although it has not often been explicitly analyzed or considered. From the beginning, the FCC has required licensees to keep logs showing the programs broadcast, classified by categories specified in FCC rules. It still does. It has generally been understood that the Commission expected and required that licensees have a minimum amount of programming in all categories. In 1960, as you know, the Commission issued a detailed prolix statement on the subject stating that while it was not authorized to condition the grant, denial or revocation of a license upon its own determination of what is or is not a good program, that since the broadcaster is required to program in the public interest it follows, and this is the Commission's language, despite the limitations of the First Amendment in Section 326 of the Act, that his freedom to program is not absolute.

The Commission said it was under a duty to review the programming of each licensee on a continuing basis and then specified fourteen program categories which it considered usually necessary to meet the public interest. The statement offers no explanation of the reasoning by which a statutory standard can imply a duty despite the constitutional standards of the First Amendment. I have pointed out this disparity and incongruity on a number of occasions. In fact, I have flung it in the face of the Commission and the Commission's general counsel, and to this day have never yet had a rational legal response.

The 1960 programming statement also says that the First Amendment forbids government interference asserted in aid of free speech as well as government action repressive of it. This would be news to the Supreme Court. What this suggests is that the draftsman of the 1960 programming statement got confused between the prohibition against the establishment of religion and that against the abridgement of free speech. The best you can say for the 1960 statement of programming is that it is so ambiguous and confused as to First Amendment principles that it is not obviously wrong, although I think it quite clearly is so mistaken and confused that it is of little help.

Nevertheless, it continues to be used and circulated by the Commission, constituting a part of the application and renewal forms in current use. Despite Commission inquiry regarding the consideration of programming categories, the authority of the Commission to require specific categories of programming has not yet been squarely presented to or decided by either the Commission or the courts.

There are three reasons for this, I think. First, the Commission and its staff have avoided direct confrontation on this issue. Despite the fact that Commissioner Cox and others will assure you that they welcome confrontation, they have gone to great lengths to avoid it. Second, applicants and licensees have been unable or unwilling to force the issue. In general, those who have been willing to force such an issue have lacked the resources, and those who have had the resources have been unwilling to hazard them for such purpose. Third, the majority of the Commission has become increasingly flexible in this matter and despite the strident demands of a minority, has increasingly relied upon a requirement that broadcasters survey the needs and desires of their communities rather than seeking to impose an official standard as to the type of programming required.

The increasing political and social tensions and turbulence of recent years have, of course, increasingly also been reflected in broadcasting. The range of public demands on broadcasting has become greater, with part of the public demanding more permissiveness to accommodate unconventional and provocative programming, and another part of the public demanding stricter adherence to established standards of propriety and taste.

Broadcasters have, somewhat uncertainly and hesitantly, broadened the range of programming to include more controversial and provocative material. The Commission has somewhat hesitantly and timorously moved toward the position that it cannot forbid or suppress program material other than that falling into a class excepted from First Amendment protection. Concomitantly, the Commission has become more insistent upon and expansive in applying the Fairness Doctrine. It has promulgated rules explicating and adding procedural requirements for the Fairness Doctrine in cases involving personal attacks and political editorials and has applied the Fairness Doctrine to cigarette advertising, both actions of which have now been upheld on judicial review.

In upholding the Fairness Doctrine, the Supreme Court gave a very expansive interpretation both to the power of the Commission and to the doctrine itself. The court states the doctrine as imposing the duty that the broadcaster must give adequate coverage to public issues and coverage must be fair in that it accurately reflects the opposing view. This must be done at the broadcaster's own expense if sponsorship is unavailable. Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. Under the rules, when a personal attack is involved or a candidate is attacked or endorsed in a political editorial, the person attacked, or the candidate, must be offered reply time to use either personally or through a spokesman of their own choice.

These obligations differ from the general fairness requirement in that the broadcaster has the option of choosing the method of presentation and the spokesman under the Fairness Doctrine, but not under the personal attack and political editorializing rules. The court reasons that these requirements are well within the mandate to protect the public interest, and the Congress has made it plain that the public interest requires broadcasters to discuss both sides of controversial public issues. The court recognizes that broadcasting is clearly a medium effected by a First Amendment interest. And that is as far as they go in their holding in this case. Then the court goes on to say that differences in the characteristics of news media justify differences in the First Amendment standards applied to them, and since only a tiny fraction

of those who seek to communicate by radio may do so it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every person to speak, write or publish.

The core of the court's reasoning is in these passages: "No one has a First Amendment right to a broadcast license. As far as the First Amendment is concerned, those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or monopolize the radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which forbids the government from requiring the licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airways."

"It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community obligated to give suitable time and attention, on matters of great public concern. To condition the granting or renewal of licenses on the willingness to present representative community views on controversial issues is consistent with the ends and purposes of these constitutional provisions forbidding the abridgement of freedom of speech and freedom of the press."

Thus, it is now clearly established that the First Amendment prevents the Commission from suppressing the expression of any views that are not within one of the judicially established exceptions for First Amendment protection, and that it permits the Commission to require adequate coverage of public issues, accurately reflecting opposing views. But the reasoning of the case goes beyond this. The court now speaks of the broadcast licensee as a fiduciary with obligations to the community and its public. With respect to broadcasting, the rights under the First Amendment are those of the public to see and hear ideas and experiences; and these rights may not constitutionally be abridged by either Congress or the Commission. Note that this reasoning raises an entirely new issue, going far beyond any that has previously been considered.

What is the mandate of the First Amendment with respect to this constitutional right of the public? The First Amendment prohibits government actions suppressing speech and permits government action to require speech representing opposing views. But what government action is constitutionally commanded, if any? There is yet no clear and certain answer to this question, and probably the Supreme Court itself has not yet considered it, although it seems to have elevated the Fairness Doctrine to the height of a constitutional principle. At the very least, the court has read the Fairness Doctrine into the terms of the Communications Act; and at the most, it has deprived the FCC of the power either to repeal or basically to amend the Fairness Doctrine.

In applying the First Amendment to broadcasting, the court has done it through the Fairness Doctrine, which results in this fiduciary duty. The fiduciary duty can be defined, at least in very general terms, as that of giving adequate coverage to public issues and accurately reflecting opposing views. But the corollary right is much harder to specify. The right of the public is to hear all views, not all individuals. Indeed, it is the very impossibility of giving all individuals access to broadcasting facilities that is said to give rise to the imposition of the fiduciary duty and its corollary rights.

Yet, if there is a legal right, there must be some mode of enforcement. What is it? The superficially obvious answer is that the FCC enforces the fiduciary duty of broadcasting. But this raises as many questions as it answers. Is the FCC to be an active investigator, prosecutor and advocate as well as adjudicator of broadcasting fairness? If so, we have probably established government censorship under the guise of fairness.

Broadcasters are entirely dependent on the FCC for their economic existence. The power of licensing, revocation and renewal, or denial of renewal, is a discretionary power that is largely unreviewed and ultimately unreviewable. Every broadcasting operation is subject to a host of technical regulations, and sooner or later, every licensee is bound to violate some of them. There may be differences of opinion as to the seriousness, and the sanctions of almost any violation, and the attitude of the commissioners and their staff toward a broadcaster cannot be wholly devoid of possible influence toward such issues. Consequently, a prudent and responsible broadcaster is likely to be very responsive to the views of FCC commissioners and staff, regardless of his own judgment as to public needs or demands.

Though not often articulated in this context, that fact has become a stereotype of FCC thinking reflected in the cliche of regulation by the lifted eyebrow. This simply indicates recognition of the general fact that occasional martyrs or heroes will assert their independence regardless of consequence to themselves, but in general, people will bend to the will of those who wield power over them. And the independence of individuals and enterprises will be directly proportionate to the power that government exerts over them.

While these problems arise in a slightly different factual context with respect to broadcasting, they are by no means new problems. In the 1940s, the same problems were considered by the Commission on the Freedom of the Press established under the direction of the University of Chicago. The Commission had considered and approved the obligation of public service on the part of the press; but referring to this, Professor Chafee, who was then professor of constitutional law at Harvard, a very distinguished reporter for the Commission, said: "The ideal under consideration is for the press to give all sides of controversial public issues, or at least all sides supported by a substantial group. But for the most part, this constitutes a moral and professional obligation of the press, not a legal obligation."

"The demand that every newspaper shall always live up to the moral obligation of complete fairness to both or all sides of controversial questions comes with ill grace from preachers, professors and writers who have brains enough to know how hard it is to obtain accuracy and impartiality in statements

of fact, not to mention statements of opinion. It is a mistake to insist on the aseptic ideal of a very, very perfect press. The most we can ask is that the men who operate the instrumentalities of communication shall feel strongly the need of the community for even-handed presentation of all the relevant facts and do a really good job in meeting that need -- not a perfect job, for who of us can point to that in his own work? The press should not be responsible for its quality and points of view to the government any more than to the advertiser or to the friends of the owner. The true responsibility of the press is to those who read and listen, and inwardly digest."

While the legal basis for control of broadcasting is different than for the printed press, the dangers of government influence and of enforced conformity to some official standards, I suggest, are no less, and probably greater. Even in a tyrannical dictatorship, there is the possibility of a clandestine and underground press. But with modern electronic instrumentation, there is virtually no possibility of an underground broadcasting service. So whatever the legal foundation for control may be, the actual dangers and evils of government censorship are no less in the field of broadcasting than in the area of print media. Thus, with the declaration by the Supreme Court that in the field of broadcasting the constitutional right of free speech belongs to the public, and that this is matched by a fiduciary duty on the part of broadcasters to present opposing views, the mediating principle between right and duty becomes that of fairness; and the necessity arises for application of this principle in cases of conflict by a tribunal with judicial objectivity and neutrality.

Whatever may be the case in other areas of administrative law and broadcasting, in the sensitive area of reporting news and presenting opposing views on public issues, neither the FCC nor any other agency can be complainant, prosecutor and impartial adjudicator, or hope to be accepted in such different roles.

Under the Fairness Doctrine, as now construed by the courts, the rights are those of the public; so it is reasonable for the public to enforce them. An enforcement of those rights will be by community initiative and complaint. Government initiative and complaint would necessarily result from, and represent, the views of government officials that the content of some speech or expression had not been fair. This is hardly compatible with that neutrality and objectivity which is necessary in such a sensitive area. Impartiality and detachment are much more easily maintained when passing on the complaints of others than acting as enforcement agent.

The role of zealous critic and reformer of broadcasting pursued in extra-official activities, which has been so attractive to some commissioners, is, I suggest, incompatible with the duty of determining the balance of fairness and the bounds of fiduciary duty which has now been thrust upon the Commission by the court. Thus, a corollary to the First Amendment rights of the public and fiduciary duty of the broadcaster is the neutral impartiality of the Commission as a mediating adjudicator. This has implications beyond the duty of personal restraint and judicial attitude on the part of the commissioners. It means, also, that the Commission, like the court, in First Amendment cases must be prepared to accept unpopular and even hateful or despicable expression as entitled to constitutional protection under the right of utterance. If the constitutional principles previously declared by the Supreme Court are to be maintained, the Commission cannot, as it has done in the past, declare that

Lyndon B. Johnson

atheists or persons with similar views are not entitled to radio time, or write a long homily on the virtues of permitting all views regarding religious subjects, and then conclude by summarily denying the opportunity for atheists or free thinkers to present their views.

The Commission has, at least in recent years, been reasonably tolerant in permitting unpopular, unfashionable and uncongenial views to be expressed on broadcasting facilities. If the Supreme Court really means what it says in the Red Lion case, that First Amendment rights to expression by broadcasting belong to the public, then the Commission not only must permit such views, but has the onerous duty of requiring that even the most objectionable and unpopular views are given broadcast expression when the demand is made, provided only that they do not fall within one of the judicially accepted exceptions to the First Amendment. This goes quite beyond anything that the Commission has ever considered heretofore.

Another potential implication of the fiduciary duty of broadcasters to act as proxy for the public is that presentations pursuant to such duties may be privileged against legal sanctions for libel. Certainly, this is the logical implication of language in the opinions suggesting that the licensee has no more right of censorship than the FCC. By the same token, this concept involves revision of the traditional FCC concept of licensee responsibility.

With respect to public issues, the primary responsibility of the licensee is not to approve or disapprove the content of material broadcast, but to provide facilities for the broadcasting of views that are fairly representative of the range of opinion within the community. This involves broadcasting of views that are upsetting and even shocking to many, such as espousal of the legalization of drugs, or perhaps advocacy of the desirability of homosexuality. As it almost surely will in contemporary society, demands for presentation of both of those propositions have been presented to the Commission.

The consequence is the inescapable result of the First Amendment mandate as construed by the court and applied to the limited licensed broadcasting facilities available in present circumstances. While the scarcity of broadcasting facilities may support Fairness Doctrine rules, it does not, on the other hand, justify general government supervision of all broadcast time or the establishment of general broadcasting standards. In fact, the assertion of general government control of programming, either through the imposition of standards or by means of overall supervision, is substantially equivalent to suppression of disapproved program content, since in effect, only officially approved program content is permitted and all other expression is suppressed or, depending on how the matter is handled, discouraged.

The imposition of the requirement for carrying certain limited categories of speech of social importance under the Fairness Doctrine does not have the same consequence and must be judged on a different basis. The court has, at least by implication, recognized this distinction. In the Red Lion opinion, it carefully notes that (these are parts of the opinion that are not commonly quoted): When the Congress ratified the FCC's implication of a Fairness Doctrine in 1959, it did not, of course, approve every past decision or pronouncement by the Commission on the subject, or give it a completely free hand for the future. We need not, and do not, now ratify every past and future decision by the FCC with regard to programming.

An argument that the Red Lion decision has, by implication or otherwise, given the FCC general supervisory control of broadcast programming (which I understand is being made today) is not only unwarranted by the explicit language of the decision, but is inconsistent with an analysis of the underlying rationale. On the other hand, the scarcity argument does have implications beyond the scope of the decided cases. If the scarcity of broadcasting facilities warrants the imposition of a fiduciary duty on those privileged to operate the facilities, does the same reasoning require the same results in similar circumstances involving other media? Logically, the answer has to be that in similar circumstances, the same legal consequences will follow.

This raises a question whether newspaper facilities are not even more limited than broadcasting facilities. Statistically, it is easily demonstrated that newspaper facilities are more limited numerically than broadcasting facilities. There are more than 6,500 radio stations and over 1,000 television stations, and the number is constantly increasing. Furthermore, it is not nearly as limited as is commonly assumed. In contrast, there are only about 1,750 daily newspapers published in the United States. Broadcasting stations are located in hundreds more cities than have daily newspapers, and all large cities have competitive broadcasting stations, although less than 50 cities have competitive daily newspapers.

The arguments usually made to distinguish broadcasting scarcity from newspaper scarcity are that broadcasting is limited by the electromagnetic spectrum, whereas the number of newspapers is not limited by any natural phenomenon, and that broadcasting facilities are licensed by the government, while newspapers are not. These arguments are based on differences between the media, but not on differences that are necessarily significant with respect to the First Amendment and the right of speech.

So far as the opportunity for the utterance of all views is concerned, it does not make any difference whatever whether facilities are limited by natural forces or economic forces. In either case, they are quite beyond the control of the ordinary citizen, and in either case, the limitation on the expression of views is precisely the same. Indeed, the effectiveness of economic limitations is the whole foundation of our antitrust policy, which makes no sense otherwise. In antitrust cases in the newspaper field, the court has clearly recognized and applied these assumptions. Furthermore, at the present time, the limitations of electronic communications facilities is in part the result of deliberate choice by government agencies, including the FCC, which have chosen to permit fewer facilities than technology would allow for various economic and social reasons.

The fact that broadcasting facilities are licensed is simply a lawyer's jurisdictional argument which logically has little to do with the control of broadcast speech. The assignment of frequency, power and other technological broadcasting specifications has no more to do with the content of what is uttered over broadcasting facilities than the government power to prohibit very loud noises has to do with the right to utter any views or any sentiments quietly. Most newspapers move in interstate commerce, enjoy second class mailing privileges, and hold various other government-granted rights which might serve as a jurisdictional basis for government control if the legislative and judicial branches should ever concur in seeking to do so.

I do not assert that newspapers should be subject to government control or to an officially imposed Fairness Doctrine. I do not think they should. However, it is asserted that broadcasting and publishing have much in common, are more similar than dissimilar, and are very likely to be treated similarly by government with respect to rights and duties. It is by no means a remote possibility that newspapers may be distributed electronically, either by the same means now employed in broadcasting or by transmission techniques employed by broadcasting in the future. What then do the courts and the professors say about the applications of the rules now being applied by the FCC to broadcasting to newspapers.

Technological developments are certain to make the distinction between electronic and print journalism less and less important. The legal status of broadcasting today is very likely to be that of publishing tomorrow. Indeed, these suggestions are neither new nor without respectable advocacy. Commissioner Cox and Senator Hart have already suggested the Fairness Doctrine for newspapers. As long ago as 1946, the Commission on Freedom of the Press concluded, among other things, "we recommend that the constitutional guarantees of the freedom of the press be recognized as including radio and motion pictures, and we recommend that the agencies of mass communication accept the responsibilities of common carriers of information and discussion."

In essence, both of these recommendations have been adopted by the Supreme Court for broadcasting. But the court has gone further. It has converted the responsibilities of broadcasting with respect to information into legal duties and has elevated these duties to constitutional status. There can be little doubt that these principles will be the law for a long, long time to come. The chances are great that the technology of broadcasting will change before these governing legal principles change. As Justice Holmes pointed out long ago, the law is more the result of felt social needs than of abstract logic.

The Supreme Court sits as a kind of continuing constitutional convention, adapting the broad general provisions of the Constitution to the changing needs of contemporary society. On occasion, the court, by way of implication or construction, writes a few additional provisions into the Constitution. There may be differing views as to the process or the reasoning for which result was achieved, but the legal status of broadcasting with respect to the First Amendment seems to be clearly established now. The First Amendment has simply been rewritten for the Twentieth Century. It is not certain that this latest revision will insure a free marketplace of ideas, prevent government censorship and help maintain a democratic social and economic order. But then, I suppose it never was certain that the principles of the First Amendment would be successful.

I think the ideal remains the same, but the challenge now -- the challenge to the courts, to the Commission, the challenge to bodies such as this -- is to say what the ideal of free speech means, and how it may be achieved in the confused groping society of our present turbulent and technological world.

THE FAIRNESS DOCTRINE

Kenneth Cox

The Fairness Doctrine, of course, is a favorite subject of mine - perhaps more so than for a lot of broadcasters. I was just cleaning out a very small part of the enormous pile of stuff in my desk today. I collect resolutions adopted by state broadcasters because they are always so predictable. This one seemed particularly appropriate in line with the Red Lion case. I won't name the state, but it was duly authorized by the Association's convention, going on record as agreeing fully with the position of the NAB in opposition to the Fairness Doctrine and supporting its efforts to get a change.

Well, I think that after twenty years of debate over the legal rights of the Commission to concern itself with fairness in the handling of controversial issues, the question is at last settled. And, I think, as is often the case where arguments escalate into litigation and finally reach the courts, that at least one side of that litigation had just as soon it had not tried it -- because I think the result in Red Lion is not only an affirmation of the Commission's authority to adopt the Fairness Doctrine and to administer it as it has over the last twenty years; it was also a sweeping statement of support for a right of access for the public to broadcast media which, I think, has implications even beyond what the Commission has done heretofore.

I do not mean by that to suggest that the Commission is going to drastically change its administration of the Doctrine in the near future. I rather doubt that the Commission is likely to initiate much of this sort of thing on its own; but I think there is a basis for broader action in this decision, if the public seeks to exploit it.

There is a proposition that has been in the Fairness Doctrine all along, but has been rather obscured. It has generally been understood that if a broadcaster presents one side of an issue, then the Doctrine requires him to make reasonable time available for presentation of the other point of view. But actually, what the Fairness Doctrine said in 1949 was that the broadcaster owes an obligation to the public to devote a reasonable percentage of his time to news and the discussion of public affairs. And the Court, I think, quite clearly states that this is, indeed, an obligation; that this means that the public is entitled to have at least the major issues facing its community discussed; and this imposes a duty, in the very first instance, on the broadcaster to determine and deal with those issues.

But I don't think this is really a matter of concern to most broadcasters, because I think most of them are presenting the principal issues in their communities. But if there is a broadcaster who - whether out of a desire to avoid controversy (although I think he is missing some good programming by doing so) or out of laziness, or whatever his reasons - has not been presenting the issues which his community must resolve, then I think this opinion lays the groundwork for interested citizens to go to him; and if they get no satisfaction, they can come to the Commission and ask that he discharge this obligation. If he has been selected and given the opportunity to use the frequency to serve that community, then he must discharge his obligation to address himself to these critical issues.

Although this selection from the 1969 seminar has been revised for this collection, it is founded upon the status of the law at the time of presentation.

I am sure you have seen reference in the trade press to a paraphrased version of an opinion by our general counsel indicating that another implication of the policy is that the Commission, under this decision, would have authority to specify percentages for certain categories of programming, if it could relate its judgment to factors relating to the public interest in the programming of station licensees. Now nothing, of course, has ever really been done about this. The Bluebook in the 1940s sort of adopted this approach, but it met with such a reaction that it was abandoned, and all we have done is to give you nice little blanks in the Program Forms where you can write percentages. The Commission has never tried to fill them in for you.

The Red Lion case, of course, also reaffirms the Constitutional validity of Section 315. And so that is going to continue to be with you, unless the industry succeeds in its perennial efforts to get the section repealed. It has long been my conviction - ever since I went to work for the United States Senate, as a matter of fact - that Section 315, while it represents a very arbitrary approach to the problem, has a certain basic validity and that Congress is not going to abandon it. I would, therefore, urge that the industry, in its present situation, should support the FCC's proposal for modification of the section. Our proposal is that the statute be amended to define a major party in such a way that only the Republican and Democratic parties would now qualify; and to define minor parties and give them lesser rights under the principles of the Fairness Doctrine. We think that this would free those broadcasters who say that they wish to give time for the major candidates, to do so without the prospect of then having to make time available to nonserious candidates -- strictly fringe candidates. At the same time, however, it would make time available for serious third parties, if there are any, so that we can keep open still further changes in basic political alignment, such as have taken place a couple of times before in our history.

TRENDS IN THE FAIRNESS DOCTRINE AND ACCESS: THE PROCESS OF FREE SPEECH

Martin J. Gaynes

Many a stand on fairness depends to a great degree on what you expect of the media and what you expect the media not to do. Part of the problem has been, and part of the reason most of these debates never seem to meet, is everybody starts from a slightly different belief as to what broadcasting is supposed to be and what it is supposed to do.

Commercial broadcasting people are not ogres. They are genuinely puzzled at what is expected of them because they view radio in a little different term than you might view it or other people might view it. They view it primarily as a vehicle by which to sell products and to entertain people. They do not see the media in the same terms, the same apocalyptic terms, that some of its critics see the media.

The FCC has an extremely difficult problem because they are trying to view the media in terms of the Communications Act of 1934 which is not very explicit on many points; and certainly does not give much guidance on what the FCC is supposed to do, other than the fact that they are not supposed to censor, which is something that I think we all feel--at least, I personally do--is a foolish argument. They do censor; so does everybody else; so do the people who wish to have access to the media. Everybody is, to a certain extent, trying to influence the media. And to the extent that they influence people on the media to broadcast things which they do not want broadcast, they are censoring.

It is a fruitless argument. The real question is how much censorship should we allow and how much shouldn't we allow. That is really what the debate ought to be, not whether the abstract censorship is permissable. All you have to do is listen to OTP--you know perfectly well the government is influencing what is heard on radio. Of course they are. The question is, in what way should they be allowed to do that, and in what way shouldn't they be allowed to do that. That is the real issue.

Why do we have a fairness problem at all? And why did it come at this time? This is something that is often not, I think, appreciated. We live in a time when perhaps the social glue that holds the society together is beginning to come apart. You people in the academy, perhaps more than most other people, know that because you can see it, of course, in the institutions in which you associate. Issues are coming to the fore. People want to make their views known. They want to express themselves. We live in an age of undisciplined expression, if you want to use the term. People wish, they want, to talk and they want to be heard. They want to be heard in the past ten years more than they ever wanted to be heard in the past. It is a reflection of the fact that we face some very sever tensions in our society for a lot of reasons (imbalance, income, discrimination) which people believe are susceptible to some kind of rational solution to which people want to get their ideas across. That is the problem. How does everybody get their ideas across in an age of communications where the most effective way of reaching the most people is through the airways?

This is a problem that is always lurking around in the background of the Communications Act and in the background of broadcasting. But it is only when the problems became as intensified as they have in the past fifteen years, that the problem has come to the fore.

What do you do with a man or group who sincerely feels there is an object area of inquiry which everybody should be talking about, but which nobody is? How do we get that idea and that information across to the people so it can enter the media, the marketplace of ideas? If anybody has an easy solution to that, I have yet to hear it.

Under the system of broadcasting that we have, it is not an easy thing to do. Up until maybe fifteen years ago, access was pretty much controlled by the people who owned the stations. They were the ones to whom the government had to look. They were the ones to whom petitioners who wished to get their views across had to come.

Up until Red Lion, which I propose is a watershed, the traditional position has been, with some exceptions, access is controlled by he who is the licensee. That was never always completely true. There has always been limitations to that section 315; equal time is a limitation to that. The lottery provisions is a limitation. Even the obsenity provisions, for what they are still worth, represent an encouragement to that.

But nevertheless, access was controlled by he who held the license. This is no longer true. Red Lion said no, there is another dimension of access, and that is the public's access. And that is the Pandora's box which we have opened today. What does that mean?

Well, we are pretty sure that it does not mean that any person who wants to get on the air can get there because he thinks he has a good idea. I term that analytically "personal access." These are made up terms on my part. These terms, I give them the definitions I want to give them. I can blame nobody for them. But I work a concept around where it says there is a question of personal access. Can I get on WTOP because I want to tell everybody that I think such-and-such ought to be the case? Even under Red Lion, the answer is no.

The FCC has long held, the Communications Act has held, Red Lion has vindicated it, even the most far-reaching Red Lion decision, even Judge Wright said that the FCC is correct. A broadcast station is not a common carrier.

There is no right of personal access, but there is what I consider a second list to my own category called "issue access." I think we are coming towards a situation where issues have to be aired in some way. No radio station, with any equanimity, can say I just do not want to cover that subject. However, many of them do. Most broadcast stations do not cover almost any of the issues a lot of people think are important. Many of them say are good music stations. They give grudging acquiescence to the Commission's affairs, but the percentage usually ranges anywhere from two percent to three percent to four percent. It is not really very expansive. Nevertheless, in theory, I think they are going to the point where issue access is what is meant by access.

Now, that just describes the problem. How do you get the issues in front of the people? One of the problems we have is that a lot of information that some people wish to get on the air is not related particularly to an issue. There are facts which are noncontroversial which no one disputes. For example, let us take Fairfax County, take a hypothetical. There is no doubt in Fairfax County there is a dearth of low and moderate income housing. It is not an

issue in dispute. Everybody knows it. Some people are trying to change that. Others are trying to stop the change, but it is a fact. It does not receive very much coverage. How do you get an issue like that to the public? And how do you get those facts before the public so an issue can be created? No one really knows. The only way that is available at the present time is to appeal to the Commission to say that the stations, let us say in Virginia and Washington, are not covering all of the facts which you think ought to be covered; and as a matter of their public responsibility, they ought to.

But that is very hard, you see, because there you are really right smack in the middle of a censorship problem. That is why goverment is telling your station you ought to cover this particular fact, even though it did not come up in the context of a dispute.

How are facts brought to the public which are not primarily issue oriented as yet? I don't know the answer to that. But I think that is a serious question.

See, it is very easy to say. If A gets on the air and talks about a particular issue, then you have to let B on the air, and you don't get in so much of a censorship hassel because it responds to the courts as well. You started it, you put on A. If you put on A, you are going to put on B to cover all sides of this issue.

It is one thing, the Fairness Doctrine says you are under an obligation to present conflicting views on public issues--controversial issues of public importance. But the word conflicting or contracting is always in there. It is a lot harder to say every station has an obligation to go and seek out areas which might lead toward the creation of controversial issues of public importance. And many stations do not do that. Most of the arguments we have had so far have been in terms of the extremes.

What about if you put on one side of the issue? Now that is pretty clear. If you put on one side of the issue, you have to put on the other side. How do you do that? Well, you leave it to the discretion of the licensee. How do you tell if he is being reasonable? You kind of guess. This is where we are today.

One of the reasons we are treading water is that we are all waiting for the Supreme Court to tell us what to do. The Commission now has in front of it the whole evaluation of the Fairness Doctrine and the rulemaking context. The Vietnam case is going before the Supreme Court, and until the Supreme Court acts, I don't think the Commission will. A lot of the questions, the problems that we have, simply are not going to be answered until we get some kind of a definitive Supreme Court ruling.

But I can tell you very plainly, whatever ruling you get from the Supreme Court, it is not going to be very definitive. It will probably be as narrow as, rule as narrowly as they possibly can. They usually try and do that.

So insofar as where the war is going to go, we are kind of in a hysteric situation until we get some further guidance. But there is one very interesting concept that was involved in the businessmen's case which I think has not been sufficiently understood by a lot of people.

Judge Wright said that when an individual businessman makes a policy not to sell commercial announcements on controversial issues of public importance, and the FCC condones that policy by not taking action against it, that then becomes state action. That is susceptible to the equal protection clause and the First Amendment. The concept of a private individual or a broadcast station's actions, once condoned by the FCC as becoming state action from the point of view of the constitutional amendments, that is a very significant data. Whether or not that will be eventually upheld is one of the things we are waiting to find out. It opens up all sorts of possibilities.

But there is a converse of that, too, which often is not appreciated. If the FCC acts and tells the station that it must put on a particular bit of information or a particular point of view, and does it in response to a complaint by a citizen, that is state action too. After all, it is a direct indication that the state is acting, and doesn't that raise some rather serious questions about government interference into their choice of broadcasting. And I think it really does.

And how are we going to handle this whole state action concept which raises the entire level of this debate to a constitutional level? We are out of the realm of mere government action and all that. We are at a constitutional level. That, I think, is where some of the more interesting questions that we are going to face in the Fairness Doctrine in the future are.

The third question, and one that is really driving everybody slightly beserk these days, is what do you do with commercials. Are we bending the English language too far by considering a simple commercial to be a statement on a controversial issue? This is a matter pretty close to my heart because this is one of the real day-to-day problems broadcasters face. And it arises because of this first problem, how do you get ideas across.

You see, the people who are against cigarette advertising were concerned in terms of how do we get the whole issue of cigarettes being harmful into the arena of the communications media. Well, they did it by a very ingenious solution. They said that a cigarette commercial is a statement on one side of a controversial issue. Even though, quite frankly, I doubt anyone in the business or the Commission before that ever really considered that to be the case. And I have my own personal doubts as to whether, in fact, it isn't one. But using this vehicle of stating that a simple product commercial by so-and-so becomes a statement on a controversial issue was the vehicle by which the entire cigarette harmful controversy came before the media and eventually was handled. This, of course, opened up this terrible Pandora's box. Now wait, if that is true for cigarettes, why isn't it true for everything? Logically, it is pretty difficult to make a distinction between cigarettes and an automobile, which are probably just as dangerous to the general health of the public.

The Commission first said there is a distinction. Don't worry about it. Cigarettes are unique. It couldn't hold up logically, and it didn't. And the Friends of the Earth, the court, said we don't understand that. That is crazy. If it is true in the case of cigarettes, we don't see a distinction in the case of automobiles, and the Commission is wrong in trying to limit its Fairness Doctrine only to cigarettes--not to expand it--and they sent that back in the condition which helped initiate this whole re-evaluation.

Right now, the big problem on the firing line is how do you view commercials? And the Commission, in fact, just the other day, came up with a case involving the automobile or gasoline. Chevron 310 reaffirmed its position that that particular advertisement did not represent a statement of a controversial issue because it did not talk about health hazards or make any claims in that direction.

What is happening, I think, is a refinement of the issue so that we are revolving toward the point where commercial advertising will have to be looked at very carefully, and certain commercials will be considered to be statements on controversial issues--other commercials will not be.

This is an area which is just going to be constant confusion. My own personal feeling is that the Commission would have been better off had the cigarette holding been placed strictly on a public health basis and not by taking a concept of a controversial issue and bending it to the point where it is almost fantasyland.

I personally think that a cigarette commercial was not a statement on a controversial issue, and it offends my sense of logic to have elevated that into a statement of controversial issue even though I understand why they did it.

But we are going to be plagued with that kind of lawmaking for the near future or working out this commercial problem. And it all stems, as I said at the beginning, from the problem how do you get before the public issues which you think the public ought to be aware of. I think we ought to recognize the fact that there is an obligation on the part of stations to cover these controversial issues, and there ought to be some mechanism, some points set up, which ascribe the responsibility on broadcast stations as to what they can and cannot do. We may, as some people have suggested, have many hearings or arguments before the Commission on what should be done. But that may be the only way out.

But the trend in fairness seems to be, as I started to say, more confused, more litigation. The problem today is that generally we are in the hands of the terribly oversimplifiers. Everything gets reduced to a slogan, and everybody uses the slogan for their own particular point of view.

What we need, and I think what we will get (what I hope we will get) is an exposition of rulemaking which might clarify some of these questions.

BROADCAST REGULATION AND THE NEWS

J.W. (Bill) Roberts

I can't think of a time (and I have been in this broadcast side of journalism since 1941) when the Federal Government, the intellectual community, and the general public have all been so critical of broadcast journalism. Everyone seeming to work from a different basis of criticism. You know, it is really kind of a strange thing for an old grey-beard like me to hear the intellectual community shout at us--the broadcast newsmen--to stop being so damn objective about our reporting.

The great argument among intellectuals now is that no one can be objective in news reporting. Reporters have to be involved--we have to be committed. We can't be bothered with just plain facts--we have to interpret. It is strange to hear that because when I started in broadcast journalism, way back when, the intellectuals were all hammering away at the Chicago Tribune, the New York Daily News, Time Magazine, and a lot of others which used interpretation unlabeled in their reporting columns.

The intellectuals of that day called it "slanting the news," and they all pointed then to the New York Times as a solid example of the most professional type of journalism which did not attempt to influence in its news columns; only to inform. I sometimes wonder what the intellectuals of today, the real thinkers, would do if suddenly the news media, particularly television (the most influential of the communications media) started interpreting the facts in the style of the Old Chicago Tribune. Would they still be claiming there is no such thing as objectivity?

Well, I doubt it. But this is one factor of criticism which hurts. While the intellectual community is yelling at us to do more interpretive reporting, what do we hear from Mr. Nixon's famous silent majority? Silent? Not as far as we are concerned. A good many people--the old, plain majority of citizens--are just fed up with watching demonstrations, riots, disturbances, and civil disobedience on TV newscasts; and, boy, do we hear about it. Over and over again, we get complaints. What do you have to put that loudmouth on the air for? Why are you giving so much time to the hippies and long hairs? Why don't you report some good news once in a while?

So, on the one side, we have the intellectual community telling us that we don't disturb people enough about the significant problems, the ugliness, the miseries, the hunger and the poverty in American life; and on the other hand, we have the contented silent majority maintaining that we are not telling the truth--things can't be as bad as we claim.

All this produces pressure, pressure not only on us as broadcast newsmen (we can stand that, really), but pressure of significance in sympathy for federal control--Big Brother stuff.

The Kerner Commission Report started a swing toward the idea of having the government do something about news control on radio and television. You may remember that the Kerner Commission and the Milton Eisenhower Commission on causes and prevention of violence took their cracks at broadcast journalism and recommended various forms of control to guarantee that the news was reported fairly, and all sides were given their chance. Then came the 1968 Democratic Convention in Chicago, which created intensely angry feelings among many Democrats in Congress.

Although this selection from the 1969 seminar has been revised for this collection, it is based upon conditions existing at the time of presentation.

It was unfair, they said, it was unfair. To a politician, of course, any time you look bad, it's unfair. But this did create some support for control of television news. As a matter of fact, the Federal Communications Commission demanded and got answers from the networks about complaints as to the network coverage of the Convention. It is the first time I'm aware of the FCC taking action on coverage of a breaking news story. All of the complaints that the FCC had investigated prior to that, of which I have knowledge, dealt with documentaries or news programs that were constructed after the event. This applied to a breaking news story and how it was covered. When you get the FCC second-guessing a news editor about how he is covering a breaking story, you are getting into a very, very dangerous area of governmental control of news.

Now the FCC did rule this year that the networks had presented a fair and balanced treatment of contrasting viewpoints. It also said it was puzzled by the protests over its inquiry. The FCC then went on to state that it made clear to broadcasters year after year that it did not intend to interfere with the right of broadcasters to be as outspoken as possible on public events. But, what the Commissioners don't seem to appreciate is the effect on a daily news operation that can come from having the Federal Communications Commission hanging over your shoulder ready to second-guess you at any time on the way you are covering a news story.

If you know, as a news editor, that anything you put on the air could stir up criticism that might cause the FCC to call on you to answer, it is very likely to influence you to say, well, maybe we don't need to cover that story, particularly in news stories that are borderline--that aren't clearly a big, breaking news story. It is really a very, very subtle, and to my mind, a most dangerous kind of censorship; and it is a very difficult thing to fight. It is censorship by intimidation, but it is hard to get that idea across.

And what really bothers me about almost all of the FCC investigations in the news areas in the past few years is that almost, invariably, they go right at the guy who is doing the best job of covering the news in the community. Because it is only when you are doing aggressive, hard-hitting, tough reporting, that you stir up waves.

This gets people mad. If you just plug along; rip it off the wire to read it, cover the Rotary Clubs speeches, nobody is going to get mad at you. But if you dig into something that bothers someone in the community (the mayor or the police or some area in the community), you are going to get response; you are going to get people mad at you. You are going to get complaints to the FCC. And you and your lawyer and your station manager spend days and days of time preparing answers to the FCC; maybe even going in for a hearing. Every time that the FCC has done anything in probing into a news story, it has tended to discourage the less courageous news broadcaster from getting caught in a mess with the FCC.

It is disheartening for RTNDA, as an organization devoted to improving professional journalism, to try to push news directors into doing harder, tougher, more aggressive jobs of reporting when the Commission blows the whistle on precisely that type of news coverage.

Now, of course, the FCC, every time it finishes its investigation, puts out a report saying now we are in favor of this reporting, don't stop. But the guy who has had to answer complaints spends a lot of time and expense in answering them. That idea really discourages all but the most public-spirited, courageous broadcaster in broadcast journalism.

I think that the FCC probe of that WBBM pot party is a perfect example. The FCC went into it because the event was called "staged" and it warned WBBM not to do it again. But I think that anyone who reads the record of the investigation would find that it was just about as staged as any news conference.

The party was arranged in the sense that the reporter from WBBM suggested that it be held at a certain place, and everyone at the party knew that it was being filmed, but that is all. That is all that happens at a news conference. A guy calls a news conference and everybody knows that there is going to be a news conference, and he goes there. But the questions aren't prepared in advance. No one at the party knew what was going to be filmed or what was going to be put on the air after it was over. If that represents staging, then I say that about 75% of all the documentaries that you see on TV today are staged and should be thrown out because there are sections of them or parts of them that have been arranged just the way that pot party was.

Well, all this, the pot party particularly, and also, I fear, the '68 Convention coverage, caused the House Commerce Committee to investigate in addition to the FCC. The Commerce Committee went a lot farther than the Federal Communications Commission. It drew up a report that will have to go down in history as one of the most witless recommendations yet proposed for regulating news. These proposals were embodied in legislation (House Resolution 9566, if you want the number) that called for a prohibition of staging of news with intent to deceive. The definition of staging as it now is in that bill is so loose that it could involve probably half the news programs on the air.

The legislation would require all radio and TV stations to keep all material that they gather relating to news stories (and that includes film and radio tapes that weren't used on the air) for six months, and to allow any public authority designated by the FCC to inspect that material at any time. Violation of the bill's provisions would become a federal offense subject to a year in prison and a $10,000 fine, and a station could lose its license. That legislation is still pending in the House Commerce Committee, although so far, Chairman Harley Staggers has not had the courage to schedule hearings on it; but RTNDA is ready and willing to tear into that one if the hearings are held.

I can't believe that the Congress could write legislation like that, and I can't believe that it could be approved by a majority. Thank goodness there was a strong minority report against it; but the danger is there because the legislation is ready.

This year, Congressman Hale Boggs of Louisiana (a Democrat who served on the Eisenhower Commission on violence, and also the number three man in the Democratic leadership of the House) warned RTNDA that public dissatisfaction with violence on TV is so strong and growing so much, that unless the trend reverses itself, it will force Congress to act, even though Boggs said that most Representatives do not want to get into the regulation of broadcast programming, particularly in the news area.

He said another interesting thing. To the general public, he said, there is no distinction between news and programming, so far as violence is concerned. In other words, in his mind, the general public sees something violent on television, and they do not separate violence in an entertainment program from violence in a news program; it is all the same thing, and therefore, news gets blackened along with the entertainment for portraying violence.

All this in Congress, however, was just preliminary to the lowest blow of all struck by the United States Supreme Court. On June 9, in a unanimous 7 to 0 decision, the Court set some broad, new guidelines that seem certain to lead to more federal regulation of news. I am talking about the Red Lion RTNDA cases which our attorneys refer to as RTNDA's Bay of Pigs.

The High Court not only struck down RTNDA's argument that the requirement for a broadcaster to give equal time to answer personal attacks inhibited the broadcaster from putting people on the air, but the Court blazed a new trail of opinion based on the argument that the right of free speech of a broadcaster does not embrace the right to snuff out the free speech of others.

Nobody can quarrel with that. But, taking off from that, Mr. Justice Byron White, who wrote the majority decision, then proceeded to say, and I quote from Mr. White's language, "where there are substantially more individuals who want to broadcast than there are of frequencies to allocate, it is idle to posit an unabridgeable first amendment right to broadcast, comparable to the right of every individual to speak, to write, and to publish."

I'll give you a moment of silence to digest that lump of legal gobble-de-gook, but listen to what follows, also a direct quote: "There is nothing in the First Amendment which prevents the government from requiring a licensee to share his frequencies with others and to conduct himself as a proxy with obligations to present those views and voices which are representative of his community."

One FCC staff attorney, in commenting upon the decision, said, "The Supreme Court has ushered in a quiet revolution, adding a new dimension to the doctrine of free press, and that new dimension is the right of public participation. The licensee must share his frequency with others. The decision assures to every individual a right of access to broadcasting."

Now a George Washington University Law School professor, would go even farther, insisting this right of access applies to any communications media, newspapers as well as radio and TV. And they all say it is guaranteed by the First Amendment to the Constitution. The last time I read it, the First Amendment said Congress shall make no law which will abridge the right of free speech. Professor Burns' cause has been taken up by the American Civil Liberties Union with law suits, and I have no doubt that within a year or two, we will have further Supreme Court decisions in this area. What they will be, I don't know, but that 7 to 0 unanimous decision does not leave us much hope.

Now, you may say, well, what is there to be concerned about in this? Well, think about the problems a news director or his management faces when he is confronted, say, by a spokesman for a black militant group, a white militant group, a left winger or a right winger, a hawk or a dover, or a kook or a hippie. What does he say when this representative of a group says, I have to have a right to speak my piece on your air? Or, on the local level, where the issues really get personal, how about a local argument over where a new highway should go? You all must know what that stirs up by way of community ideas and protests. Or, where a new school should be located, or what the Urban Renewal Project should do, or whether sex education is necessary in the schools.

You name it. Whatever the issue is, if it is hot enough, the news director and his manager are going to get a flood of complaints that they have been totally unfair, they haven't given the right voices a chance to air their view.

Now, the FCC says, yes, you will undoubtedly get complaints like that, so you better be prepared to answer them. You had better document the decisions you have made in the news area, including what people you put on the air and why you put them on. So answering complaints of that sort is likely to become a full time job for just about every radio-TV news department in the country, even the educational stations.

I heard the other day from Rob Downey, who heads the News Department at WKAR at Michigan State University. He passed along a letter he got that went to the station manager as well, which protested refusal to carry a featured news program which endorsed a particular view. The letter warned, "Since you base your denial of air time on the FCC's Fairness Doctrine, your station will be monitored from now on. Your regular listeners around these parts inform me your station has been unfair and biased in its treatment of a number of issues." The letter went on to say, "Unless you give us an opportunity to present our viewpoints on these same issues, it will be reported to the appropriate authority." And do you know who signed that letter? The Michigan Farm Bureau Federation. Now, if the Michigan Farm Bureau Federation is going to use that kind of pressure on a news department of Michigan State University, you can imagine what news directors and their station owners are going to get from black militants, white militants, and all the other pressure groups that exist in our country.

It is really not a pleasant prospect to live with, but I have enough faith in the judgment and the courage of current news broadcaster editors to believe that we are going to fight through this maze of federal oversight that is being slipped around us. I think we are going to show the legal experts and the one-sided thinkers who really don't want to think the thing through to a conclusion, who just think one way only; I think we are going to show them how fatal the consequences can be of what they propose.

RTNDA is just beginning to fight back, but don't count us out. We need your help. We need the help of everybody we can get: NAB, the American Association of Newspaper Editors, Sigma Delta Chi, and others. What we are going to try to do is all get together and work on this thing. It is a very difficult thing to fight, because it is a very amorphous concept to get across to the average person, but I think we can do it.

315 AND THE POLITICAL SPENDING BILL

John Summers

I've talked with my good friend Art Ginsburg here, and we've decided that I would cover the technical aspects of our discussion of 315 and the new Political Spending Bill, and specially the Spending Bill itself, because it is new and it's very complex, and there is an awful lot of confusion.

The spending law has a lot of provisions, not all of which apply to broadcasting, and I'm not going to get into them; reporting provisions, credit provisions and what have you. Essentially, the Congress has established a limitation on spending of ten cents per eligible voter, but only six cents of that can be spent in broadcasting. There is a minimum of $50,000 and on the 60% ratio, that would mean $30,000 as a minimum could be spent on broadcasting.

Now, like some of the other recent actions of Congress, this law is discriminatory. Just as we got the business on the cigarette prohibition, we got it here also. I guess we're getting sort of used to that, so battered and bruised we don't like it, but we have to live with it.

It's basically discriminatory for three reasons. First, the candidate can spend the whole ten cents per voter on print media, whereas he can only spend six cents in broadcasting. That's, per se, discriminatory. The lowest unit charge provisions of the law, which I'll discuss next, apply only to broadcasting. They don't apply to the print media or other media. In those media, the candidate gets the comparable charge. In other words, he gets the very same treatment that any commercial advertiser does.

The third discriminatory aspect is that in broadcasting the candidates have a right of reasonable access, which I'll also be discussing. There is no such right in non-broadcast media.

In discussing the broadcast aspect of this law, there are essentially three categories, and I'll take them one by one. I don't want to get too detailed in this discussion, but I will touch upon what I consider the highlights.

The three categories are lowest unit charge, certification and reasonable access.

Now, first as to lowest unit charge. This aspect of the law applies to all candidates, as Senator Pastore said in his hearings, from dog catcher right up to President. All legally qualified candidates are entitled to lowest unit charge. It's the only aspect of the law that applies to all candidates. The other two aspects, reasonable access and certification, apply only to federal candidates.

There are two qualifications in terms of when lowest unit charge applies. First, the candidate must personally use the time himself. If the political spot announcement or program doesn't involve a personal use by the candidate, the purchaser's not entitled to lowest unit charge. How long does a candidate have to appear in a spot announcement, say? Well, there is no time period. The Commission tells us that he must be identified or identifiable. This has resulted in some very cute gimmicks on the part of the candidate. We have spot announcements around the country where some slick announcer makes a pitch, and at the end a voice says I'm Joe Blow, candidate for Senator or what have you, and this was paid for by such and such a committee. That's considered a use and, therefore, the candidate gets the lowest unit for the whole spot announcement.

Some of the candidates have even tried to get a little slicker and at the end, they simply pop in and say this announcement was paid for by such and such group without even identifying themselves. Now that's going too far, and I think the Commission agrees with us--it's a little too cute--that where the candidate is not identifiable (unless he has a voice like Everett Dirksen or something like that) he shouldn't get lowest unit charge. And while we urge broadcasters to give candidates every break, I think that when they try to play it that cute, they're not entitled to a break.

The other qualification is that the use by the candidate must be within either the 45-day period before a primary election, or the 60-day period before a general election. If the use occurs outside those periods, he simply isn't entitled to lowest unit charge.

What lowest unit charge means is that the candidate is entitled to discounts, frequency and otherwise, offered to the most favored commercial advertiser "for the same class and the amount of time for the same period." This simply means that you only get the lowest unit charge if you purchase within the same class of spot. That means a fixed spot as opposed to a preemptable spot. You have to purchase within the same class. You have to purchase the same amount of time. You can't purchase a sixty-second spot for the price of a thirty-second spot. It has to be the same amount of time. It has to also be in the same time period. You can't purchase in radio a morning drive time spot at the same price you could purchase a spot at 2:00 P.M. in the afternoon. So essentially what the candidate gets out of this is the frequency discount in every case; as long as he's purchasing the same class of spot, same amount of time in the same period of the day.

Lowest unit charge does not apply to production-oriented charges such as use of a studio, taping and things like that. If it did, obviously, a candidate in television could actually use up his whole spending limitation on producing one good television spot. He could spend $30,000 on a spot announcement. The spending limitation simply doesn't apply. It only applies to the purchase of broadcast time, and also if any agency commission is involved, that's thrown into the limitation also.

Agency commissions are a very complicated area, and I'm not going to get into it unless someone actually has a question. For the operating station it's pretty important, but I'm not too sure it is for your case here.

There's no distinction made between national and local rates. It's whichever rate is the lower that governs in terms of determining lowest unit charge. Actually, in most cases, the local rate will be lower, but there are some strange circumstances in which the national rate will be the lower rate, and therefore, it governs.

Another interpretation of the Commission in carrying out the intent of Congress, and this really hits a lot of stations where it hurts, is that the term lowest unit charge is not necessarily governed by the rate card. If the station has been selling off the rate card to a preferred client that it had over the years at a very low rate, then that low rate will apply in determining lowest unit charge. It caused a lot of stations to look at some of their practices and make some changes. And I would say if they make a change before they get into the 45- or 60-day period, and they intend to stick by it, I see nothing wrong in making a simple adjustment.

Certification is the next aspect of the law I'd like to discuss. The law says that a station violates the law if it sells time for use by or on behalf of a federal candidate without obtaining certification that the amount of the charges will not violate that candidate's spending limitation. Now let me explain something because there's an awful lot of confusion on this. Some people seem to think this only applies where the candidate directly, or even indirectly, is paying for the time himself. That's not true. This spending limitation is really a limitation on the amount of paid exposure that any one candidate can get via advertising. If it were otherwise, it would be very simple to circumvent the law because a candidate would just have to say, well, look, that spot that was on promoting me for U. S. senator, I didn't have anything to do with that. That's some independent group out in Kankakee, and I don't know anything about them. It doesn't come out of my limitation. That's not the case.

The law means that if any time is purchased by or on behalf of a candidate, it comes out of his limitation. And that's why we have the certification required in every case.

Now what's the effect of this? It is that a lot of well meaning but small and insignificant political groups are, in effect, precluded from buying time to promote the federal candidate of their choice because they simply can't get the certification.

A candidate runs a pretty tight campaign, and he can't have a lot of little groups that he knows nothing about, has no connection with, buying time and having that time come out of his limitation. Because when you buy time on behalf of a federal candidate, you have to make the certification; and if the certification is not signed by the candidate himself, then it has to be accompanied by an authorization in which the candidate authorizes a given person to certify on his behalf. And that authorization has to be signed by a candidate.

So as a practical matter, I think a lot of people have been precluded from buying time on broadcast stations to promote federal candidates of their choice.

One other aspect of certification. The candidate does not have to make a personal appearance to trigger the certification requirements. As long as it promotes him in any way, whether or not his voice is used or he appears, it's covered by certification.

Let me get into reasonable access. Again, this applies only to federal candidates. As you know, before the passage of this law, 315 provided that in the first instance, at least, no station had to sell time to any political candidate. Once having sold time, and once a candidate had appeared, then there was the equal opportunity requirement which, of course, still exists. But in the first instance there was no actual requirement in the law to give access to political candidates.

Now quite frankly, despite that, the Commission had always held that under the public interest standard in the Communications Act there was an obligation upon stations to air the views of candidates on political issues and what have you, but that public interest holding, so to speak, has traditionally given the station a great deal of discretion in terms of what races they covered and what issues were covered. So this is a new and very significant aspect of the law because it says if you don't give federal candidates reasonable access, you're subject to license revocation. And that gets the attention of broadcasters usually--when you talk about revocation.

Under the law, they have to either permit candidates to purchase a reasonable amount of time, or to give them a reasonable amount of free time. They have an option. They can do one or the other, or technically, I guess, they could give a little free time and sell some time--a combination. But the federal candidate simply can't be shut out. If he wants to appear on a station, he has the right to appear. Now, the station may make him buy time, or it may give him time, but he has a right. He simply can't be shut out under the law.

Prior to the passage of this law, I think stations pretty much handled political advertising on a first come, first serve basis. If a candidate wanted to run a saturation campaign the last week of a campaign, and the station had the time available, they sold it to him. Why not? They're in business. The effect of the reasonable access provision has been this, though. No station wants to lose its license. And so a lot of stations have adopted policies to implement the reasonable access. They said okay, we've got so many candidates, we've got so much time, we're going to sell each candidate so many spots a day, so many during 'drive time,' so many here, so many there. Now, most of these policies that I've seen are very, very reasonable. And I think the Commission or courts, in looking at them, would say that's a very reasonable policy. And I think that is reasonable access.

But what does it do to the candidate who planned this big saturation campaign the last week of the campaign? He can't do it any more because the station has a reasonable policy, and they have to abide by it because if they go ahead and they sell all their time--available time--to someone for a saturation campaign and then another candidate comes in at the last minute, they might not have any time to sell him. And he's entitled to at least what they specified in their policy.

So I think the reasonable access provision, to that extent, has clipped the strategy, so to speak, or tactics of a lot of the candidates. They may want to take another look at it, I don't know.

Are there conflicts within the law? Yes, there are. And I'll just close by illustrating a hypothetical case which points out what these conflicts are. Take the situation of a rock-and-roll station. Candidate A has been advertising on the station. Candidate B has avoided it because he's not interested in rock music, and the people to whom he's appealing, he feels, are not interested. He just doesn't feel that it's worth his time to advertise on that station. So we get down to the last three or four days of the campaign and candidate A decides to get a little tough in his advertising, and he appears on this rock-and-roll station and slanders B, does just about anything imaginable. But in the meantime, B has used up his spending limitation. He doesn't have any more money to spend under his spending limitation. But when he hears about this slanderous attack, all sorts of charges, he goes to the station, and he says I've got to get on the air. I've got to answer those charges. Your audience has heard all this, and I just can't let it go. All right, B has two rights under the law. He has the right of equal opportunity, assuming he made his request within seven days, and he has the right of reasonable access on that station, even though he's never exercised it; he has that right. Can he exercise either of those rights? No, he can't because--at least that's what the Commission tells us--because the Commission says that the spending limitation transcends those other two rights. Once you've spent your money, you're out. It doesn't make any difference whether you have a right of equal opportunity or a right of reasonable access. You've used up your spending limitation, and that transcends the other two matters.

THE BROADCAST CODE (Highlights From Remarks)

Stockton Helffrich

There are all sorts of misconceptions about the Code--what we do, what we don't do, whether there is supposed to be some sort of dogma that everybody falls into line on or not. Basically, most of the Code interpretations come about from rather logical responses to manifest needs, and when we talk about manifest needs, we usually talk about priorities, what's sticking out like a sore thumb that needs something done about it. And that may be in the area of either programming or advertising.

I've jotted down one thing I wanted to quote to you. It appears in a chapter called "Mass Communications" from the publication Fundamentals of Social Psychology, and it has this to say: "One can say almost anything to his best friend, but as the audience becomes larger, the communicator is subject to more and more restrictions, taboos, codes, and cautions." Posed against that is an interesting statement of Rod Serling's: "A television writer is constantly hamstrung by taboos and imposed dogmas that emanate from the sponsor and are transferred down through the agency to the network and finally to the program producer." Here are two diametrically opposed points of view. There is a good bit of interest in the issue at the American Civil Liberties Union and such organizations who are basically against codes in any form. They have a feeling that this editing comprises some sort of prior censorship and ought not to be allowed.

During the past ten years, the Code Authority, as a department within NAB, has expanded, and a New York office was opened in addition to the one we have here in Washington and the one in Hollywood. Our initial involvements had largely to do, believe it or not, with matters of good taste. There's a good bit of concern as to whether some forms of advertising are getting a little too juicy, or whether or not pills going through trap doors in intestines, or whatever, aren't getting just a little too juicy, and so there was a good bit of concern about taste.

We did look into the whole business of taste to see whether things were getting a little too graphic or not, but found in a very short period of time that the real problems seemed to be more in the area of substantiation of advertising claims--were they really valid, were they really backed up with documentation that made some sense. We got much more involved in that for almost two or three years, sort of supporting the network clearance departments and any activities that the Better Business Bureau was pushing, and so on. This interest incurred quite a feeling of confidence between network broadcasters and the NAB Code Authority. They and we were beginning to pull some chestnuts out of the fire and get some things straightened out that had been poorly handled. Broadcasters also began to get the feeling that it might be good if we had a little more involvement in the programming also--not in the selection of programming or determining what kind of programs would be put on, but in terms of what was getting into programs that needed more attention.

I guess the best way to illustrate this is with a few examples from actual developments, and I think as I give you examples, you will see how times have truly changed. There was a point, for instance, at which one of the networks was actually terribly anxious about the pelvic gyrations of Elvis Presley. It seems incredible that this could have caused any concern at all in light of some of the current motion picutres shown in theatres and some of them that are finding their way into television. But there was a point at which a network had adverse

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Although this selection from the 1969 seminar has been revised for this collection, it is based on conditions existing at the time of presentation.

criticism because the lady, who was then running the Ding Dong School, mentioned the fact that the goldfish in one of the bowls she was displaying was pregnant, and we really had a flap over that from the audience.

It will indicate too, the degree to which the Code Authority and the self-regulatory activity of broadcasters was in a highly sensitive position as morals change. All sorts of things are expected of us, and I think that part of our function, believe it or not, is to resist their expectations. They are absurd, some of them, and yet they do represent a segment of the audience which is worried about the peculiar nature of broadcasting which comes into the living room and which, as it were, invades the prerogatives of parents.

My own feelings are much more positive toward the broadcast media as to their influences. I think they, if anything, offer a golden opportunity to parents in the framework of the home to make evaluations with their children, in terms of the questions the kids bring to them, their attitudes and response to the popular media. Why not comment in the family framework and discuss what the family attitude is towards a given thing that did or didn't happen in radio or television in a program that's just been broadcast? Rather interestingly, a great deal of our activity has been in the area of how do you handle, how do you reflect something like alcoholism, drug addiction? Which language is "strong" and what is profanity? What about these new Motion Picture Association ratings of films in terms of adult acceptability? Racial stereotypes simply are not anything that you see any more in television. And I think that all of these come about as a result of social attitude and broadcasters' response to those attitudes.

I don't want to spend too much time just on programming; I want to get on to advertising.

I remember some of the questions that used to come to me, particularly at NBC and later in the NAB, and there were such amusing ones when you looked at them out of the total context. When I was at NBC, Northern Paper Mills wanted to introduce some advertising for their toilet tissue, and toilet tissue hadn't yet got on in television. So of course, the immediate query was, do you accept it or don't you accept it. And, of course my attitude, and I'm sure it was very permissive, was that society accepts toilet paper so there must be some way we can talk about it. But, believe it or not, what we had to do, the commercial which was devised (and these were spot commercials), involved showing a woman with a shopping cart going through a Supermarket. She throws in, first, the kitchen paper towels and the paper napkins and then the facial tissues, and then, finally, a roll of toilet tissue.

So this broke the ice and seemed to do it without shocking anybody, and slowly we got around, thirteen weeks later, to deciding that they could then do a specific brand name commercial for one of the toilet tissues; and that's the way toilet tissue advertising began.

Incidentally, that's the way almost anything begins that's in the so-called border line or in the sensitive area, and now we've had a tremendous to do, all out of proportion, in my opinion, over the acceptance of an Alberto Culver product called FDS which is a feminine deodorant spray. I remember being up for almost three hours before the Television Board defending this audacity that we would put such a product on the air. The product seems to have earned very wide acceptance with no trouble at all, and in fact, it has so many competitors now in the field that the problem now is whether we are going to saturate the market with this or that spray.

There are certain products which, as the competition gets rough (and the market place is what tends to make the advertising cut corners as it gets rough), emerge as problem areas at the network clearance offices. When I mention the networks, it is not to downgrade the clearance activity of the group stations or the big independents which in one way or another have a clearance staff for copy. But in the sheer framework of the whole thing, it is the clearance departments of the networks which hold the line in different categories or, if they see a development arising which ought to be restricted, it is likely that it will be their attitude which will affect what happens throughout the industry.

Some of the obvious product categories in this area are those for arthritis and rheumatism, for instance. Not too oddly, the analgesic advertisers got into some really competitive practices in implying that analgesics would take care of inflammation and swelling--some of the symptoms of arthritis--which is simply not true. We had to reject a trend beyond that approved by the FDA position and say, as it became apparent, that this was something which had erupted into practice which ought to be stopped. And on the basis of good, sound medical opinion, we proceeded to set up advertising guidelines for the advertisement of products for the relief of arthritis and rheumatism, and prohibit, literally prohibit, any claims in relationship to inflammation and swelling.

To get our guidance in this area, we went to some of the leading medical schools in the country, and we have now a Medical and Science Advisory Panel of some thirty members who have volunteered their services free out of an interest in the different areas of their own expertise; and in return for that, we maintain their anonymity. Without divulging their names, I assure you that they are the top people in such areas as headache clinics, internists, any category you may name, dental specialists, and so on. These people have helped us a great deal in sorting out in advertising copy that which is reasonable and that which is plain hogwash.

In the development of different solutions as they have arisen in response to problems, we have guidelines in the following areas as examples: weight reducer copy, toys, testimonials (we have a specific bunch of guidelines on what you can and can't do in testimonial advertising). You probably know about our men in white rule, which definitely prohibits the use of doctors, dentists, and nurses in the copy (there are some ground rules which go across all product lines). We have a new safety standard which states that you cannot encourage any act in your commercial which would be an unsafe practice. We do not insist that you show a safe practice, necessarily, but you can't show an unsafe one. There are some exceptions to this, and we are now requiring both programmers and advertisers, wherever it is feasible or would be feasible, to show seat belts and harnesses in reflections of the automotive industry.

Of the many problem areas we've had, cigarettes is obviously one of them. I don't think any category has ever presented broadcasters with more problems than this one. We're caught between our public interest responsibility and our legal rights as media. It's a legally salable product, and broadcasters have been very reluctant to take the position that they could not advertise cigarettes. On the other hand, we recognized early in the game, five years ago when the Surgeon General's Report came out, that obviously we were going to have to have some guidelines or you were going to be implying benefits to health and what not which simply don't exist.

And so there are very specific and real guidelines. You can't use testimonials in the commercial, you can't show prominent athletes, you can't have

uniformed authority citizens like pilots, or firemen, or policemen shown in these commercials smoking cigarettes, and so on. These things have helped to cut back on misrepresentation in advertising, but you are still stuck with the basic problem. Paid advertising sets out to be attractive, and it's pretty hard to make unattractive a pitch which at the same time we know may be encouraging someone to take up the habit which the great majority of people in this country think is a lousy habit.

PART IV

THE BROADCASTER AND COMPETITION

As a general proposition all of us favor "competition" but oppose "destructive" competition. Unfortunately, nearly every competitive challenge threatens some service of an existing industry and so is likely to be viewed by supporters of that industry as being destructive. Thus, those of us who feel an affinity for the broadcast industry tend to see cable as a destructive or anti-competitive force, while we accept the existence of group ownership patterns similarly threatening to small broadcasters, or network program agreements considered by copyright owners to be equally anti-competitive or destructive.

Even if this identification bias could be avoided, however, a serious problem of definition remains, for "competition" comes in a wide assortment of forms within the broadcast industry, and may result in a broad range of different social consequences. Cable system operators argue for competition, but do not want to bargain competitively for program rights. Broadcasters support the same general principle but want government protection from cable competition. Public interest groups call for a break up of the network programming monopoly but also want more comprehensive national news and documentary services.

Would a severance of newspaper-broadcast ties result in a freer flow of news, or simply lessen the capacity of such broadcast stations to present local news? Is ownership of a television, radio-FM combinations in a single locality more or less monopolistic than ownership of a string of such facilities across the nation? Is a conglomerate owner preferable to media-oriented ownership, and if so for what reasons and under what circumstances?

The FCC has been criticized for its case-by-case determination of such questions, but perhaps the agency staff has sensed instinctively that the quality of broadcast service may be determined less by category of ownership involved, or even degree of competition, than by the intrinsic nature of the particular owner in question. This does not necessarily mean that monopoly could be as beneficial for the public as competition, but simply that we have not yet formulated standards for establishing either what may be anti-competitive in this field, or what social consequences may result from each instance where competition may be limited.

Marcus Cohn, head of the firm of Cohn and Marks, and visiting lecturer at George Washington University, challenges many of our cherished beliefs about competition in the lead article in this section. Frank Kahn, an Associate Professor at Herbert Lehman College, and author of Documents in American Broadcasting, then advances the argument that broadcasting regulated as a public utility might avoid many of the destructive competitive elements in the industry today.

Christopher H. Sterling, an Associate Professor at Temple University and editor of the Journal of Broadcasting contends on the basis of his recent study of newspaper-broadcast ownership and other research on media ownership commissioned by the NAB that neither the degree nor the magnitude of such concentration has increased during the past quarter of a century.

Attorneys Roger Zylstra, of Cole, Zylstra and Raywid, and Robert Coll of McKenna, Wilkinson and Kittner, describe the Third Report and Order establishing the present federal regulatory controls over cable television from the standpoint of the cable and broadcast industries respectively.

Charles E. Sherman, an Associate Professor in the Department of Communication Arts, University of Wisconsin, outlines the evolution of copyright legislation during the past decade while Robert Pepper, a graduate student at the University of Wisconsin, now an Assistant Professor at the University of Iowa, outlines subscriber protection considerations that are seldom incorporated into local cable television franchise agreements.

PROBLEMS IN MAINTAINING COMPETITION IN BROADCASTING

Marcus Cohn

This session deals with the question of the FCC's efforts "to maintain competition as it applies to broadcasting."

Before dealing with this general subject of the FCC's new policies in this area, I think it would be productive if we gave some thought to precisely what we are talking about, and the assumptions underlying the idea of "maintaining competition."

The word "maintaining" has a kind of holy aura about it. It has virility; it has virtue. It connotes something which is noble and should last. It connotes an image of the little man with his finger in the dike, or Custer's last stand. It suggests also that there is a threat to the competition because you are forced to maintain it. It implies that there are forces which are converging upon it, somehow or another, and threatening it. I suggest that all of this is total nonsense. No one is threatening the maintenance of competition in broadcasting. Indeed, the threat is exactly the other way -- the threat of those who want more and more competition, without thinking through carefully what the net result is of more and more competition in broadcasting.

I do not believe that we should try to have the greatest possible amount of competition in broadcasting -- that is to say, two hundred million people running around with transmitters. That would be the ultimate in competition, but it would not serve a public policy goal.

The second word that we are dealing with is "competition." I think it is important for us to define, or at least to focus upon, precisely what kind of competition we are talking about.

Now, of course, one kind of competition is simply the economic competition of licensees in broadcasting. If you told any broadcaster in the commercial world today that we were talking about how to maintain competition, he would think that you were a man from Mars who did not know what was going on in broadcasting today. As far as he is concerned, every day the competition becomes more and more intense, and more and more proliferated.

And if you are talking about competition in the origination of programming, I suggest that here, once again, you talk to anybody in the field of broadcasting. They will tell you that every day (and you know it as well as I do) there are new ideas and there are new programs being broadcast, both on radio and in television.

And if you are talking about competition in the sense of the product which is advertised, then I suggest that you talk to the advertiser and ask him whether there is any threat to the maintenance of competition.

Now, of course, there is an ever-increasing competition among the governors of broadcasting. The four to three, the five to two votes of the FCC signify a certain amount of competition; and the shrill accusatory language of the dissenters demonstrates that there is a multiplicity of violent kinds of competition among the governors of broadcasting themselves as they try, in the competition of governing, to decide what the role of broadcasting should be.

Although this selection from the 1969 seminar has been revised for this collection, it is based upon the status of the law at the time pf presentation.

We have a hang-up on this word "competition." It is a part of Western ideology and, of course, the antithesis of Eastern culture. I suggest that competition, in the revered tones that I was subjected to when I went to college, is really a myth today.

There are different kinds of competition, all of which arise from Western ideology. John Stuart Mill spoke of the competition in the marketplace of ideas. When Mill was talking about that kind of competition, he was describing what went on in the hamlets and the villages of his time. He was describing a period of time when 100 or 200 people could sit down and actually have dialogue, actually discuss ideas, and hopefully arrive at, what Mill called, the truth. But, did you ever try to debate someone in the subway today, or at a professional football game; or indeed, did you ever try to debate someone at a Republican or Democratic National Convention? It cannot be done. And the whole Mill concept of the marketplace of ideas as being the technique by which man arrives at a truth, I suggest to you, is an outmoded, outworn, antiquated concept and completely inapplicable to 1969.

And then there was another person who talked about competition. Adam Smith had this wonderful concept that the economic marketplace would work itself out for the benefit of man if there were only competition. In his Folklore of Capitalism, Judge Thurman Arnold, who died yesterday, put his finger on the myth of our reverence for capitalism; and Adam Smith wrote in a period of time -- writing about an economic kind of endeavor at a period of time -- which became completely outmoded in America in the 1950's and 1940's. All you have to do is look around to find out that Smith's concept of national economic competition is completely outmoded and outdated. Government subsidies, government ownership and/or operation of businesses, such things as the negative income taxes, and the dependency (whether direct or indirect) of practically all industry upon the Pentagon makes it completely ridiculous to talk about economic competition in 1969.

And then there was a man by the name of Darwin who talked about competition. He had the idea that man's physical achievements came through struggle and combat. The net result of the process -- the end product -- was not an animal but noble man, who no longer had bestial animal instincts. Yet, the only species of animal today that war among themselves is man. Dogs generally do not fight dogs, and buffalo do not fight buffalo. It is only men -- the species which developed out of competition -- that fight among themselves.

Any one of these three concepts of competition, I think, should demonstrate that this worship of competition is really either a falsely hallowed thing or, indeed, society itself has gotten to the point where it has abandoned, if it has not rejected, the concept of competition. And even during the past couple of years, I think something has happened here in America, and, indeed, throughout the world, which indicates another kind of rejection of competition. I am referring to the great contributions (and I underscore these two words) of today's youth in disavowing competition as a goal of life. They each want to do their own thing. That wonderful phrase -- do your own thing. In doing your own thing, you do not have to compete with someone else. There is a spirit from within which is far more noble than a spirit which is ignited only by competing with someone else; that is what I think the youth in America are saying.

When they talk about the fact that they do not want grades and want only pass-fail marks, what they are really saying is, "We reject competition as a value and a goal." And, indeed, if you stop to think about it, the really great artists, the really great creative souls of the world, also rejected competition as a goal. Whether you think about Picasso or Van Gogh, I think you will come to the conclusion that, again and again, the spirit of creativity did not come from competition, but came from within.

I was very interested in the recent news items about Samuel Beckett's indifference to and rejection of the awards which were to be given to him during the past week. His life has been basically that of a hermit. He wrote what he wrote, whether it was Godot or any of the other things, not for the purpose of entering them into competition, entering into kinds of arenas where he might get rewards that others didn't, but because there was something from within him that he wanted to say.

I am convinced that the spark of greatness comes from within and not like two stones or sticks which happened to be rubbed together in competition which ignite something else. And, indeed, as far as you gentlemen and women are concerned, competition is not the name of the game in the educational process.

I would like to believe that political science is taught at one of my alma maters, the University of Oklahoma, in an excellent manner not because the professors are in competition with professors at Kansas and Texas, or Arkansas. I would like to believe that great political science teachers are teaching at the University of Oklahoma without the need of competition from Kansas, or Texas, or Arkansas.

Does competition necessarily mean a better (whatever that word means) type of programming in broadcasting? Maybe what we are really talking about and yearning for, is not competition, but merely diversification. Maybe what we are really talking about is merely giving the public a greater choice, rather than deceiving ourselves into believing that in this process for achieving excellence in truth, competition has to be a part of the process. If we believe in diversification -- and I do -- for the purpose of giving each person or each institution the opportunity to achieve its own quality and for its own excellence, then we are talking about something completely different than the concept of competition.

One of the things which I would like to comment on this morning, is the conflict that a great number of educational television stations are going through at the present time: the question of competing with the commercial stations within their community for a larger audience. I hold firmly to the line that I do not want WETA here in Washington, to which I have a moral, legal and other obligations, to compete with the other Washington stations in the sense that it is attempting to get a bigger and bigger audience. I would much rather have WETA program a program that twelve or fifteen people are terribly involved in and terribly devoted to. I am urging that WETA program for a meaningful and interested audience rather than for an audience which is watching most of its television because there is nothing else to do.

Where is the licensee today who prides himself on the small, but very faithful number of his viewers or listeners? There are very, very few licensees that fall into that category because we are competition oriented. We think in terms of competition. We think in terms of competing with the other guy down the street.

Why is it today that there is this current fervor over competition and the restructuring of broadcasting? What has happened during the past four or five years, which has resulted now in more and more talk about restructuring broadcasting and creating more and more competition? I do not know the answer -- but I have a theory about it.

I think that one of the reasons that there is a cry in this country for the restructuring of broadcasting is because television has brought home the horror of chaos in our society, and the deterioration of all institutions. Broadcasting has

brought the public the Republican and the Democratic Conventions, and the conflicts on the university campuses; it has told it like it is, and when the institutions begin to tumble, we don't read about it a decade or a century later, but actually see it happening.

The three horrible assassinations which occurred during the past few years, the horror of hunger in America, and the black revolution have all come to us as actualities and not second hand. Television put the microscope on all of society's cancers and explored the truths. A very wise man said that television during the past five years ran the sightseeing buses through America's disaster areas for all of us to see all of one time, and we did not like what we saw.

The messenger who brought the bad news in 1969 was the licensee of radio and television stations.

Professor Kimble of Columbia's Graduate School of Journalism, recently said, "People really do not want it told like it is. They want it told like they think it ought to be."

Al Otten, the perceptive Chief of the Washington Bureau of the Wall Street Journal, recently wrote a piece on the credibility gap between newspapers and their readers and commented that readers do not really want completely honest reporting any more. They do not like to read the sociological pieces that appear in the Journal. They are disturbing. It is so uncomfortable to read them. I think that at the heart of the thrust for the restructuring of the industry is the public's dissatisfaction with the bad news of our time.

Let me deal specifically with the interrelationships between some of the FCC attempts to restructure the industry and the questions of maximizing or maintaining competition.

But before doing that, I think it is important that we put in perspective precisely what the Commission is doing when it talks about restructuring the industry in order to increase competition. There is a certain hypocrisy on the part of the Commission in its attempt to restructure the industry. During the past ten years, I think it is a demonstrable fact that the Commission has been on a program of not maximizing competition but, indeed, doing exactly the opposite. Putting aside some of the broad rulemaking proceedings, are you familiar with the fact, for example, that the Commission has continuously, during the past ten of fifteen years, adopted more and more stringent engineering standards, which preclude additional radio or television stations from being established in the United States? And practically every one of you gentlemen knows the horrors and the hardships of radio stations owned by educational institutions who try to get nighttime hours, or try to maximize their daytime coverage because of technical standards of the FCC. Indeed, are you aware of the fact that several years ago the FCC put in a computer, and the computer really answers the question of whether or not your application will serve the public interest? The FCC has dehumanized the adjudicatory process whenever there is the possibility of an engineering question with its computer.

And do you know that if there are two applications, A and B, for a radio or television license, that proposed programming of the applicants is no longer an issue in the case? That is to say, assume I propose a certain kind of programming, and you propose a certain kind of programming, we each are applying for the same radio or television station, do you know that under the Commission's present standards it will take no evidence as to what our programming will be? It only worships the structure. And, indeed, if you have a television station, and I apply against you at renewal time, the only thing the Commission will consider (unless your programming has been of an extraordinary quality) is your structure and my structure.

Programming has nothing at all to do with who is the better qualified applicant to operate this particular television station.

If the Commission is really concerned about maintaining and maximizing competition, I suggest that it is simply hypocritical to think that you can deal with this only in terms of the applicant's structure and knowingly and affirmatively ignore any and all kinds of programming concepts.

Let me deal briefly with some of the various techniques which the Commission has adopted in the past, and presently is in the process of using, in order to maintain competition or, indeed, in some instances, attempt to maximize it.

Years ago, when Walter Emory and I were at the FCC, the Commission adopted a rule which said that no one individual in America could own more than seven radio stations. Now the theory behind that was that there were about 700 radio stations in America and anyone who owned more than one percent would be a horrible monopolist.

Now it turns out that today there are about 7,000 radio stations, but the holy number of seven to a person still remains. Now these seven radio stations which you are permitted to own may be scattered throughout the United States. They may be in communities of 5,000 or 10,000 people, or on the other hand, they may be in communities of one million people, and the Commission shuts its eyes and treats all cities the same -- seven is seven. It is something like what occurs in Las Vegas: the lucky and hallowed number is seven. And once you have your seven, it doesn't make any difference whether the community has 2,000 or a million souls within it. Seven is the name of the game; and seven was the holy number in 1943 and it is the same holy number today.

The same thing applies to television. A person may have five VHF television stations and two UHF stations. When those holy numbers were adopted, there were approximately 300 television stations in the United States and today, even though there are 700, those holy numbers remain the same.

In 1940, the Commission adopted what it called the "newspaper doctrine." It said that given a choice between two applicants for a broadcasting license, the Commission would prefer a non-newspaper applicant to a newspaper applicant. The story of how this came about and why this came about is intimately related, I think, to the whole question of the political position that newspapers took during the 1940's and, particularly, their expressed animosity to the President of the United States.

Since 1940, we have had a sharp decline in the number of newspapers published in the United States. And, indeed, there is hardly a month that goes by that some newspaper does not announce the discontinuance of its existence.

There are more and more newspapers in the United States which are actually being supported by the revenues of the television stations which they own, and we are reaching the point where the television station is supporting the newspaper rather than the newspaper supporting its broadcasting sister.

The Commission has presently under study the question of conglomerates owning radio and television stations. What is a conglomerate? I won't attempt to define it in any precise words but, basically speaking, a conglomerate, I suggest, is any kind of a broadcasting licensee which has other kinds of interests. Now these interests may be of an economic kind -- and generally are of a economic kind -- or any other kind of an interest which operates within the total society, whether profit making or not. They may be, on the one hand, large industrial, banking or

manufacturing institutions. Or, on the other hand, they may be educational institutions, or municipalities, churches, or labor organizations who are in, or want to get into broadcasting.

There is an inherent supposition in the conglomerate inquiry that man is corrupt and venal, that man uses one activity at the expense of the other, and that one activity has to be contaminated by the other.

I do not know what the precise statistics are, but I have a feeling that when the Commission finishes its inquiry, or makes its report on the conglomerate problem, it will find that about 90 to 95 percent of all broadcasters have some kind of outside economic interest. In other words, there are very few broadcasters who are only broadcasters. With one or two exceptions during the past 25 years, it is a demonstrable fact that broadcasters have not contaminated the air waves with their other nonbroadcasting interests and, indeed, have used and operated their broadcasting property under the licenses given to them by the FCC in a manner which was completely unrelated to any other kind of activity.

A word about the Commission's recently announced policy of "one to a customer." This is a concept that a person within a community should have only either an AM or an FM radio station or a television station; no one individual or institution should have more than one of these. Because of this policy no one has been permitted, with some exceptions, to acquire both an AM and FM, or an AM and a television station. The basic thrust of the policy is to divorce the ownership, and we are talking about structure, of AM from the ownership of FM and from the ownership of television stations.

It is true that there is language in the Commission's Notice for the investigation of the conglomerates that non-commercial stations would be exempt from the inquiry. But, logically, I do not think that holds water because if there is to be a "one to a customer" rule, and if we are to be really tough in believing that anyone owning more than one broadcasting facility in a community, somehow or another, is either a venal person himself or has power over the community which he ought not to have, then I think it ought to apply to every licensee and there shouldn't be the kind of demarcation which apparently might arise.

One of the other things that bothers me about this one-to-a-customer rule is that it applies to all communities. Whether we are talking about New York with 25 or so FM stations, and 12 or 13 television stations, or whether we are talking about the community where there is only one radio station and one television station and only one FM station, the Commission treats them the same. Here, once again, is the over-simplification of what the issue is; another expression of the belief that by changing the structure of the industry, you can solve its problems.

One of the other things that the Commission has done -- and this is also a kind of a restructuring of the industry that we generally do not think of in those terms -- is to get the public directly involved in the content of broadcasting. The thrust of having the public itself involved in the programming bypasses the whole structure.

Let me explain what the Commission has done in order to get the public involved and bypass the structure. First, there was the development of the survey concept. Each licensee, at renewal time particularly, has to go out and make a survey of the needs, tastes, and desires of the community and then program based upon what the survey showed.

Now if, indeed, the Commission is interested in programming as the final result of a licensee's obligation, and if, indeed, it sets as a standard that a licensee fulfills his obligation to serve the public interest if he responds to what the public wants, then it really does not make any difference at all who owns the station assuming, for the sake of discussion, that the programming meets the end result -- programming according to what the public wants.

There are all kinds of problems in the survey concept. And one of the problems that I always have a lot of fun with is that theoretically if every survey were completely objective, and every survey were accurate, then every survey in a community would come up with exactly the same results and, therefore, every station would do exactly the same kind of programming.

If, for example, you have five stations in a community and five honest and noble men who go out and make honest and noble surveys, you would come up with five results of what the public wants. Each of them would be exactly the same and the five stations would program accordingly exactly the same. Under those circumstances, I raise the question of whether there is a necessity for five stations. Should there not only be one?

Some of the other things that the Commission has done in order to involve the public in the structuring and the programming of stations is to require the stations to announce over the air, and publish in the newspapers, the fact that the renewal application has been filed with the Commission, so that the public will have an opportunity, if it desires to do so, to either examine the application in the licensee's own office, or at the Commission and, of course, if it desires to do so, to advise the Commission as to why the application should not be granted.

There are two other developments in this area of the public's participation in the operations of licensees which I want to spend one more moment on. You are all familiar with the Jackson, Mississippi, WLBT case where the U.S. Court of Appeals for the District of Columbia broadened the standard of what we in the legal profession call "standing" in order to have a foot in the door concerning whether or not the Commission should grant an application for renewal of license. What the court said in that case was that as long as the protesting group was an organization or an institution in the country that had some history of continuity, it had the necessary "standing" to raise problems concerning programming of any radio or television station at the FCC and, indeed, in a hearing on the renewal of the license.

There is another "public involvement" phenomenon which has arisen during the past decade and which has tremendous significance. I am referring to the trend, in city after city, of community groups to insist upon a voice in the programming of stations by the establishment of various types of public advisory committees. Frequently, the establishment of these committees is a part of "the deal" that the station makes with the local group which has protested its application for renewal of license. These advisory committees, in case after case, have extracted firm and positive programming and other commitments. To the extent that the licensee makes these commitments, his role as a competitor in a competitive industry is diminished.

Now, in one sense, that is also a structural change because the licensee now does not have the unfettered, unqualified character of a licensee but is an integral part of the local advisory council. To that extent, it has minimized rather than maximized competition because, what he has actually done, is said to the licensee that you should program according to what the advisory council is telling you to do rather than what you think is best in terms of competitive activity.

There are two other events that have occurred, and which are directly related to the question of competition, which I do not think received the kind of attention that they should have. I am referring to the Red Lion decision and Professor Barron's recent provocative articles on access.

The basic significance of the Red Lion case is that it elevates the FCC's concept of participatory democracy to a constitutional principle. The FCC had been saying "go out and make the surveys, find out what the public wants and program accordingly." What Red Lion basically does is to elevate that concept into something more than a mere interpretation of the Communications Act; that concept is now a constitutional principle.

Under Red Lion, broadcasters have taken on the characteristics of common carriers. They now have an affirmative duty to seek out and carry varying points of view on controversial issues.

The Supreme Court said that the First Amendment was not designed to protect licensees, but rather the rights of the public to espouse ideas in a free marketplace. The licensee must -- and note these words of the Supreme Court -- "conduct himself as a proxy or fiduciary." He is not an independent licensee operating in a normal competitive system. The Supreme Court said that is the right of the viewers and the listeners, and not the right of the broadcasters, which is paramount. It is the viewers and the listeners who have to be assured the right of access to the facilities of the broadcaster.

Professor Barron, in his landmark articles on access to newspapers, raised the basic issue of whether the public does not have a right to have access to the editorial and news columns of newspapers.

The ultimate implication of the thrust of the present trend toward restructuring the industry is to dehumanize the licensee. It makes him impotent, sterile, and unimaginative. The whole concept of the public's participation in what the licensee is doing, or can do, or should do, turns over to the public at large and relieves the licensee of all of the ideas inherent in competition. It turns him into a common carrier.

Let me close these remarks by commenting on our public policy in the selection of our licensees.

I am always amused by the fact that under the Communications Act, not only of 1934 but under the 1927 Act, as well, there are four qualifications to become a broadcast licensee. First of all, you have to be a citizen of the United States, and I can spend three hours on that antiquated concept that a Canadian or Frenchman would somehow contaminate our air waves if he were a licensee -- even though I can tune in on Radio Moscow and hear what the Russians are saying. Of course, this concept of citizenship and the prohibition against aliens owning broadcasting stations is not indigenous to the United States. It is everywhere. All nations have the xenophobia hangup.

Secondly, you have to have money to become an American licensee. You have to prove that you have financial qualifications. Thirdly, you have to have technical qualifications. That means that you won't interfere with somebody else who wants to broadcast on the same or an adjacent frequency. And, lastly, you have to have good character -- whatever that word might mean, from month to month or year to year.

Now if you have all four of those things -- you are a citizen of the United States, you have money, you are not going to interfere with somebody else and you have good character -- we have decided that, as a matter of public policy, you have all of the qualifications necessary to be a licensee. There is not one word about educational requirements in the Communications Act. There is not one word about artistic motivation or cultural talents. There is not one word about creativity.

I suggest that there is a real problem in attempting to structure the industry in the straight jacket of our licensee qualifications. You can reply by saying, "Well, look, how would you want seven FCC Commissioners to judge a licensee's qualifications. They don't have the talent or background to make judgments on creativity, talent or cultural backgrounds and interests." My answer is quite simple. If you were talking about the Federal Power Commission, which deals with the transporting of gas, then I suppose these kinds of sterile qualifications would be adequate. But, as long as we are talking about the kind of an industry that we are talking about, then I think that the qualifications for the industry should be far broader than they are.

Those are the remarks which I have prepared in order to get this matter in some kind of focus. I do not think, as I said at the very beginning, we can talk about maintaining competition without recognizing who the competitors are, what the process is for their selection, what competition really connotes, and analyze realistically, precisely what it is that the Commission is doing when it talks about wanting to maintain, or increase competition.

A PROPOSAL TO REGULATE BROADCASTING AS A PUBLIC UTILITY

Frank Kahn

Let me begin by listing a few premises that I think require little substantiation:

First: Broadcasting should serve the public interest. (The Act says so; Matt Dillon says so).

Second: All broadcasting is essentially "public" broadcasting--not just noncommercial broadcasting, and not just news and public affairs, or operas. As a corollary, all programming, even passive entertainment programming, should have some relationship to the public interest.

Third: The public interest is not merely or solely what interests the public. Conversely, a program that nobody watches fails to serve the public interest because nobody is interested in it. Consider both aspects of this point as derivations from an adaptation of what John Stuart Mill once said. He might rephrase it this way for application to broadcasting: "If all mankind minus one watched 'Marcus Welby,' and only one person watched 'The John Pennybacker Show,' mankind would be no more justified in preventing the one person from watching 'The John Pennybacker Show' than he, the single viewer, would be justified in preventing mankind from watching 'Marcus Welby.'"

Fourth: Broadcasting is a business.

Fifth: Broadcasting, like other businesses, attempts to maximize profits.

Sixth: Broadcasting, like some other businesses, and unlike still other businesses, is <u>permitted</u> to maximize profits.

Seventh: If the way to maximize broadcast profits is to attract the largest possible audience, that is what broadcasters will do. Most will try. One will succeed, and the rest will try to finish in second place. No one will lose, especially if his number in the TV broadcast licensing lottery is from 1 to 108. This is called competition.

Eighth: A relatively low level of programming (in terms of culture and complexity) will attract the largest possible audience most of the time.

Ninth: Everybody loves a winner, and the sincerest form of flattery in broadcast programming is imitation. (This is also called competition). If everyone shows "Marcus Welby," nobody will show "The John Pennybacker Show."

Tenth: There's something wrong with all this.

Here's what's wrong. It is demonstrably incompatible to require broadcasting to serve the public interest if broadcasting is also free to seek the highest possible profits.

Why? Because the profit potential of programs becomes the prime determinant of what gets shown. If the public interest is ever served, it's almost by accident. Once the broadcaster convinces the FCC that a grant will serve the public interest,

he is left free to serve his private interest for the most part. The FCC is reluctant to intrude in programming matters, for:

(a) They don't agree among themselves as to what programming best serves the public interest.

(b) They risk running afoul of Section 326 and the First Amendment.

(c) They are too busy redesigning their private bathrooms.

(d) They would have to answer to Congress, which is unhappy whenever the FCC does anything beyond remodeling bathrooms.

(e) The Commissioners would not be welcome to enter the NAB building.

(f) Commissioner Johnson would probably dissent, and then Dean Burch or Commissioner Wiley would have to write a long concurring opinion, chastising Nick for his lack of ethics or somesuch.

So . . . we must either remove the public interest clauses from the Communications Act, live with the anomalous situation I have just described, or do something else.

We can't remove the public interest clauses from the Act because some discretionary criterion is needed for the FCC's licensing activities, and nobody's come up with a better one. Also, Congress doesn't like to change such things. Also, I'd have to revise my book. And Walter Emery would have to revise his. None of this is in the public interest (or mine).

We can't continue to live with the anomaly because I can hardly pronounce the word, my students don't know what an anomaly is (I just taught them that "analogy" is not something that makes you sneeze), and there's a way to correct it.

Now here's what you've been waiting for: let's do something else! For decades we've been playing around with how to regulate broadcasting. Competition was expected to produce superior service for the public. It didn't. It couldn't. Competition in broadcasting is imperfect, and it always will be, so long as broadcasting is a mass medium, for there are limited frequencies and those who occupy them compete mainly for the advertiser's dollar by competing for the largest possible audience. The result is a competitive search for the lowest common denominator of taste conducted by a limited number of competitors, all of whom resemble each other closely. Again, there are no losers...except the public.

If we had to run education on the same basis we'd gear our lessons to the most stupid class member, and if anyone were above that lowest level, well, we'd change that pretty soon! This is called the "leveling effect," and it's a problem with many democratic institutions and processes.

Put another way, as Peter Steiner stated in 1954, "Public interest is the test, not the inevitable result, or any form of competition." So-called competition in broadcasting has failed to meet the test of public interest. Programming lacks balance. Most of it, perhaps 95% of it, is fluff--passive entertainment--prefabricated hamburger--"bubblegum for the eye"--or, in the case of radio, "acoustic wallpaper."

We must regulate in a different way if regulation is ever to implement the public interest goals of public policy as enunciated in 1927 and 1934 by our elected Congress, and as upheld time and time again by our court system. WE MUST REGULATE THE ECONOMIC OF BROADCASTING. We must look upon broadcasting not as a common carrier, but as a utility--an essential public commodity or service granted oligopolistic privileges. We must place realistic limits on how much profit a station may earn. This and this alone will allow us to retain the major facets of our broadcasting system and insure the degree to which the public interest is served. For only if we remove the broadcaster's incentive to pander to our lowest sensibilities and most pedestrian needs will the broadcaster be encouraged to do something else.

One would have to combine profit regulation with uniform accounting methods. We might even have to regulate station rates, payouts to shareholders, depreciation schedules, and, yes, even salaries of corporation officers and station personnel. This would not be a popular plan. Neither was the abolition of slavery. Neither was compulsory education.

Can it be done? It's on its way, gang! Check Lee Loevinger, who says more people like scrambled eggs than caviar. In 1963, just before he joined the FCC (and way before he was an NAB consultant), Broadcasting reported that Loevinger said, "regulation in the public interest can best be accomplished by attention 'to the economic structure of the radio and television industry.'" He hoped not for utility regulation, but for "diverse and independent ownership." It hasn't happened yet.

Skipping through recent history, in 1967 Fred Friendly suggested a utility-like limitation on station profits. In 1970, Red Barber suggested the same thing.

In 1971 (in the Citizens Communications Center case), the Court of Appeals suggested that the FCC consider reinvestment of station profits in programming as a possible index of "superior" station performance. This link between station financial resources and station performance has been seized on by people like Nick Johnson, Larry Lichty and his Better Television for Madison organization, the Stern Community Law Firm, and the Alianza Federal de Pueblos Libres. Such groups are attempting to open up the confidential financial records of stations (FCC Form 324) in order to test this untried aspect of what well may become the law of the land.

In my own view, which is admittedly biased, since I proposed utility status for broadcasting in 1961 (Herbert Hoover has everybody beat--he was suggesting this notion in the early 1920's), a convincing series of legal and policy arguments can be made in favor of utility or quasi-utility regulation for broadcasting. I believe, despite Section 3(h) of the Communications Act, the FCC already possesses the power to do what I propose. What is needed to get the ball rolling is for someone to file a petition for FCC rulemaking. Someone here ought to be the one to do it. I think it could well be John Summers. This may sound even more ludicrous to you than everything else I've said, but for reasons I don't have the time to present, I think that utility-like regulation in the long run will best serve not only the public interest, but the collective interests of those broadcasters who erected the edifice in which we presently find ourselves.

Think about it.

NAB Report: Pattern of Media Ownership

Christopher H. Sterling

The whole question of media ownership, from a legal point of view and as a controversy has been around for some time. And what I would like to do this morning for about ten minutes is briefly outline the background of this issue (because it is not new), explain what has happened, where we are, and then briefly outline the NAB research program, which is probably the most extensive and conceivably impressive body of research that the NAB has mounted to date.

The first strong concern about ownership in a broad base sense probably arose in the 1930s. Congress raised great concern, particularly over increasing newspaper control of AM stations--and made some noises in various directions. The Commission began to look into the ownership question in the late '30s, on a rather informal basis. This was somewhat tied in, according to some observers, to the New Deal, with concern expressed about Republican papers getting control of "democratic" broadcast stations.

The first attempts at setting ownership limits--multiple ownership limits--were tried in the early 1940s. But the first real investigation, and probably the grandfather of what we are dealing with now, was the famous Order 41 of the Commission. It was 41 and 41A which established the newspaper investigation in the spring of 1941 growing out of major Commission (and Administration) concern because newspapers at that time controlled half the granted applications of new FM stations, as well as nearly a third of on-air AM stations.

So the newspaper issue was really the core of this thing. And the major concern, typically of course--is ownership by a newspaper of a broadcast station in the same market. I want to stress the fact that I am talking about multiple ownership within the same market of different units of media.

The FCC's newspaper investigation went into hearings in the summer of '41. Washington in the summer of '41 did not have much air conditioning; and those of you who have been in Washington in the summer can imagine why they did not get very far. The hearings ended in 1944 with no clear findings. The conclusion was that decisions on license renewals would continue to be made on a case-by-case basis. This indeed has remained the case until now.

Around 1954, the FCC set the final ownership limits that now exist (seven AM, seven FM, seven TV of which no more than five may be VHF); and those ownership limits for any one ownership unit (person, group, institution) still stand.

In the 1960s the issue began to heat up somewhat. From 1964 to 1968, the Commission investigated television ownership in the top 50 markets, being most concerned about group ownership; especially one group owning stations in several of the top 50 markets. This eventually led to a well-known and much broken FCC rule on that issue.

Now we come to the specific NAB research that I want to talk about. In March of 1968, the Commission issued a proposed rulemaking which became known by the term "One to a Customer," Docket 18110, a docket number which is quite important and which is still open and probably will be for some time. The proposed rulemaking barred any owner of a full-time station from buying any other full-time station or newspaper in the same market. Now, two problems. One, it did allow AM-FM combinations in smaller markets. And two, of course, the Commission made clear it did not directly control newspapers. However, it did control broadcasting and was concerned about the combination of media, and it asked for comments. And comments it got. Most of them negative.

The WHDH decision of January 1969, fits here only in the sense that it woke up a lot of broadcasters to the concern about ownership because the decision basically was decided on diversity of ownership within the Boston market, even though it was a three to one, rather weird decision in itself.

On the 25th of March, 1970, the Commission adopted the one-to-a-customer rule, which had been proposed two years earlier. But more importantly, it proposed another rule. And the other rule was for divestiture within five years of all existing combinations which did not fit the one-to-a-customer restriction. And again, it asked for comments, and again, it got them and this time in spades.

The Commission said that the proposed rulemaking, as well as the existing rule which they had then adopted, was designed to prevent undue influence on local public opinion by relatively few persons or groups. The FCC also felt this was a reasonable start toward diversity.

The NAB Board got together shortly after that rule and proposed rulemaking came out and decided this was the time to draw the line and try to come up with some solid broadcast oriented research. And perhaps broadcast oriented research is the wrong way to put it. It sounds biased, and I do not know that it necessarily was.

The reason the research is particularly interesting is because the NAB put aside what in the end result amounted to a quarter of a million dollars for this research effort and for legal fees, with former FCC Commissioner Lee Loevinger, acting as NAB counsel, and a variety of "academic" researchers pulled in to do a fair number of studies. This was planned and assembled in the summer of 1970.

In the spring of 1971, a series of five studies were issued, which I think are fairly important and which I think you ought to at least be aware of if you are not already, because the data is surely valuable. It is all on file with the Commission. It is in the Commission library. It is even in the NAB library.

The first one to be filed was a massive study by M. H. Seiden and Associates. It is called "Mass Communications in the United States, 1970," a four volume affair, of which really the first volume is of most general interest. Seiden looked at the top 205 ADIs (areas of dominant influence). He examined the media input into those markets. Not merely the media that

originated in a given market, but media which entered those markets above a certain very low cutoff point, like a 100 copies of a given magazine type, for example. He looked at commercial radio/television, thus leaving out public or educational broadcasting, which of course would add more voices. He looked at the daily and weekly press. He looked at selected national magazines, particularly those that dealt with social and political issues. And he included, as I say, media generated both from within and outside the market.

What he found was an incredible diversity of media--and Broadcasting and Television Digest reported on this fairly extensively--an extensive variety of media coming in. The problem with the study from my point of view was that, first of all, we did not see what was going on in the background--I mean, how did we get to this snapshot, as useful as it was. Secondly, there was a problem in my mind here of equating one radio station with X thousand copies of Time magazine, for example, or even fewer than a thousand copies of Time magazine. Impact of these media, as we all know very well, is very, very different. And this did not come out. It was a purely statistical study, useful as far as it went.

The second study to be filed, and I am listing these in the order they were filed by the NAB as items in this docket, was done by R & C Incorporated. This was a technical, statistical study titled "The Quantitative Analysis of the Price Effects of Joint Mass Communications Media Ownership," looking at a very specific area to try to decide specifically whether advertising and advertising discounts were affected to a strong degree by conglomerate versus "independent ownership." Some 536 television stations and over 350 daily newspapers were studied to check ownership effect, and the basic conclusion was that whether a group was conglomerate or whether a given media voice in the market was not conglomerate, there was little difference. And there was little difference on advertising effect. The chief things that affected the cost in advertising of either print or broadcasting media were, of course, population, market income and the audience of the station or the audience of the newspaper as, again, one might guess.

The third study filed was by yours truly, titled "Ownership Characteristics of Broadcasting Stations and Newspapers in the Top 100 Markets, 1922-1967." And this one took the cake because it was seven volumes long. Having studied under L. W. Lichty, none of us--and there are several of us here--have never been able to do anything briefly since. The key results are summarized in the first 30 pages. What I attempted to do was to establish more than a snapshot; to establish a time study; where have we been, and where are we going. Rather than taking ADIs, as Seiden did, I took SMSAs (standard metropolitan statistical areas), because they could be established back to 1940 and reconstructed fairly effectively (using counties) for 1930 and 1922. We took 1922, as 1922 was the first major year of radio growth. So we took the top 100 markets, as defined in 1967, and kept the order the same, even though the order had obviously changed during the period of time, but kept the order the same to get a straight comparison. These are the brief conclusions of that study:

There has not been an increase in concentration of ownership in daily media. I looked only at daily newspapers and broadcasting stations. There has not been an increase in concentration in the top 100 SMSAs since 1950. There is an interesting double edge trend that came out here. By 1950, concentration had gone up fairly sharply, from 1930 to 1940 to 1950. It is after 1950, however, when we got first the input of FM and television. With the coming of the so-called new media, the degree of concentration went down very sharply because a lot of new owners went into these media as well as old owners buying FM and television stations.

Second conclusion: broadcasting ownership has grown slightly less concentrated over the period studied.

Third, newspaper control of broadcasting outlets has decreased sharply. Remember again, this was the issue that had raised great concern in the '30s and '40s because newspapers had major control of broadcasting stations, 30% of the AMs and half of the FMs, and they had a large chunk of television in the very early years when there were less than a hundred stations. But from those high levels of 1940 and 1950, today newspapers control approximately 7% of broadcasting stations and by control I mean 51% or more. I am talking about literal control not just ownership. Today newspaper owners make up less than 5% of all the ownership units that are in broadcasting.

Those were the major conclusions. Again I stress that what I am talking about here is not conglomerate group ownership where one group may have stations in a variety of markets. What I am talking about is multiple control in a single market.

There were two other studies filed for NAB, both of which I think are interesting and should be mentioned because they give a notion of what the NAB was looking at and trying to get information on.

Burin C. Robbins of Southern Illinois University filed a study of pioneer AM stations from when they went on the air before 1935 to 1951, and pioneer television stations from whenever they went on the air to 1971, trying to see what ownership category changes occurred over that time. Robbins' study presented raw data but did not attempt analysis or comment.

The only real program study, and now we are really getting down to the nub of the issue, was a study filed by James A. Anderson of Ohio University. It is called "Broadcast Stations and Newspapers, the Problem of Information Control: A Content Analysis of Local News Presentation," and looked at newspaper controlled broadcast stations and independent (non-newspaper) stations' news coverage to see if indeed there were any particular strong trends one way or another. His conclusion was that there did not seem to be any effect of control of news, particular kinds of news, let alone similarity in news between co-owned newspapers and

broadcast stations.

The NAB made its comments in April of 1971 and asked the Commission to either dismiss the proposed rulemaking or at least have a full hearing. To date, nothing has happened. We are still up in the air. The basic feeling is, however, that the weight of evidence (and I have not even talked about the ANPA (American Newspaper Publishers Association) filing which was three volumes in itself, from a newspaper point of view) will force reconsideration, and probably heavy modification of the ruling if indeed the ruling is made. And of course, the Commission's membership makeup is changing considerably as we go along, which alters the outlook still further.

Implications of the Third Report and Order

Roger Zylstra

I don't profess to be an expert in cable regulation. I'm not sure that there is such a thing at this point, although the new rules have been in effect now since March 31 of 1972. They are very complex, as I'm sure you've been able to decide for yourselves. They cover six or seven hundred pages of printed paper, and we're finding that there are many things in the rules that we didn't realize existed until we get into the specifics of the problems.

What I would like to do is trace very briefly where cable regulation got its start. I think probably this subject is of as much interest as a history course as it is as a legal or broadcast regulation type theory. And probably the most interesting aspect of its development has been its relationship with the television broadcast industry. The reason the FCC got into the field of cable regulation in the first place, I think is because those of us on one side of the fence say because of pressure from the broadcasters; the other side of the fence says because of the legitimate concern on the part of the FCC with the public interest in maintaining the integrity of the existing television system. My firm has spent virtually all of its time on the side of the fence opposite the broadcasters, so you should keep that in mind as I give my talk.

The conflict between the broadcasters and the cable industry is one that we had hoped would be resolved by the Third Report and Order. I can assure you that it has not. It's only beginning. We have found that of some twelve or thirteen hundred new applications for cable systems under the Third Report and Order, that a very high percentage--how many nobody knows for sure, but at least upwards of two and three hundred, perhaps four hundred, have been actively opposed by television broadcasters; many of these opposed despite the fact that they are, at least apparently, consistent with the new rules and regulations that became effective on March 31.

The conflict is continuing. We've just gone through a very interesting proceeding involving the city of Albuquerque, New Mexico where a franchise for a cable system was issued to a client of ours back in the late 1960s. And to give you some idea of the intimate relationship that cable plays with regular television stations, after the franchise was issued, we ended up in the state courts on the question of the validity of the franchise. The case was finally decided by the State Supreme Court, upholding the validity of the permit. The battle then switched to the Federal Communications Commission at the time that we applied for authority to carry distant television stations from Los Angeles. That fight has been going on and on since 1967. And finally it was resolved after other legal proceedings, including an antitrust action issued against all three of the Albuquerque television stations in the Federal District Court in New Mexico and also after the filing of a petition by the cable company with the FCC seeking revocation of the Albuquerque television station licenses on the grounds that they had abused their public trust by attempting to obstruct cable both before the FCC and the courts. That case has been resolved; fortunately, everything has been settled. The application for the new system in Albuquerque has been unopposed now with the dismissal of the petitions. And hopefully, there will be some harmony in Albuquerque from now on. But it's been a very long and very interesting struggle that has cost people lots of money. And we hope that this kind of problem has been somewhat resolved now by the Third Report and Order.

The reason the FCC got into the picture initially was its jurisdiction over microwave relays. In 1965 it began to regulate the duplication of programs by cable systems through carriage of distant signals by virtue of its authority over microwave licenses. It wasn't until February of 1966 that the FCC got into the business of regulating cable systems directly. This, of course, was its Second

Report and Order. And at that time, it imposed what most of us, at least, considered to be a freeze on carriage of distant signals in the major markets. Virtually ninety percent of the country since 1966 has been in this freeze. A number of systems have gone into operation, quite a number, as a matter of fact, largely limited to carriage of local stations or overlapping grade B stations from other markets.

Of course, during this period of time, there has been the development of closed circuit programming by cable systems. But the ability of the cable operator to sell subscriptions through closed circuit programming so far has been limited. There are some very exciting things on the horizon. For example, Hughes Aircraft Company has on file an application for a satellite system which would deliver eight channels of national network programming in two cable systems. What they are going to put on those eight channels nobody is quite certain. And this really is the exciting part about cable television. Bringing distant signals from Los Angeles into Albuquerque, New Mexico turns some people on, but it's not terribly interesting from a philosophical standpoint.

The FCC after 1966 and after imposing the freeze went through various rule proposals none of which were, in their minds at least, satisfactory. In December of 1968, it thought it had come to grips with the distant signal major market problem by proposing the re-transmission concept, where a distant station could be carried in a major market only if the cable television operator obtained permission from the originating television station. It was soon recognized that it was impractical to obtain permission from the originating station because it, in turn, had to negotiate clearance with dozens, and sometimes hundreds, of program suppliers. The FCC between February of 1966 and December of 1968 didn't authorize any distant signal carriage within the core of the major markets. Between December of '68 and July of 1970, when they finally got around to proposing another set of rules, I think they authorized two re-transmission consent experiments, neither of which proved to be terribly informative.

Finally in July of '70, they turned around and came up at that time with the public dividend commercial substitution plan, which was really nothing more than a substitution of local station commercials into the distant signal programs being brought in. And of course, there were limitations on the numbers of distant stations that were proposed at that time, which I won't get into because it's past and probably never will be of any relevance to what we're talking about today.

What we're dealing with right now is some six or seven hundred pages of regulations. Lest that be staggering, I think about two hundred of those pages do nothing more than list the counties of the United States in which stations are significantly viewed. So the documents aren't quite as formidable as they might appear. The regulations themselves, I suspect, could be condensed to maybe fifteen or twenty pages of printed material.

But what we're talking about in terms of distant signals now are in the major markets, defined as the top one hundred markets by size, approximately, and the areas within thirty-five miles of those major cities. In the top fifty of those markets, systems are now being permitted under the new rules to carry, in addition to local stations--and significantly viewed stations, as determined by ARB ratings--a maximum of three independent stations. If there's one or two independent stations in the market already, the maximum number that can be carried from outside is two. In addition, a limited number of educational stations can be carried

in absence of objections. With objections, the commission has indicated that it intends to limit systems to carriage of the local educational station plus stations that are tax supported educational stations. I don't know that that question has yet been presented to the FCC for interpretation, so nobody really knows how far they're going to go in educational stations.

Also, systems would be allowed to carry an unlimited number of foreign language stations. This has some interesting possibilities, particularly if satellite transmission should come into effect. Right now it's really of concern only to states near the Mexican and Canadian borders. And there's some very attractive French language programs, for example, coming out of stations like Channel 7 in Sherbrooke, Quebec. But its signals are right now only in the northern New England states, and it's going to be very difficult for somebody in Champagne, Illinois to bring that station in.

In the markets below the top fifty, we're talking about essentially the same signal line-up, except the maximum number of independents that can be carried is two. If there is one local--the maximum number, if there are independents that can be carried, is two. If there is one local, you can still carry two, but no more than that. And if there are no locals, you can only carry two, whereas in the top fifty markets you could carry three.

In the markets below the top one hundred, we're talking about carriage of just one distant independent station. If there is an independent station locally, the system is not permitted to bring in any distant independent commercial stations. It can of course bring in the educational stations and the foreign language stations.

Distant signals, of course, are what we as representatives of commercial interests think of first, because in the minds of many operators that's what makes the difference between a profitable system and one that goes into bankruptcy. As educators, some of the other areas would be of more interest to you. And probably the area of access and program origination by the cable systems is the one area that at least I look upon as being the future. I think that many cable operators are beginning to realize now that the number of homes that will subscribe to cable service because of distant independent stations really is somewhat limited when they get right down to it. It's a useful promotional tool and in selling subscriptions to be able to say you're going to get programs from Los Angeles. But I think that in the area of access services and originations, that this is where the future of cable lies.

The commission, in trying to form cable in a way that would give it maximum capacity to deliver programs, got into the business of dictating to cable operators, at least in the major markets, the number of channels they must have on their systems. New systems being built in the major markets must now have twenty channel capacity. All systems in the major markets must convert to twenty channel capacity by 1977 at the latest. So this is a step that we think is going to get the FCC in the position of having to encourage now the type of regulation that's going to permit operators to utilize those additional channels in some way, hopefully, a profitable way.

In addition to carriage of the broadcast signals, the cable operator must also make one channel available exclusively for the use of public access. It must also make one channel available exclusively for government access and one channel exclusively for educational access. The type of equipment that must be furnished to make these access channels available is still somewhat in doubt. But, essentially, the philosophy of the rules is that the cable operator should have the necessary facilities to allow a member of the public to come in off the street and, if he wants to for five or so minutes, or even longer, get up and

lecture on why communications professors should be banned from the university campuses, he's free to do so. And it's commonly referred to as a soapbox, that channel, and that's basically what it is.

Beyond that, what the cable operator does is right now somewhat flexible. There is a rule which has not yet been completely finalized and enforced which is going to require systems with more than thirty-five hundred subscribers to devote another channel to originations by the cable operator itself. That rule was in effect for a while, but a circuit court of appeals, of course, reversed the commission, and during that period of time, the FCC lifted the rule. The authority of the commission has been affirmed now by the Supreme Court, but they haven't got around to the business yet of getting that rule back into enforcement, even though it is contained in the Third Report and Order.

That pretty well gives the average cable operator anywhere from six to ten, perhaps even more, channels to be creative. And he's required to make the additional channels, at least up to a number that matches the broadcast channels carried, available for lease to anybody that wants to lease a channel. This, hopefully, is going to give rise to some independent program producers leasing channels on cable systems for new creative programming.

Of course, in this area, too, we get into the nonbroadcast, non-entertainment type services, such as surveillance systems, burglar alarm systems. We represent a system that's being built in the northwest Chicago suburbs that has made an arrangement with Scientific Atlanta in conducting an experiment which I think is relatively new; the first system to actually be doing this in day-to-day life, which gives them the capacity to push a button on their computer and determine which programs on the various channels on the cable system are being watched and how many people connected to the system are watching it. In something like five seconds time, they can get a read-out on how many people are watching "I Love Lucy" and how many people are watching the twenty-four hour letter channel, and how many people are watching Ed Sullivan, and that sort of thing. And this, of course, has great potential as an advertising or marketing tool.

The whole area of special services is something that you can talk about for days on end, and you're probably more familiar with it than I. But it's in this area that I think most of the major companies are now devoting their resources to be creative. Aside from getting into the business now of building the major markets that they've been fighting to get the right to operate in for so many years, it's in this area of future services that we're now focusing.

The other aspect of the Third Report and Order which should be touched on but is not, in a sense, part of the Third Report and Order is protection of local stations, not only for network programs, but for network programming. This, of course, first came about in the Second Report and Order and has been continued into the Third Report and Order. The other type of exclusivity that really gets complicated--and I don't know who's going to figure out this area. But there is a very, very complex set of rules which you should know exist, and if you can understand them after taking a look at them and hearing the talk, whatever it is, I'd like to talk to you myself, because I don't. I'm not sure I ever will.

CABLE REGULATION BEYOND THE THIRD REPORT AND ORDER:

THE EVOLUTIONARY PROCESS

Robert W. Coll

I think there are multiple topics that I could choose, because there are going to be a lot of future problems in a lot of different areas. I selected three; maybe I won't get to all three of them.

First, what I call program siphoning or pay television. The second is problems with controlling program content beyond controls that may be necessitated by the pay television clause. And the third is enforcement of all of the regulations which the Commission has decided upon. And that obviously omits a lot of very important areas including the tremendous problems that local and state authorities are going to have in trying to fit themselves into the regulatory scheme, but time is limited.

There is also one loose end that I might just, by way of preface, mention that in my judgment is going to be a problem in the next two or three years, and that is the absence of copyright legislation.

You know that all of those associated with the development of the 1972 cable rules, or the compromise, or whatever you want to call it, agreed and assumed that a necessary part of that regulation was the development of copyright legislation that required CATV systems to pay on a compulsory license basis for the programming they were going to be permitted to carry, particularly from the distant signals. And that legislation is not in being and it is not close.

And the Commission had to face the choice in February, 1972, should we go ahead and authorize these operations before this legislation becomes a fact or do we wait. And I frankly admire Dean Burch's personal courage for saying the hell with it, I'm going to authorize something. We have to get something done. But he also had to admit--the Commission also had to acknowledge at the time--that if this legislation is delayed unreasonably, the Commission would have to reconsider whether it should continue to go ahead and get these operations in being with public and private investment reliance on it.

My own judgment is that the copyright legislation is going to be a long time in coming. I had an occasion to be privy to some of the negotiations between the parties, and you think it would be simple enough, just collecting money. But I am under the impression that Henry Kissinger and Le Duc Tho have been a lot closer in the last three years than these parties are today. And it will come down to the personalities involved with the Commission, the White House and the Congress as to whether they can knock sufficient heads to get legislation agreed upon within a reasonable time period.

Well, pay television and siphoning, I think, at least from the standpoint of a national communications industry, have always been the issue with cable. I do not think there has really been another--from their standpoint, I do not

think there has really been another issue. There has been a lot of smoke and fog and strategic maneuvering and arguments posed and things of that sort, but I think this is what the national fellows have always been afraid of, and it is not a new issue. It has been around the Commission since 1952, anyway, when Zenith first suggested over-the-air subscription television. What they have always been afraid of is that cable represents an economic potential that can outbid them for their programming.

And to understand the issue, you really have to accept a few facts which are facts. The television industry can only--and I am talking about the networks now--spend so much money on program product. What they can spend is limited by what the advertiser will spend. And the advertiser, believe it or not, does not buy in the dark. He is not a bottomless pit. He considers that if television is not an efficient buy from his standpoint--you and I could argue over how valid tools are by which he makes these judgments, but they are probably the best available--if it is not an efficient buy, he is not going to use that medium. He will go to direct mail. He will go to billboards. He will go to other competing media, and the television industry knows that.

Now, right now, the television networks are spending about one billion dollars a year, among the three of them, on programming. And maybe they could spend a little bit more, I am sure, they are not spending as much as they could; it would be unrealistic to think they are. But they are up to a point where it is somewhere in the ballpark of what they can spend.

Now, if you will turn the other side of the coin, and you will visualize cable in place on a widespread basis. And maybe interconnected. I am not sure interconnections is essential for these purposes. You and I could agree that at some theoretical point in time and in place, the cable industry could generate a lot of money for program purposes; more than the networks could for an individual buy. If they want to charge--depending upon how many people there are available and willing to pay; maybe it is 25 cents a home, maybe it is a one dollar home, maybe it is somewhere in between, maybe it is 15 million homes, maybe it is 25 million homes--but there is some point where clearly that industry can generate more money for programming purposes than the networks can.

And that is a public interest problem. It is a private interest problem too. But it is a public interest problem that the Commission has been wrestling with, and it is now wrestling with in docket #19554 which the Congress is concerned about.

And the public interest aspects of the problem (you can see the private ones right off) are something like these. First of all, you are inclined to say what the hell difference does it make. If television cannot compete for the program products, too bad. I mean, that is the American way, and if they lose it, they lose it. But the first problem is how widespread will cable services be?

We sit around here and we say, well we are going to wire a 100% of the country. If you really could wire a 100% of the country within a feasible period of time, I suspect maybe cable has built a better mousetrap, and they are entitled to the benefits of that innovation. But the studies indicate that is not so.

Whatever study you take, whether you take the 1969 reports of the President's task force or more recent studies about the cost of cable construction, indicates that there are very severe limitations on the construction of systems by private capital, certainly, suggesting that perhaps wire by private capital can be made available for no more than fifty percent of the homes, or maybe it is seventy, or maybe it is sixty-five. And then you say, well what about public capital, and Congressman Germain of Rhode Island is already moving in that direction. But the studies would indicate that you are talking about billions of dollars, perhaps well over a hundred billion dollars to wire all the country. And I do not know whether the Congress of the United States or the President is prepared to make that kind of commitment for this kind of service with all of the other problems the country has.

Well if it cannot get to all of the people, then you have a problem. Because the problem is that while it is not reaching all of the people, it can take programming away from some of them. In other words, if you build the backbone of the system in the big cities and generate these revenues that I am anticipating, you have a theoretical capacity whereby those systems serving the minority, or half, are bidding in Hollywood for the programs that are now on television; and they are winning, at least some of the time, and increasingly more of the time. And the problem becomes, well what happens to the rest of the country? What happens to the national communications system in light of the effects of this system of communications which is not national in scope.

And, of course, there are a lot of scare stories, some of them are truer than others, I suppose. But you worry about a degradation in national communications in towns--not only as a fact that some poor fellow on retirement has to pay three, four, five bucks a month or special charges for special programs more likely in order to see Dean Martin or Mary Tyler Moore or whatever suits his fancy--you worry about a development in the network's capacity to continue to maintain the news forces and these staffs to respond at times when national communications are very important to the country. To respond to the time when a President is assassinated or the Soviet Union has decided that they are going to replace missiles in Cuba. And you worry about who is going to replace that service in that capacity.

Well, what the Commission has done to this time is this; and as I read these off, I think you really ought to, as I do, worry about the prior restraint implications, particularly in light of the Midwest Video decision this summer which I consider to be no more than a four and five-eighths--a four and three-eighths--sustaining of the Commission's jurisdiction on a very limited rule requiring originations where you have more than 3500 subscribers.

What the Commission has done, first of all, is said that, "Okay, if you are going to make special charges for programs (per channel or per program) then you cannot carry any sports event which has been on free television for the preceding two years, probably going to be expanded to five years." And that is supposed to protect the NFL. Of course, the NFL games are the most emotional issue down here. Whenever you go over to Capitol Hill, that is all they talk about--the NFL games. It is a good

example, I guess. But they get very exercised about it, so if you will permit me the same example. Of course, there is a significant exception to that which Senator Pastore was worrying about last week, and that is home games because home games have not been on television, you know, for the past two years or five years, if anything.

And of course, what Senator Pastore is worried about here in Washington, D.C. where the Redskins are always sold out, is that, of course, that local stations cannot carry their home games that these guys have in mind feeding it back to the public for three, four, five bucks a game. Why shouldn't they? They are not so much protecting their gate, they want to expand it. They got 53,000 seats out there. If they can get cable throughout this vicinity, they have suddenly got 253,000 seats. And he worries about that.

The second thing they did was adopt this feature film rule. And these are all the over-the-air rules that they just took whole and put them on paper without really thinking too much about it. And that is that if you are going to make a direct charge, then you cannot show a feature film which is older than two years from first theatre exhibition. Now the idea of that is to get new films in the hands of the public, not the old stuff. The idea of that is, well look, free television cannot carry the current run stuff; the producers won't sell it to them, so this is something different. This is something new.

And the third is the rule on series-type programming (the Dick Van Dykes, the Mary Tyler Moores, etc.) and the rules say there you just plain cannot carry them at all where a direct charge is made.

Now, these rules are very controversial, and I can just conclude their description with the positions of the various parties. You understand the broadcaster's position. Next, the copyright owners'. Everytime I meet someone from the Niser firm who represents most of the copyright interest, he shows me the First Amendment to the Constitution which he has tatooed on this arm, and then he has tatooed on his chest passages from the Federalist Papers concerning how important is the promotion of the ingenuity and genius of authors in the country. And he says we own these rights, and we can do with them what we damn please. And nobody can tell us that we cannot go the pay television route if we want to.

The cable industry, interestingly enough, at first was an innocent victim of all this fight between the copyright owners and the networks. The cable industry did not really want to start it out having more than pay television, I don't think. But it does now. It does now as a result of these limitations that have been placed upon distant signals that they can carry. And the guy is looking around for the kind of investment that he is being asked to make. He wants a little more guarantee than two lousy distant independent signals to sell this service. And, as they say, pay television is the answer.

And then you get to the Department of Justice which filed in 1971, and has continued to repeat its viewpoint that, very much coinciding with copyright owners, that copyright owners are right. This is none of the government's

damn business. The government has no right to impose rules, restrictions or limitations of any kind on origination by cable systems, whether or not a direct charge is exacted. And that would be scary to the broadcasting industry except for the final position of the Congress of the United States. And the Congress of the United States--through Senator Pastore particularly, but also Torbert MacDonald on the House side, and through most responsible members of the relevant subcommittees--have said no, that is not going to happen. It is not going to happen over our dead bodies. Now you the Commission, we do not know how you can stop it, but that is not our job, but you had better stop them. I had better not wake up one morning and find that my constituents are being asked to pay two, three, four, five bucks a month for what they are now getting over the air. It is regressive. I am not going to stand for it. I am not going to put up for it. But, as I say, it is your problem--you solve it. And so the Commission is trying to solve it.

The next five, six, seven years (because no easy or definitive answer is available to the Commission) are going to be characterized by a hell of a fight among all of the contending industries about what should be done and what should not be done in terms of controlling program acquisitions by cable.

Just briefly, this question of program content control. If you have read the Commission's August 5 letter to the Congress--August 5, 1971, was a bold charter that through these access channels and these dedicated channels--leased channels they were really going to encourage innovation and one thing or another. They backed off a little bit in their report putting limitations on obscenity, indecent matter and lottery information. But I foresee that if cable gets in its place and as people go on to use it, as however they feel, say whatever they want to say, to do whatever they want to do, that this medium with its seeming immediacy and personal impact on the public--I mean everybody has a television set and it is so easy to use. It is not like a book. You do not have to go out and buy it--it is right in your living room. That what goes over those cable systems is going to result in a lot of complaints to the federal government.

Good Lord, we just spent two weeks down here listening to people complaining about children's programming on television. We are constantly being told how television breeds violence, crime, etc. Well, if you can picture the kind of material that the total freedom, which is envisioned for these channels, will produce in the American living room, you can picture the complaints and the problems that the Commission is going to be faced with. And the very difficult task they are going to have it doing anything about it.

And then the Commission and the Supreme Court are going to have to face the question straight forward without this argument about the scarcity of frequency space that they have always used to justify the minor incursions into programming which the government has been responsible for. They are going to face head on, does the First Amendment apply to television communication or doesn't it. And does it apply in the same way that we have applied it to print media and films, etc.

And finally, enforcement. Enforcement of these rules--absent licensing or even with licensing--is not going to happen. They are terribly complex. I cannot even blame the cable operator for not complying; he can honestly say he did not understand them half the time. But more than that, detecting violations when you have 190 systems within your service area; keeping track of them; monitoring them, it just cannot be done. And the Commission knows this. They have had this problem from the earliest time that they imposed network exclusivity rules. They know that they are ignored. They know that they are not paid any attention to. And sooner or later--when the Federal government adopts regulations they mean that they will be complied with, and they do not like people who do not comply with them--the Commission is going to come down hard on an industry which continues to thumb its nose at it. And that will happen for a while, and then I think what will happen will be the establishment of an honest-to-God system of periodic licensing and review of operations.

COPYRIGHT: QUO VADIS?

Charles E. Sherman

Actually, when you stop to think about it, we have been trying to get a copyright bill now -- the one that we presently have is 1909 -- and we've been trying to get a revised version of this 1909 copyright law for almost as long as America has been involved in Vietnam. I don't know if you've ever thought of it in that way, but beginning in 1955, just a few months after the Eisenhower administration committed us to a policy of Vietnam involvement, the United States Copyright Office began an extensive program to revise the 1909 copyright act. In 1964, when the Tonkin Gulf Resolution passed Congress, the first of many copyright bills was introduced in the House of Representatives. Both the Tet Offensive and the Fortnightly decision occurred in 1968, and since that year negotiators in Paris and in Washington have been dealing with their respective subject matter. But I wouldn't be surprised this year to hear one of the presidential candidates say that no President should be re-elected unless he can get a copyright bill within four years.

Actually, the problems relating to copyright are many and complex and really should be a subject unto themselves for just a full discussion and as another field of law. And most of the attention has been related to the problem of cable television. But I think that we tend to forget the last proposed bill, Senate bill 644, which is before Senator McClellan's subcommittee on patents, trademarks, and copyrights, has serious implications for media in general, as well as for us as educators. In many respects, it could have a significant and I think regressive impact, in some respects, not only on the flow of ideas in broadcasting and cable, but also on teaching and scholarship. And what I'd like to do is just review some of these changes and some of the things which we seem to take for granted at this moment, as well as to go into some aspects of the copyright compromise in regard to cable.

First, the length of copyright protection is going to be extended under the new bill from the system right now, where you have two 28-year terms, to the life of the copyright holder plus 50 years. Now, that will bring us into concert with the 50 nations that adhere to the Berne Copyright Convention, which is the major international copyright convention. And there seems to be some move afoot which will eventually bring America into this convention. We do not belong to it right now. The only international convention that we adhere to in the copyright field right now is the UNESCO Universal Copyright Convention, which is much more limited than the Berne convention.

Another important difference in the bill of 1909 and the new one is this. The 1909 copyright bill makes a distinction between works performed in public for profit and works performed publicly. It is what the Europeans would call the difference between grand rights and petite rights. Basically, it you take musical compositions, aside from operas or musical comedies; basically the shorter versions of works, these have to be performed in public for profit to be subject to copyright, while full-scale dramatic works receive protection simply when performed in public. The revised bill makes no distinction between these categories and drops the phrase "performance for profit." So educational or public broadcasting, which has been exempt from paying fees to ASCAP and BMI, will now have to be required to join their commercial colleagues and pay license fees. And already the people from BMI are drawing up a separate set of standards which will apply to the public broadcasting sector.

The new copyright bill will also make it difficult to use copyrighted materials, such as photographs, literary works, in the teaching/learning process. There is no difficulty if you employ such works in normal face-to-face teaching activities, as long as you work for a nonprofit educational institution. But copyright payments would be required for utilizing protected materials in individuated student instruction, which might be accomplished through computer-aided instruction, listening and viewing booths, and so forth. So a lot of the innovative techniques that we've been talking about in teaching, allowing students to go at their own rate, at their own convenience, and so forth, would be subject to copyright provisions, whereas the normal traditional method of face-to-face instruction would be exempt. The key here appears to be where the teacher directly controls the process: then we can get away with just about anything in terms of taking slides, excerpting works, and so forth. However, where we want to put the student off on his own and use other methods, at that particular point copyright provisions might enter in. Of course, you're still going to have to pay your licensing fees for motion pictures. They do not come under the exemption of face-to-face teaching. So that would still apply.

Another provision which relates to the area of scholarship will seriously affect photocopying. There's no question that all of us, I think, have come to rely very heavily on the Xeroxing of articles. It saves a tremendous amount of time. We don't have to take those arduous notes -- simply underline, line up the material, and get to work on it. Under the new copyright act, this activity could be seriously limited. And I say "could be" because I think this is going to be one of those provisions that's put in that becomes unenforceable in many respects. But it's directed mainly at protecting libraries. And libraries are only going to be allowed to make one copy of a work in addition to the original that they buy, only to protect it in case they lose a copy, or it's worn out.

They recognize also in this bill that if you have unattended copying machines in libraries, the library cannot be held directly responsible for this. Where the library sets up a Xeroxing room to try to do copying of a full article or a full work for your own personal use, is going to probably cost more, because there may have to be some charge back fee involved, or it's going to be seriously limited. And I think this is one of the provisions it's going to take a great deal of difficulty to work out, but one that I think at some point or another the copyright holders are going to try to check in order to set the precedent.

Nevertheless, there is one part of this that will allow, in the area of scholarship and in criticism, some copying under the fair use provision. Now, up until now the fair use provisions have mainly been a court test case system of setting out what do we mean by "fair use." For the first time, they will now be statutory provisions. And these are the four factors that will become the doctrine of fair use in the new copyright law: one, what is the purpose and character of the use; two, what are you using the work for or what's the nature of the copyrighted work; three, the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and importantly, four the effect of the use upon the potential market for or value of the copyrighted work. So you will have some leeway, but in terms of full-scale reproduction I think there may be some difficulties.

The broadcasting industry also, in addition to paying their licensing fees to ASCAP and BMI, is going to feel the increased effects of the new copyright act if it goes through now as presently written in "644." For many years, European broadcasters have had in addition to copyright what we call "neighboring rights." That

is the right of the performer in his presentation, the right of the record company in terms of making the record, and the right of the broadcaster in terms of his own presentation of the program. So that what is now being considered here is one part of the neighboring rights for American artists. And that is a fee that would have to be paid by radio and television stations to the artist for allowing the radio and television stations to use their recordings. And this would be a two percent of net receipts fee from advertising a license in addition to the license paid to ASCAP and BMI, because that money now goes to the copyright holder, not to the performer. So now you're getting into the area of performance rights.

Well, finally the thorniest problem and the one that is still with us is the question of cable. And right now you have the cable industry in a much strengthened position, especially since fortnightly in '68, as well as, the recent decision handed down by Judge Motley in CBS Teleprompter. I'm sure you're aware that there has been a compromise agreement that was part of the third report and order, a compromise agreement basically relating to what the FCC would do in the area of exclusivity. It had four parts, and I'd like to briefly just go over those four parts.

It said, first of all, "liability to copyright, including the obligation to respect valid exclusivity agreements, will be established for all CATV carriage of all radio and television broadcast signals" -- so that's something new -- "except carriage by independently owned systems now in existence with fewer than 3500 subscribers." Now, that will be a change in terms of 644 as it presently exists. Actually, much of the third report and order, if you go back into copyright bill 644, its really had genesis in that particular bill -- actually the one before it, 543, which had been introduced in '69 by McClellan, and then this is the reintroduction of it, practically a repeat account of it.

In addition, as against distant signals importable under the FCC's initial package, no greater exclusivity may be contracted for than the commission may allow.

They bit, too, on the 3500 subscribers. There is no distinction, as I indicated, in 644, so that there is a recognition for the first time at least in this copyright agreement of some cut-off point economically were a system could be able to pay this compulsory license fee, which is the second part of the agreement.

Compulsory license fees would be granted for all local signals as defined by the FCC, and additionally for those signals defined and authorized under the FCC's initial package, and those signals grandfathered when the initial package goes into effect.

The FCC would retain the power to authorize additional signals for CATV carriage. There would, however, be no compulsory license granted with respect to such signals, nor would the FCC be able to limit the scope of exclusivity agreements as applied to such signals beyond the limits applicable to over-the-air showing.

Three, unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees.

And, four, broadcasters now, as well as copyright owners, would have the right to enforce exclusivity rules through court actions for injunction and monetary relief.

It seems to me what has basically happened in that point four is that it's going to be very difficult to police these exclusivity agreements -- I think especially in the bottom 50 markets, where the exclusivity is much freer than in the top 50 markets where it's very restrained. And I think you should carefully read, by the way, the exclusivity agreement, because it had pertained to a whole series of programs, not just a package. You know, what happens, for example, if you take a program like "I Love Lucy," which had different packages which have been circulating now for years: as long as you're showing one "I Love Lucy" in syndication, then that refers to every package of "I Love Lucy" all the way back. So it's one series from the program, and not just one package, to which exclusivity will apply. Now, when you get into the bottom 50 markets, it's looser; but I think here you're going to have the greater enforcement problem, because the smaller stations, with the smaller staffs are going to have greater trouble policing this whole exclusivity business. So I think to a large degree I'd have to agree with the broadcast industry, and especially the broadcasters from those bottom 50 markets, that that's where the compromise took place. That is really where, in a sense, the industry, to quote some of those broadcasters, sold them out. They wanted to protect the more lucrative markets, and they let the next 50 go.

Now, I think we shouldn't get overjoyed that because of the third report and order we're going to have a copyright bill very quickly. It's still bogged down. The main problem now is the fee for the compulsory license fee. Trade reports indicate that the copyright interests at this point want fees amounting to 17 percent of a system's gross profits in order to be given these compulsory license fees, whereas NCTA negotiators are offering the formula which presently appears in Senate bill 644, which would operate on a sliding scale of one percent on gross revenues up to $40,000, to five percent on revenues of $160,000 and above. And so there is here a tremendous way to go yet before these negotiations, I think, will come into an area of compromise. Nevertheless, I talked to some of our people at the law school at the University of Wisconsin who specialize in copyright, and they feel that there will be copyright legislation some time in the next session of Congress, probably toward the end in 1974. But then remember it was Robert McNamara who said our troops would be home for Christmas.

CITIZEN RIGHTS AND CABLE

Robert Pepper

In viewing this outline, it should be remembered that these provisions are only recommendations presented by numerous studies, intended to help protect and/or enforce cable related citizen-consumer rights. Not all of these recommendations would necessarily be appropriate for every situation.

I. Citizen Participation/due process
   A. Hearings and public notice on,
      1. Terms of the cable ordinance
      2. All applications and bids received from potential operators, including the financial suitability of the applicants
      3. Rate determination and/or rate changes
      4. Periodic operations review
      5. Franchise renewal
      6. Franchise termination
      7. Franchise revocation
      8. Transfer of control of the franchise, whether by sale, merger, or other means.
   B. Subscriber initiated revocation proceedings

II. Right to Know
   A. Access to Operator Information in Include,
      1. A copy of the city ordinance, state and federal cable regulations, and copies of the system's certificate of compliance
      2. A copy of the system's license or franchise agreement
      3. A copy of the operator's original application for a franchise from the municipality
      4. A copy of all types of subscriber agreements used by the operator
      5. A copy of all operator rules
      6. All correspondence between the operator and all regulatory agencies
      7. All correspondence between the operator and any government official, including law enforcement officials
      8. A list of all stockholders holding 5% or more of the franchisee's voting stock
      9. A list of all directors and officers of the franchisee, with addresses and phone numbers
      10. The names, addresses, and phone numbers of the local system manager and the chief engineer
      11. A copy of all annual stockholder reports
      12. Annual financial statements prepared by a certified public accountant
      13. All technical and physical construction plans and maps
      14. A log of all requests for public access and/or leased channel time with the disposition of the request
      15. A log of all requests by bona fide candidates for time
      16. A log of all requests for service and their disposition
      17. Logs and copies of all complaints, with the time required for response and service performed
      18. Logs of all signals and programs carried
   B. Access to Franchisor Information to Include,
      1. All correspondence, applications, bids, and related material for all applications, both accepted and rejected
      2. All rules, operation procedures, application procedures, reports, results of examinations, etc.
      3. All final orders, statements of policy, and administrative and staff operating procedures

4. The names and addresses of all members of the franchising/regulatory authority
5. The voting records of every member of the franchising/regulatory
6. Minutes of all meetings of the franchising/regulatory authority
7. All rules, terms, agreements, conditions, and regulations promulgated by the franchising authority
8. A list of all citizen rights pertaining to cable communications

C. Franchise published materials to include,
1. All rate schedules
2. A weekly program guide listing all known content for the coming week, with the exception of retransmitted broadcast signals
3. The address and phone number of the local office
4. The addresses and phone numbers of the local manager and chief engineer
5. A list of all citizen rights related to cable
6. A reminder of the complaint procedures and how they work
7. Instructions on how to operate terminal switching equipment
8. A copy of the operator-municipality franchising agreement
9. Copies of all types of available subscriber agreements
10. A list of franchise officers and directors, with addresses
11. In plain language, what is required of the operator by law
12. An annual report of the system's operations including profit and loss statements and complaint and service summaries

D. Franchisor published materials to include,
1. An explanation, in lay terms, of the franchising and cable regulatory processes
2. The names and addresses of those directly involved in cable regulation
3. A list of all citizen-consumer rights pertaining to cable franchising, regulation, and operation
4. Notice of acceptance of applications
5. Notice of all hearings dealing with cable
6. Notice of all meetings of the franchising authority
7. A notice of all bids received, including from whom
8. All terms of the franchise before it may be approved

III. Nondiscriminatory access to cable services with respect to
A. Geographic discrimination
B. Economic, racial, religious, sexual or other discrimination
C. Rates, services, and rules
D. Anyone preventing cable reception (i.e., recalcitrant landlords)

IV. Nondiscriminatory training and hiring

V. Public access and leased channels
A. Provisions for public access channels
B. Public access/leased channels--nondiscriminatory, first come access
C. No censorship by the cable operator
D. Right to reply on leased channels
E. Free facilities for public access

VI. Consumer rights
A. Hook-up cancellation rights
1. Operators cannot require security deposits or advance payments without prior permission from the franchising authority, and then only after due process

2. The subscriber should have the choice of either buying or leasing the terminal connection equipment
3. The subscriber should be able to terminate his subscription at anytime without charge or penalty
4. The operator must supply a switchback device between the cable system and the subscriber's antenna
5. Upon termination, if requested, the operator must remove all equipment from the subscriber's premises
6. Upon termination of service, the operator must reconnect the subscriber's antenna
7. If the subscriber moves within the franchise area, the operator must reconnect the subscriber's terminal with the cable system at the new address without charge

B. System operation rights
1. The system must be designed so as not to create any electrical interference with broadcast signals
2. Any interruption of service for maintenance must be so planned so as to cause the least amount of inconvenience, and subscribers must be notified of the interruption in advance, if possible
3. The system should be designed and staffed for 24 hours/day operation
4. Any cable system construction or excavation sites should be protected against creating a danger to the public
5. Subscriber involvement in broadcast signal selection and in cable services selection should be solicited

C. Service and complaint procedures
1. The operator should have a local office within the franchise area, open during normal business hours, with a listed telephone capable of receiving complaints 24 hours/day
2. Requests for service (except initial hook-up) must be fulfilled within 48 hours of receipt
3. Requests for cable installation within operating franchise area must be fulfilled within seven business days
4. The operator must have published complaint procedures
5. A record of all requests for service and how and when they were fulfilled, must be kept in an open public file

D. Subscriber refunds and reduced costs
1. Subscribers should be refunded prorated fee for interruption of service for any reason
2. If the operator terminates service within two years of installation for any reason, or, if the subscriber cancels service within 18 months of installation for failure of the operator to live up to the franchise or the subscriber agreement, the operator must refund, to the subscriber, the initial installation charge
3. If as a result of regulation or technological developments (other than the natural growth of the cable system), the operator's costs and/or expenses are reduced, the operator should pass the savings on to the subscribers in the form of decreased rates, or as increased services

VII. Privacy

A. Prohibited wire tapping

B. Prohibited information accumulation and/or correlation
1. No terminal monitoring should be permitted without specific written authorization by the subscriber for the specific occasion
2. All polled surveys are to be conducted in such a manner as to protect the individual subscriber identity

3. Operators, or their agents, should not be permitted to correlate subscriber information without specific written subscriber authorization
4. Police surveillance by cable should be limited to vehicular traffic only, except where a subscriber requests in writing that his home or office be monitored for security
5. Landlords cannot request surveillance of property leased to tenants without the tenant's written permission
6. Operators cannot release any information they have collected by subscriber responses, without written permission (i.e., for billings, banking, shopping, etc.), except for general population data protecting the individual subscriber identity

C. Devices preventing wire tapping

D. Devices preventing unauthorized information collection
1. A device that notifies the subscriber that his terminal is about to be polled should be required at all terminals
2. Every terminal should be equipped with a subscriber controlled deactivation switch for terminating and/or preventing terminal monitoring, regardless of prior subscriber agreements.

PART V

THE STUDY OF COMMUNICATION LAW

What is the most effective way to approach communication law? Is it a system of principles to be applied; a collection of behavioral patterns to be analyzed; a technique of research to be mastered; a set of procedures to be followed? Or, as in the fable of the blind men and the elephant, is it none of these elements in isolation, but all of them in conjunction, combined and synthesized in various useful combinations?

Based upon the selections in this section, communication law would appear to demand the last approach suggested, a field which can be traversed by a number of routes, each offering its own distinctive perspectives, but by-passing other useful viewpoints along the way. None of these presentations makes this point explicitly, but from their disparate discussions it seems clear that the focus of any study must be broad to cover more than isolated aspects of the field.

In the first selection the editor, a communications attorney, Associate Professor, Department of Communication Arts, University of Wisconsin and author of Cable Television and the FCC, contends that communication law courses should emphasize decisions and rulemaking as administrative or judicial behavioral patterns in motion, rather than as rigid or even completely logical sets of legal principles. Yet while it is argued that studying law as a social science will allow a far more realistic evaluation of its trends and tendencies, the author would also have to admit that an excessive preoccupation with process and procedure could obscure those vital legal precepts which give such courses their significance and value.

Henry Fischer, a communications attorney and managing editor of the Pike and Fischer reference services, makes a valient attempt in the second selection to explain the operation of Radio Regulation, the loose leaf series he and Bishop James Pike established more than a quarter of a century ago. Here, as in a television production course, it would seem that words alone could not convey what a "hands on" demonstrate could illustrate, referring to the article while paging through the various volumes of the series.

In the final selection Russell Eagen, a communications attorney with the firm of Kirkland, Ellis and Rowe, offers a personal insight into research methods of a lawyer handling a typical problem for a broadcaster client. While the question is not one of the pivotal free speech issues any of us might have chosen for analysis, his first hand comments provide a healthy sense of realism for those of us who have a tendency to see communication law only in terms of its monumental decisions at the Supreme Court level.

BROADCAST REGULATION: CHARTING A COURSE FOR THE FUTURE

Don R. Le Duc

Once in the not too distant past, a course in "broadcast regulations" could be designed simply as a "how to do it" exercise for tomorrow's station managers, a detailed drill in rituals necessary to obtain and maintain a broadcast license. General principles of communication law seemed so firmly established then. A license renewal would flow routinely from lawful operation of a broadcast facility; challenges could be mounted only by prospective or actual competitors; basic programming and employment practices lay within an area of managerial discretion; advertising would lead to complaints only if excessive or fraudulent. Underlying these principles was an even more fundamental premise. Broadcasting would remain the dominant form of electronic mass communication in the United States, forever secure from effective media competition, overt governmental pressures or concerted public demands. Then came Church of Christ, followed by Fortnightly, Minshall, Red Lion, Banszoff, WHDH, Citizens Communication Center, Business Executives Move for Peace, among others, and each of these principles was challenged--its basic presumption all but rebutted.

The traditional "broadcast regs." emphasis upon rules without reason seems to have less validity with each passing year as an ever expanding number of pressures upon broadcast control emerge from beyond the borders of the Communications Act of 1934 and relevant federal rules. New media channels are eroding broadcast markets, aroused public awareness threatens broadcast autonomy and a field which could deal primarily with questions of procedure several years ago must now consider issues of survival.

A student equipped only to understand the mechanics of regulation without an awareness of the fundamental societal forces it has come to reflect will be denied the ability to foresee and thus prepare for future legal trends, compelling opposition to tendencies he has not been granted the capacity to anticipate. By the same token, research with an excessive concern for existing law and its implications, while performing a valuable recordkeeping function, cannot in itself provide the potential to predict future movement in this field, much less evaluate the ultimate wisdom of such movement in terms of basic First Amendment considerations.

Perhaps in response to the trade school orientation of the traditional "broadcast regs." course, some schools have moved to the other extreme, transforming it into a social or jurisprudential study by placing their emphasis upon the collective wisdom of judicial broadcast law opinions. If the first approach can justifiably be described as "rules without reason," this approach might as properly be called "reason without reality." While a technique avoiding the tiresome details of FCC procedures might seem tempting to most scholars, it bears about the same relationship to the actualities of regulation as the memoirs of the commanding general do to the realities of war. In each instance, the writer can see individual skirmishes only in broadest outline, issuing general instructions which must be translated into specific tactics at lower levels of command. In each instance, too, the overwhelming majority of events occuring in the field are outside the knowledge of the commander, coming to his attention only in the most exceptional cases. Thus as warfare is only dimly related to the grand designs of its planners, so the mass of broadcast regulation process is only occasionally affected by decisions rendered in federal courts.

Without belaboring this parallel much further, it is also true that while a seductive air of rationality exudes from most well drafted legal decisions,

opinions, as military recollections can at times be self-serving. To paraphrase Justice Jerome Frank, what may seem at first glance to be an exercise in rational judgement may in fact be only rationalization, justifying a holding made on other, more pragmatic grounds.

The relation between regulation and judicial decision is distorted still further, of course, by Readers Digest versions of a judicial opinion, often ignoring crucial exceptions to general statements and seldom distinguishing between controlling points and dicta. In such cases "broadcast regulation" has been transformed into a course in selected judicial rhetoric, an edifying intellectual exercise in its own right, perhaps, but with only limited value as a basis for understanding the elements of communications law.

While legal decisions cannot in themselves convey a sense of the day-to-day reality of broadcast regulation, they can when taken together provide a useful framework for general historical research in broadcasting. A knowledge of the particular legal decisions in effect during an era in the past will allow the broadcast historian to furnish an adequate description of the regulatory mileau as well as the social and economic environment in which broadcasters then operated, or equip him to trace the evolution of a particular regulatory doctrine as reflected by successive judicial opinions defining its varying applications. In addition, to the degree that litigation is, as Roscoe Pound described it, "the pathology of the law," the amount of litigation surrounding various issues during different eras in the past will in itself give some indication as to the issues then considered to be of most vital importance.

The primary factor inhibiting this type of broadcast research in the past has been the ineffectiveness of legal indexing systems when operating as a guide for those working against its customary flow of citation. While the broadcast historian seeks to recreate the condition of communications law at some moment in the past, or to trace a legal doctrine from its source, the broadcast attorney is interested only in information about existing law in his efforts to project future trends. Since legal references are prepared by attorneys for attorneys, citation is progressive rather than retrogressive. Thus, without some key or guide providing access, it is impossible to follow a line of cases from the present into the past. In order to supply this missing element, Professor Thomas McCain of Ohio State University and I designed a basic classification system to locate original legal citations during the FRC era in preparing an article for the Fall 1970 issues of the Journal of Broadcasting. [For a copy of this chart, write the author, Department of Communications Art, University of Wisconsin, Madison, Wisconsin 53706.]

While the primary focus upon broadcast regulation until this point has been upon its legal implications, the rich resource of economic, social and technological evidence contained within its documentation will support a far broader range of research. Since principles of law are dictated by evidence and drawn from precedent, no group has been more diligent in preserving and maintaining access to its documented history than the legal profession. The diversity of information generated by legal proceedings can perhaps be most easily illustrated simply by listing some of the FCC dockets now collecting such evidence; "equal opportunities in broadcast employment" (Docket 19269); "CATV ownership patterns"(Docket 17371); "satellite communication; coordination between space and terrestrial stations" (Docket 18877), to mention only a few of the almost 100 preceedings now pending with evidence available for scholarly examination. The unique degree of credibility which can be accorded such evidence arises from the adversary nature of most regulatory proceedings, where documentation is customarily submitted under oath, and subject both to sanction

for misrepresentation, and challenge by the broadcaster's opponents. In truth, in view of its vast unexplored realm of data and analysis, it might be accurate to describe broadcast law as the largest undeveloped area remaining for mass communication research.

But while this seminar will consider broadcast regulation as a set of rules, a system of philosophy and a resource for research, its greatest emphasis will be upon regulation in its most dynamic form, as a process shaping and defining the functions of mass communicators, and thus directly, the very nature of the mass communication process of the future. "Return with us now to those thrilling days of yesteryear" may have a comforting sound but if this field is to have a vital role in preparing students for crucial responsibilities in our evolving media, and as significantly, if we are to act as informed critics of emerging legal doctrines, the static principles of the past must be augmented by a technique adding the reality of constant and incessant change.

Cable, satellites, license challenges, counter-advertising contentions, governmental pressures--avoiding these complicating issues will achieve two results; it will simplify our teaching and research, and as certainly, it will leave our students unprepared to respond to the crucial questions they will face. Yet even the understanding of complex and conflicting rights involved in each of these contemporary issues seems less important than gaining a broader perspective for viewing the operation of the regulatory process itself. Today's "relevant" issues will in time be supplanted by others perculating upward as mysteriously through the filters of federal bureaucracy. Why, for instance, might counter-advertising demands be diluted and eventually discarded within the internal mechanisms of the FCC while "anti-violence" demands are enacted into rules? More generally, what future issues may cause certain citizen or industry groups to coalesce; at what levels of government is each type of coalition most likely to be effective; what type of opposition is each issue likely to generate; what will be the relative strengths of these factions clashing at each successive level of regulation; what degree of reaction is the defeat of either likely to cause--only this type of continuous analysis would seem capable of furnishing "broadcast regulation" with the dimension of knowledge necessary to evaluate the process it describes, and make intelligent judgments based upon such evaluation.

This will be a demanding task, for governmental structures, as abstract paintings, seem far more definitive and organized in their regulatory behavior when viewed from a distance. Unfortunately, however, the FCC is not an entity in terms of process, but simply a collective term for some 1500 civil servants clustered in various offices, often forming into factions themselves in reaction to the coalitions supporting various issues. This seminar, then, will attempt to view specific issues such as comparative licensing standards; competing media challenges and free speech principles within the context of that process shaping the end-product we call "broadcast law."

USES OF PIKE & FISCHER

Henry Fischer

I have been asked to tell you something about Pike & Fischer Radio Regulation in about twenty minutes. Even a half hour, I am just told, and I will do the best I can. I do not know how much I can do, because Pike & Fischer right now is a rather large set of very heavy books. It began publication in 1948, and it has been accumulating weekly ever since. When it was published, it was published specifically at the request of the Federal Communications Bar Association, under their sponsorship. And it was designed as a reference tool for the radio lawyer and radio engineer who works with this business every day and week. This set of books was then designed and is still edited as a basic, comprehensive research tool for the expert in the field of radio law. To the extent it is helpful to others, that is wonderful, and we like it. But the comprehensive nature of the book, of the set, is due to its history in the fact that the people who use it primarily, are the radio lawyers and the radio engineers who work every day in the field of radio law.

It consists of a large number of books. There are four current service volumes, loose-leaf. There are three loose-leaf digest volumes. Then, in addition to that, there are two bound volumes of consolidated digest. Then there are still outstanding volumes, three to twenty-five of the cases volumes, in the first series (that is R. R. first), and volumes one to twenty-five are R. R. second. I do not know exactly how many books that makes, but it is colossal. That is the physical side of the book. And those books are kept up to date with weekly reports that range anywhere from a hundred and fifty to, sometimes, four hundred and four hundred and fifty pages a week.

Use of Current Service Sections

The four volumes of current service are, in effect, all the legislative material, that anybody in radio might need. And by legislative materials, I am not referring just to statutes. I am referring to statutes, rules and regulations, forms, and that sort of material of a set nature. And I am not talking about statutes that relate only to the FCC. We are talking about any statute that a radio lawyer might have use of. That is the Communications Act. We have the old Radio Act. We have the Satellite Act. We have the tax statutes that are relevant to radio. We have the Administrative Procedure Act. We have the Judicial Review Act that the lawyers may be interested in. And not only do we have the acts--and then we have relevant regulations of agencies other than the FCC; the FAA, for instance, or the Federal Trade Commission; all these concerning radio.

Then, of course, we have all the rules and regulations of the FCC pertaining to radio. And I say "pertaining to radio," because we do not purport to cover in the Pike & Fischer Radio Regulation the common carrier aspects of the FCC except as they deal with radio. Now, of course, more and more the common carrier aspects of the operation at FCC deal with radio in the sense that they deal with the satellites and they deal with point to point microwave communication. To that extent, Pike & Fischer covers it. But the ordinary rate-making cases concerning telephone, for instance, Pike & Fischer does not purport to cover. However, all that legislative material and the legislative history pertaining to that material--and I am talking about committee reports, Senate reports, House reports and that sort of thing--all appear in the current service.

The five digest volumes are subject matter digests of the interpretations

of all the materials that appear in the current service. By "interpretations," I mean the opinions of the FCC, the letters that the FCC writes back and forth, the reports of the FCC, and the opinions of any courts anywhere in the country that concern and interpret the legislative material in the current service volume appear by subject matter in the digest volumes, organized exactly in the same fashion as the current service volumes are. In other words, if you are interested in political broadcasting, Section 315 of the Communications Act, the subject matter of that in Pike & Fischer is designated as Paragraph 10:315, the paragraph number that Pike & Fischer Radio Regulation assigns to the legislative material in the Communications Act that concerns political broadcasting. And if you go to Paragraph 10:315 in the current service volume, you will find Section 315 of the Communications Act. Now there are other provisions of rules concerning political broadcasting which are in the FCC rules and regulations part. But that is its basic nature.

If you go to the digest volume and look up in the digest volume Paragraph 10:315, you will find digested there all the interpretations of the FCC reports, as far back as we can research. In other words, that goes all the way back to the old Federal Radio Commission and before then, all digested, all the opinions of the FCC and the courts concerning and interpreting Section 315 of the Communications Act. And there also, you will find a reference where, in the cases volumes of Pike & Fischer, you may find, in full text--the opinions that are digested under Paragraph 10:315. So that you start research on that question in the current service for the legislative materials and the legislative histories.

Go to the digest volumes to find the subject matter digests of all opinions and interpretations of that provision, and then to the cases volume for the full text of any of those that you may be interested in. And theoretically, when you have done that, you have completed your research in Paragraph 10:315 as far as you can go no matter where you might try to find it. And if we haven't done that, then Pike & Fischer Radio Regulation has not done its job for the radio lawyer. The idea of the Pike & Fischer Radio Regulation set is to have on the lawyer's own shelf everything he needs for his research in radio regulations without having to go to another library. That is our function.

Use of the "Paragraph Note"

Now, going back to the example I have used of Paragraph 10:315. When you find Section 315 of the Communications Act--it happens to be in Volume I of the current service--you will not only find the text of the section, but under that section, you will find what we call the paragraph note. Because every section of every statute and every rule that we put in Pike & Fischer has a paragraph note, which indicates its source, when it was amended, where the basic document may be found concerning that amendment, and where, in the legislative history section of the current service, you may find the material relating to that section in the committee reports that we publish. That is true not only of every statutory provision, but every rule of the Federal Communications Commission that we have. We have a paragraph note indicating when that rule was adopted, where you may find it in the Federal Register, when it was amended, and then referring you to any report of the Commission that was issued at the time of its issuance or amendment that explains the nature of the action that was taken. Those reports, like opinions, are also published in our cases volumes.

That is the organization of the set. I have already indicated, it is organized not by page number so much as by paragraph number. This set of books is loose-leaf. We are always inserting materials. Our categorizing system is useful in the current service and the digest only for the purpose of filing.

It has no other purpose in those two sets. Of course, in the cases volume, the categorizing system is the normal categorizing system, which is sequential and serves also for reference purposes. But in the current service and digest, the categorizing system has only one purpose, and that is for filing. And it changes. Paragraph 10:315 may be on one page today and next year be on a completely different page because we have inserted a lot of pages in the interim. But it will always be Paragraph 10:315.

Now the reason we assign 10 to the Communications Act and different numbers to other provisions is because while we can say Section 315 of the Communications Act, Pike & Fischer has several acts and several rules all of which may be 315. So we have to assign a number before that section number which is an identifying number of the act that we are talking about. Ten is our identifying number, paragraph number for the Communications Act. Paragraph 51 happens to be our identifying number of the rules of procedure at the FCC. FCC calls it Part I. Our number for it is 51.

Correlation Table

The result is that we have, particularly with reference to the rules of the FCC, a correlation table, because our paragraph numbers before the colon are different from the part numbers that the FCC assigns to its rules, for obvious reasons. Our paragraph numbers are permanent as far as we are concerned. The parts for the FCC rules change from time to time. They have changed them so often that, as I indicated, we have had to go back and re-do our original digest volumes for the first series to incorporate the relevant material under the new part numbers for the FCC. That is the occasion for the issuance of what we call the consolidated digest.

What we have is a correlation table which sets up our paragraph numbers and the sections and the parts of the FCC rules. And that can be found in the finding aids.

"Proposed Material"

Among other things, we publish all proposed amendments to the rules of the FCC. Now we cannot just put that in the book and let people read the proposed text and get the idea that he is reading something which is already law or regulation. So we put that in the book in its proper place on green paper. And, of course, it is marked "proposed," but a lot of people read real fast. But when you read anything in Pike & Fischer on green paper, you know it is of a temporary nature.

The FCC is amending and changing its rules at a great pace all the time. And they have rulemaking proceedings pending sometimes for years. And it is very important sometimes for you to know after you have read a rule what the FCC has done, if anything, by way of proposing amendments to it before you go any further.

Well, we have at the beginning of our finding aids a table of proposed amendments, also on green paper. And the tables--the tables there are arranged by docket number and also by section number. For instance, if you just happened to read--Paragraph 53:24 of the rules, which is 73:24 of the FCC's rules, and if you want to know whether the FCC is proposing any amendments to it, you turn, under the finding aids, to the table of proposed amendments under the section number, and if there are any proposed amendments, it will tell you what they are

and where they can be found by page number in Pike & Fischer. So that nobody who is researching a rule of the Federal Communications Commission finishes his research without checking the table of proposed amendments to determine whether the FCC is in the process of proposing amendments to that rule. We have the full text of those amendments. We have the reports indicating why they are doing it in our cases volumes, and we have the table of proposed amendments and our finding aids indicating, quickly, whether there has been a proposal to amend, where the text of the proposal can be found, and where the report can be found. And when you go to that text, that will lead you to the report of the Commission, in which it discusses this proposal.

Table of Cases

So that is one of the things we have in our research volume. Now, of course, we have a table of cases, first, for all the twenty-three volumes of the first series, which are now out of print, and a table of cases for the twenty-five volumes of the second series. They happen to be--those tables of cases are every fith volume--every fifth volume of the cases volumes. We are now in the process of consolidating them and putting one complete table of cases for the entire twenty-five volumes of the second series in the finding aids section, along with the table of cases for the twenty-three volumes of cases in the first series. So if you know the name of a case, of course, you can get into the case--into the set by just looking at our cases material.

Table of FCC Reports

In addition to that, we have a table of all the FCC reports by docket number. If you know the docket number of any FCC report, you can get into Pike & Fischer by looking it up in the table of docket numbers. And that will lead you directly into the cases volume where you can find the full text of the report.

Citation System

Then we have our own Shepards. I do not know if you know what a Shepard is. That is a citation table. If you have a case, a full text of the case, and want to know what cases in the future have ever made reference to it, you go and look up the citation of that case in this citation table, and it will give you the citation of all cases subsequent to the issue which have made reference to the case that you know. You can check to find out whether other subsequent cases have followed it, have ignored it, or have distinguished it or overruled.

In addition to that table, we have a table of rehearings to find out whether a particular case that you are interested in has gone to court or has been reheard, or any subsequent action taken with reference to that case. In our finding aids section, we have a table that tells you what has happened to that case after the time of the opinion that you happened to have read.

Then we have a cross-reference table between RR and the FCC reports, both ways. If you have an FCC citation and want to know where to find that in RR, you just look that up in the table, and it tells you that. And it works the other way. If you want to know where in the FCC reports--we are a little bit ahead of them; we are several months ahead of them--so that there is a large section of our reports where we do not have it. But when they come out, we indicate where in the FCC reports you can find any case or report of the FCC that we publish in our books. We publish many opinions of the courts that you

won't find in any FCC reports; you have to go to a reporter system for that.

Paragraph Numbers From Cases

Now there is one further way, and a very important way, for getting into our set of books--it is very useful--without going through any of those things. And that is, if you know a case that you are interested in or are reading a case that you are interested in Pike & Fischer, at the beginning of every case we publish, we headnote it with the digest paragraph by subject matter that we think represents the essence of the decision of the agency or the court. And when we do that in brackets right at the head of that digest number, we put the paragraph numbers of the subject matter where that digest will be put when it is incorporated into the digest. Once you get that paragraph number--as you know, once you get a paragraph number for Pike & Fischer, you are in. You can take that paragraph number from that case, go backwards to the digest and to the legislative materials, and from that case, research that point back to the beginning of time without going through the word index, without using any of the tables or anything else; just from the fact that you happened to have read that case and then followed the digest paragraphs--the digest by digest paragraph--back to all similar materials that have ever been decided by the courts and the FCC and to the legislative material, which is the basic source of all that material.

Now this is a way of using Pike & Fischer that is very helpful and which you won't find where we say how to research Pike & Fischer. But if you know the case and you read it in Pike & Fischer from the headnotes and the digest paragraphs at the top of each headnote, you have found the key for all research on the point that was decided in that case.

Consolidated Digest

Now, one more thing. That is the consolidated digest. The three volume loose-leaf digest is a digest of all the interpretative materials that appear in RR Second. When the first series of radio regulations closed down, there were twenty-three volumes of case material. And that was all digested under old section numbers of the FCC rules and regulations. And I indicated the FCC in the interim, between 1948 and the present, had changed around their parts and their rule numbers at least three times to the point where a rule number of a current rule may be similar to a rule number back in '48, but the substance of it was altogether different in '48. What we did was take all of that old material and reorganize it under the present numbering system that the FCC has, so that under the present numbering system that the FCC has, so that by knowing the paragraph number for RR Second, you can now get into the material for the first series of RR with the same paragraph number. And in this book, we also give you the transition stages of the rule, through all the different changes in the rule numbers. And that is the purpose of the consolidated digest to lead you back through the same paragraph number from RR Second to the interpretative materials in the first series of RR. Everything else in the original RR is obsolete, and it has been replaced by the current service volume and the digest volumes of RR Second.

HOW A BROADCAST ATTORNEY RESEARCHES LAW

Russell Eagen

In trying to break my subject into segments with the hope that I will leave each of you something of worth, I approached the question of research basically in terms of an historical example.

The thought occurred to me that I might take one question that I was faced with once and try to recapitulate how the research tools came into use and what happened. As we all learn in law school, the first thing you have to do is analyze precisely what the question is.

Now, hopefully, I can avoid too much detail in going through this to "state the question." Basically, the question I'm going to discuss today arose from the fact that there is a section of the Internal Revenue Code (Section 1041) that, in substance, gives the Federal Communications Commission authority, upon a certain showing, to issue what we call a tax certificate. Under certain circumstances when a station is sold, a tax certificate can be obtained from the FCC that, in effect, postpones the payment of a capital gains tax, much in the same manner that if you sell your home and reinvest the proceeds in a new home--then your capital gains tax is postponed until you sell the second house.

Now this provision really came into being because of the "duopoly" provisions of the Commission's Multiple Ownership Rules. Back in 1940, there were maybe thirty, forty examples of where the same person owned more than one AM station in the same city. The Commission looked at the situation and decided that this was not in the public interest and it adopted a rule that stated in effect: "We'll give you 'x' days to get rid of one of the two stations, if you have more than one in the same city."

Naturally, the broadcasters who were thus required to sell went to Congress, and, as a result, Section 1071 of the Internal Revenue Code was enacted. The language at that time read something to the effect that if you sold a station and this implemented a Commission policy regarding the Multiple Ownership Rules, then you were entitled to a Section 1041 tax certificate.

So then it came to be that all the situations where one person owned more than one AM station in the same city were eliminated and the Multiple Ownership Rules provided that no one person could have an interest in more than five VHF stations. In the 1950's someone made a contract to buy a sixth VHF station and in order to obtain FCC prior approval of the transfer of control pursuant to Section 310 of the Communications Act, agreed to sell one of his existing five stations. He argued that he was entitled to a Section 1041 Tax Certificate in connection with his selling of a station. And under the language of the statute as written in the 1940's, he was. So, Congress changed the statute to read in effect: "We'll give of these tax certificates only where the sale is appropriate or necessary to effectuate a change in Commission policy." In other words, any person who had five VHF could no longer go out and create a situation by buying a sixth and say: "Now, look, your rules say I have to get rid of one of my five and thus I am entitled to a tax certificate," because the rules provided for a limit of five when he acquired his fifth station.

That basically was the historical situation I was faced with when we had a client who had television stations in Cities A and B, sold his station in City B,

and purchased a station in City C. At that time the Grade B contours of the stations in Cities A and B overlapped, a situation permitted by the rules when the stations were first built and operated under common control.

Some time after the two stations in Cities A and B were built with Grade B overlap, the Commission changed its rule and said: "In the future, we're not going to let anybody who has one station acquire a second station that involves Grade B overlap with the first. However, those of you who now have that situation will be grandfathered with the provision that the Grade B overlap you now have cannot be increased." We were in a situation where the owner of the two stations in Cities A and B wanted to improve the facilities of each. But he was faced with a Commission rule that said he could not increase the Grade B overlap. And so, what can he do?

Well, he couldn't improve the facilities of either one as long as he kept the other. So he decided to sell one and improve the one he kept. He read Section 1041 of the Internal Revenue Code, as changed, and decided he was entitled to a tax certificate in connection with sale of one station on the theory that the elimination of Grade B overlap would effectuate a change in policy respecting Grade B overlap as between commonly-owned stations that came about after he had acquired his two stations.

So what does a lawyer look at to confirm whether a tax certificate would be issued by the FCC? Well, you'd obviously research FCC decisions on the point. Also, you would inspect FCC Public Notices that the Commission puts out. You know, they put them out every day. Every once in a while, there'll be a Public Notice that constitutes, in effect, a policy statement.

Now in this particular situation, there was a Public Notice of this kind that was put out that purported to be a correct interpretation of Section 1041. It said, in substance: "Well, we've looked at this, and we're not going to give any tax certificate unless, as a result of a rule, you are required to sell a station."

It seemed to me that the Public Notice didn't make sense. So, we turned to the legislative history of Section 1041 (Congressional Hearings, debate on the floor, etc.). We put together, we thought, a very persuasive showing to the FCC that the policy statement of the Commission set forth in its Public Notice was not an accurate interpretation of the statute. We argued, in essence, the statute says "necessary or appropriate" to effectuate a change in Commission policy and you've got to read that word "or." Well, we were so convincing that the Commission voted against us three to two and refused to issue a tax certificate. I really couldn't believe it, but there it was.

So then the next question was: "Do we appeal?" We thought we had a strong case on the merits and decided to appeal. The next question was: "Which court?" You read Pike & Fischer and note that the Communications Act, as you probably know, provides for two routes of appeal which are set forth in Section 402 of the Communications Act (which would be, in Pike & Fischer, 10:402). We read Section 402 but it didn't seem to us that the Section 402 applied because it related to actions taken by the Commission pursuant to the Communications Act of 1934. Here, the Commission refused to issue a tax certificate pursuant to Section 1041 of the Internal Revenue Code.

So, if Section 402 of the Communications Act does not apply, what does? Well, we next read the section of Pike & Fischer that sets forth the APA (which is

25:1ff). There's a provision in the APA (Administrative Procedure Act) that says, in substance, that every final action of an administrative agency is subject to review by the courts. As to the specific method of review--you follow the most applicable statute. In 99.9 percent of all Commission appeals, the procedure is governed by Section 402 of the Communications Act which is divided into two parts: 1) 402(a), which governs appeals of rulemaking action; and 2) 402(b), which is the method used to appeal decisions granting or denying applications.

Now a 402(b) appeal has to be filed with the District of Columbia Circuit Court of Appeals. In the case of a 402(a) appeal, you can take your choice of the various Courts of Appeal, depending on venue. We decided that neither part of 402 applied and that we had to proceed under Section 10 of the Administrative Procedure Act. We went to a District Court and asked, in effect, for a mandatory injunction holding that the Commission, in effect, abused its discretion in incorrectly interpreting Section 1041 as a matter of law. It was a pure question of law.

But nothing is crystal clear. Section 402(b) provides a thirty day period to file an appeal; 402(a), a sixty day period. The procedure we thought was correct provided for a thirty day period. So, when the thirty days expired, we filed, in effect, an appeal with the District Court in State A and also filed contingent Section 402(a) and 402(b) appeals with the D. C. Court of Appeals with an appropriate motion asking the D. C. Court to delay action until the District Court ruled. So we had these three appeals pending.

The first question in the District Court appeal, of course, was jurisdiction. The Commission and Justice Department were representing the government. At one point, they argued it was a 402(b) appeal. At another point, they argued it was a 402(a) appeal. The District Court judge happened to rule that we were correct and that the matter was before him. Eventually he ruled with us on the merits, and the government appealed to the Court of Appeals in Richmond. Subsequently, the Commission confessed error and issued a tax certificate.

In researching the questions involved in the above proceeding before the FCC and the Courts, the most important source, without a doubt, was "Pike & Fischer Radio Regulation."

Now on some of the things that Henry Fischer mentioned, I do have some comments. I noted that one gentleman mentioned Xeroxing and distributing the first or summary page of the weekly material sent out by Pike & Fischer. Now, I personally have found that page a very handy research tool myself. I keep all of these pages in a separate binder. So I have one or two more volumes of Pike & Fischer than most people! But I've found it to be extremely useful. Sometimes it is rather hard to put your hands on exactly what you're looking for. You may have only a vague recollection of when the Commission spoke on a particular question. If you have any idea of the date of the action, I've found the easiest way to obtain the citation (and thus a copy of the action) is to leaf through the weekly summaries. And I've found that method to be very useful and productive. Also, the summary pages are a useful reference for reviewing past significant FCC actions.

There is one thing that I've found difficult in using Pike & Fischer. This was mentioned by Don (LeDuc). It's sometimes hard to go back in time in researching action on FCC Rules because the numbering system has changed a few times. But, really, if you stick with it, you can find it! I had such a question the other day. A daytime AM station had written a letter to a Class I-B station saying, in effect: "Would you file a letter with the Commission saying that you would not object if we were given authority to operate beyond local sunset." I had a recollection that

there used to be a rule that said, under certain circumstances, the Commission would issue Special Temporary Authority to operate beyond the hours set forth in AM licenses. I also recalled that this type of authority was terminated and the rule was eliminated. I experienced the multiple changes of numbers of rules that Henry mentioned. But I easily found the history I wanted. Basically, through the use of the consolidate digest, I was able to find my way in about five minutes to the Report and Order that the Commission issued when they eliminated the rule. The only thing that shocked me about it was that my system of using the weekly summaries didn't help in this instance. I thought the rule was eliminated maybe five or ten years ago. I was somewhat astounded when I found the Order was issued in 1948! So the weekly sheets didn't help me too much there!

Now, one other thing that Henry mentioned. Let us say you have a question concerning political broadcasts. So you look at 10:315 in the digest. One thing I've never completely figured out relates to where else one should check--maybe Henry could tell us when I conclude in a few minutes. In addition to looking under 10:315, I also check the digest of the Commission rules that, in effect, recapitulate Section 315. You know, there's one rule for AM, one rule for FM and one rule for TV. And I really don't know how Henry solved the problem of duplicating within his own digest. Obviously, a Section 315 ruling should go under 10:315. Should it also go under each one of the three rules? That would be four appearances of the same case in the digest. How Henry solved the duplication problem, I don't really know. I generally check the rules and the statute in the digest to make sure that I haven't missed anything.

As I indicated, it is frustrating at times when you're trying to go backwards in history. In the case of my tax certificate situation, I found with relative ease references to the pertinent legislative history of Section 1041 and to FCC interpretations thereof. In this instance the changes in FCC rule numbers over the year did not present a significant hurdle. However, in other instances, the search backward in time is more difficult because the subject is covered by a statute that has been amended and by AM, FM and TV rules which have been renumbered extensively. I had such an experience recently in connection with a lottery question.

One situation where I think you need something else besides Pike & Fischer is where you have a question as to the exact previous wording of amended rules. Pike & Fischer will give you a reference to all the amendments to any rule, but if you want to find the exact text you must go to the Federal Register or to some other source. In short, Pike & Fischer doesn't publish the appendices to Reports and Orders which contain the exact language of the amendments to rules. I can understand why, because there has to be some limitation on bulk. Probably the instances where you would be looking for something like this are few and far between.

Another tool I use at times relates to the fact that the Commission has a section that keeps an amazingly detailed set of annotated rules. They have an index system where you can go to any rule and find your way back through all amendments to day one with the Federal Radio Commission. You can get the same information a little more laboriously, by using the Pike & Fischer references to the Federal Register.

One other source that I use for history is Broadcasting magazine. Now, I forget my exact dates, but I believe Broadcasting commenced about 1933. In our

office, we have a bound set of every Broadcasting magazine ever issued. I have found this set to be a tremendously helpful research tool. And if you have some idea of the dates involved, you'll get a lot of detailed and accurate information in Broadcasting. Now the same thing is true, but to a lesser extent, of Television Digest, because it doesn't go back as far.

You do have an index problem with the use of Broadcasting magazine. They have changed over the years their table of contents. But that's not much of a practical problem. If you have a point in time where certain events happened and you have Broadcasting available to you, you can find valuable source information very readily.

I have one other note. Henry (Fischer) mentioned the green sheets that pertain to pending proposed rulemaking. They remain as long as the matter is pending, whether for twenty years or two months. When Henry publishes the Report and Order which terminates a rulemaking proposal, out comes the Proposed Notice of Rulemaking. A lot of the Notices are very useful research tools. If you do have Pike & Fischer, I would set up some filing system to retain the green sheets that are Notices of Proposed Rulemaking. I'd try to devise some way to keep those on file, because those are tremendously helpful resources. Of course, the Notices are also available in the Federal Register.

AFTERWORD: A PERSONAL VIEW

In preparing this collection of studies for publication, two contrasting characteristics of the BEA Broadcast Regulation seminars seemed to stand out in bold relief. The first and more obvious one was the nearly uniform excellence of the presentations made to the 1969 and 1972 sessions. Few of the studies seemed either too narrow or too broad, too detailed or too specific for our interests. Concepts were explored and explained with precision by speakers who appeared to understand our needs as researchers and teachers and were willing to work diligently to meet those needs.

Yet, while there was great strength displayed in those topics treated during these seminars, there also appeared to be a serious weakness reflected by topics of equal significance which were ignored. For example, while we learned of the successful defense of one license challenge case, we did not hear from any license challenger; while broadcasters detailed the perils cable would pose for the public, no cable operator was invited to describe the promise he saw as inherent in broadband systems; while industry spokesmen gave us their view of "access" demands, the "Fairness Doctrine" and minority hiring practices, no "public interest" law firm or citizen group had the opportunity to defend or even describe its own position. Other matters of regulatory interest, such as excessive advertising during children's programming, alleged deceptive news and documentary practices, or program producers monopoly complaints, among others, were not even mentioned in passing.

As scholars and as teachers we cannot afford to overlook points that are being raised by thoughtful critics of the existing system, for we cannot answer questions we have not heard. It might well be that these voices crying in the wilderness will lose their romantic appeal when listened to closely, or that we may even find answers to rhetorical questions, but we must first be entrusted with the information before we will know. If our own organization cannot furnish us with what we need, we must find it for ourselves for our professional pride demands that we seek facts objectively and our integrity demands that we describe those facts to our students as honestly as we see them.

In that sense, then, while this collection offers ample evidence of what we have gained from prior Broadcast Regulation seminars, it should also provide positive direction for what is still left to be done.

Don R. Le Duc
Editor

APPENDIX A

"NAME THE GOVERNMENTAL PLAYERS" QUESTIONNAIRE

Since regulation is carried out by men and not organizations, knowledge of the actual officials now exercising regulatory authority in each of the following positions with primary responsibility over the broadcasting industry should be particularly valuable. Fill in the blanks below in pencil (jobs change) and see how well you can do.

A. Office of Telecommunications Policy

Director:_____

General Counsel:_____

B. Federal Communications Commission

Chairman:_____

Commissioners:_____

_____

_____

_____

_____

_____

Chief, Broadcast Bureau:_____

Chief, Cable Bureau:_____

C. Federal Trade Commission

Chairman:_____

Commissioners:_____

_____

_____

_____

E. Department of Justice

Attorney-General: _____

Solicitor General: _____

Asst. Attorney-General, Anti-trust Division:

_____

F. Senate

Chairman, Committee on Commerce:

_____

Chairman, Communications Subcommittee of Commerce Committee:

_____

Chairman, Committee on the Judiciary:

_____

Chairman, Appropriations Subcommittee on HUD, Space, and Science:

_____

G. House of Representatives

Chairman, Committee on Interstate and Foreign Commerce:

_____

Chairman, Communications and Power Subcommittee of "Commerce" Committee:

_____

Chairman, Committee on the Judiciary:

_____

Chairman, Appropriations Subcommittee on HUD, Space, and Science:

_____

H. Court of Appeals for District of Columbia Circuit:

Chief Justice: _____

Judges: _____

_____

_____

_____

_____

_____

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_____

APPENDIX B

CHICAGO JOURNALISM REVIEW / OCTOBER, 1972

Challenging

By LAWRENCE W. LICHTY and WILLIAM B. BLANKENBURG

The Federal Communications Commission has revoked virtually no broadcasting licenses for programming or failures of promise versus performance. Of 78 revocations or denials of renewals from 1934 to 1969, the great majority involved misrepresentations to the FCC, illegal transfer of control, or technical violations. (There were only 34 from 1934 to 1959; 44 from 1960 to 1969.) Only five stations lost their licenses for any matter involving programming directly — fraudulent contests; false, fraudulent and misleading advertising; indecent and vulgar material; overcommercialization; broadcasting horse racing information; and departure from promised programming.

In the one case that the FCC mentioned "departure from promised programming" it also cited the station for broadcasting horse racing information and failure to file ownership information (WCLM-FM, Chicago). Most revocations or denials have involved several charges — the average is two.

More than one-fourth (30 of 108) of the original, pre-freeze TV stations were granted by the FCC to station owners specifically cited in the Commission's Blue Book *(Public Service Responsibilities of Broadcasting Licensees)* as deficient in promise v. performance, lacking in public service and sustaining unsponsored programming, or other charges.

WISC-TV

WISC-TV is a CBS affiliate that broadcasts on channel 3 in Madison, Wisconsin. It is owned by Television Wisconsin, half of whose stock is held by the estate of the late Morgan Murphy of Superior, Wis. The Murphy estate also owns the Superior *Evening Telegram*, nine other newspapers, four other television stations, two radio stations, and a handful of small cable television systems. The Ralph Immell estate owns 20 per cent of Television Wisconsin, and the remaining stock is held by other owners and estates in Madison.

The authors are members of an organization known as Better Television for Madison (BTM), a group largely composed of University of Wisconsin journalism and communications teachers. It was formed in the summer of 1970 primarily to file a petition with the FCC to deny renewal of a license to Television Wisconsin, Inc., to operate WISC-TV.

Our decision to file a petition was based on three regulatory theories, two well-established and one just evolving. The first is familiar, impeccable, and vague.

1. That licensees of airwaves are to operate in the public interest, convenience, and necessity.

2. That performance should at least bear a family resemblance to promise, especially in the area of public-service programming.

3. That performance should have a relationship to profits. This proposition is relatively new, and support for it is cited below.

We had several choices. We could have simply appealed to the station to improve its programming and meet with us. However, earlier letters to the station, phone calls, discussion by some of our members as well as others had convinced us that this would be futile.

We could have fought for the license ourselves — that is, file what is typically called a "strike application." However, we simply did not wish or have the resources to pursue this procedure. It would require engineering studies and proof that we did in fact have the capital to operate the station — we didn't.

In filing a petition to deny we honestly believed (and still do) that we could obtain — if the license were denied — an operator much more qualified and interested in providing additional quantity and quality of news and public affairs programming. We should note that there was much additional criticism that could have been leveled at the station. For example, several women's groups had appealed to the station over the years to improve its children's programming. However, because of our background and expertise we chose to concentrate primarily on the station's deficiencies in news and public affairs programming.

There was no question in our minds that the station was doing a "bad job" and that they were doing this poor job because their intent was to make as much money as possible without providing adequate service, and that nothing short of petition to the FCC would convince them otherwise. So then, and still, our objective was to obtain a new licensee for the station — since that is the way the system is supposed to operate.

Let us emphasize that in most cases it is better to go quietly to the station with criticism than noisily to the FCC with a petition. However, we had a case of longstanding minimal service and while we did not have as extensive proof as we would have liked, we were convinced from our own experience and from talking with a number of other people in the community that this was the only action possible.

On October 19, 1970, Better Television for Madison formally filed with the FCC, asking that it "deny the pending application of said WISC-TV for renewal of its television license, or in the alternative, to designate said application for hearing. . ."

In the petition, BTM alleged that WISC-TV "has provided its urban and rural audiences only minimal quantity and quality of local news and public af-

a TV license: the Madison story

fairs programming during the past three years. . ." and that "such failure to provide more comprehensive and meaningful local service has had a uniquely deleterious effect upon the coverage of news and public affairs in this service area because of the extreme disparity between revenues available to WISC-TV, as the sole VHF television station in this market to finance such programming, and funds available to its two commercial UHF competitors to provide similar services."

The petition, which ran 12 pages, noted that articles in *Broadcasting* and *The Wisconsin State Journal* in 1967 had reported that WISC-TV enjoyed annual gross revenues of $1.4 million to $1.6 million from 1962 through 1965, and had an average pre-tax profit of from $600,000 to $1 million a year. The same articles reported that WMTV had total pre-tax profits of $70,000 over the four years, and WKOW-TV showed a net loss of $120,000. We do not know the original source of these data, which by FCC standards are supposed to be confidential. We were able to infer later profit-and-loss figures from income-tax information.

We then argued that public affairs performance should be commensurate with profitability, and that WISC-TV had fattened its profits in part at the expense of public affairs programming.

Our petition also compared WISC-TV's presumed profits with those of stations in similar markets, and we charged WISC-TV with having an extraordinarily large proportion of non-program material in its newscasts; with deceptive use of "news film"; with a failure to use the "full complement" of CBS newscasts, as promised; with not having as many newsmen as it stated in its application; with making minimal efforts toward local public-affairs programming; with conducting a faulty community survey; and with providing inadequate and inaccurate election coverage, among other things.

Our petition sought to examine several questions essential to any license challenge.

Examining the owner

Who owns the station, and what is his history of performance? We found that Radio Wisconsin, which later became Television Wisconsin, had made and failed to keep several promises to the Federal Communications Commission. These we cited as evidence of character, although these matters occurred well before the 1967-1970 renewal period.

What are the goals of the owner? In our reply brief of December 24, 1970, we charged that "the WISC-TV general manager has previously stated that the licensee knew that WISC-TV could not continue to make such large profits indefinitely." We alleged that the owners were attempting to maximize profits as long as possible, and then dispose of the station. We noted that this information was "admittedly hearsay" and "was not said to a member of BTM." It came to us from an acquaintance who talked with the general manager, and was quoting him directly. Our acquaintance, now a high public official, was not willing to write the FCC, but he has said he would make such a statement under oath at a public hearing.

This is a petitioner's dilemma. Unless a public hearing is held, there is no obligation for broadcast personnel, management, or owners to tell the truth. Former employees, public officials, and competitors may not come forward with information although they may well provide it under oath. The petitioner, then, cannot adequately present these views and facts without a public hearing, and probably can't get a public hearing without first presenting the information.

The dilemma has recently been made all the more poignant by the District of Columbia Court of Appeals in the WMAL-TV case, which went against the petitioners:

"In the event, then, that a petition to deny does not make substantial and specific allegations of fact which, if true, would indicate that a grant of the application would be *prima facie* inconsistent with the public interest, the petition may be denied without hearing on the basis of a concise statement of the Commission's reasons for denial."

Is the station adequately staffed? In some respects "adequacy" is a matter of opinion, but the number of employees in a given category should be a matter of fact. The application for license renewal will usually list staff positions and their number. We found contradictions and obfuscations in WISC-TV's allocation of personnel to news operation. We cited the difficulty to the FCC and noted that at one point the station claimed the general manager as a newsman because he "funneled stories" to the news department. We repeatedly asked the management to name its 10 (or 12, as variously claimed) newsmen, and it has failed to respond.

We also took WISC-TV's list of 17 news "stringers" and attempted to reach all of them. Of the 11 we located, seven had either never worked for the station or had stopped providing news as long ago as 1967.

What are the financial capabilities of the station? A balance sheet appears in the renewal application. But more precise data, especially as to annual profits, and more especially departmental budgets, are likely to remain secret, particularly in a closely-held corporation. The FCC does not reveal profitability information for individual stations.

However, there are ways to make estimates. For example, an analysis can be made of the number of commercials, the rate card, and the network affiliation contract. This can yield an educated guess of revenues. Knowledge of the staff size and a comparison with "typical" expenses as listed by the National Association of Broadcasters can aid an estimate of expenses.

In our case, some financial information was more easily acquired. Earlier we cited a newspaper and magazine story that revealed profits for the period 1962-65. These figures were evidently leaked from the FCC or elsewhere — we've never found the source. In addition we were able, under Wisconsin law, to learn how much each station paid in state taxes each year.

Station	State Income Taxes Paid 1962-69
WISC-TV VHF	$358,534
WMTV UHF	23,931
WKOW-TV UHF	7,397

The discrepancy reveals some of the advantage of having the only VHF outlet in an intermixed market. It should be noted, however, that WKOW-TV incurred extraordinary expenses during that period in constructing another station.

By using aggregate FCC financial data

for the Madison market, and working backward through the state corporation tax formula, and by attributing equal expense to each station, we were able to estimate that the station's profits were 48 per cent of revenues in 1967, 46 per cent in 1968, and 40 per cent in 1969.

Examining Content

Content can be analyzed in several ways, but in view of the FCC's general reluctance to consider programming directly, and its greater concern over misrepresentations, it is wise first to focus on the types of programs being offered as compared with those that were promised in renewal applications. Even this may be a fool's errand, because the FCC has been exceedingly tolerant of differences between promise and performance in allocation of programming.

For example, consider:

WISC-TV PROGRAMMING

	1952 Promise	1958 Performance
Entertainment	55%	80.7%
Religion	7	1.4
Agriculture	5	4.0
Education	8	2.3
News	6	3.7
Discussion	9	2.1
Talks	10	5.8

Other than entertainment, the performance was less than one-half the promise.

WISC-TV PROGRAMMING

Category	1967 Promise	1970 Performance
News	7.8%	6.3%
Public Affairs	7.5	4.5
Other	5.0	7.7

The years 1967 and 1970 were, of course, the boundaries of the most recent full renewal period. Are the figures significantly discrepant? We think so, the station obviously doesn't, and so far the FCC hasn't said.

Of course, the situation in television broadcasting has changed since 1952. Yet, it cannot be denied that in 1952 WISC-TV had promised that in the prime time from 6 to 9 p.m. it would be only 67 per cent commercial — in 1967 it was 99.3 per cent commercial. In 1967, during all hours, it provided only 18.7 per cent sustaining, compared with 40 per cent promised.

So far as we can find in the public record the station never offered, and the FCC never asked for any explanation for these and other changes and discrepancies.

Another matter worth investigation is the number of commercials presented during selected time periods. We found overcommercialization (by FCC and National Association of Broadcasters standards in a sampling of selected hours.

Are programs properly described in the renewal application? WISC-TV listed the "Joe Pyne Show" as a public service program that provides "provocative coverage of matters of interest." When the series was aired in Madison it was at least two years old, and Pyne had been dead for a year.

How extensive is local news coverage? There is no clear criterion, but some quantification is possible. For example, we went to the local film processor who had served all three stations and learned how much film was being used. We found that, in the first six months of 1968, WMTV processed about twice as much color film as WISC-TV, and WKOW-TV processed three times as much. (After learning we had acquired this information, WISC-TV delayed its payments to the processor for some time.)

How well does the station provide specific services? We reviewed analyses of speed and accuracy in coverage of local elections and found WISC-TV to be slow, slovenly, and occasionally inaccurate; moreover, in covering the November 1968 state and city elections it provided no information for nearby locales outside of Madison.

Does the station carry as much network public affairs programming as it promised? WISC-TV said it carried the "full complement" from CBS, but it skipped 195 minutes a week of CBS news programming. Does it pre-empt prime-time entertainment "for presentation of special programs, often of a local, locally-produced and sustaining nature"? WISC-TV said it did, but a check of the 31 substituted programs showed that only four were locally produced (18 were for Billy Graham or the King Family, and not sustaining).

A petitioner should interview persons who have appeared on the station's own programs, or who have sought station cooperation for public-affairs programming or announcements. Inevitably some chronic soreheads will be found, and their recitations should be viewed skeptically; but if the station is faulty in its local service, several substantial citizens will be able to attest to frustrating experiences.

Examining the Audience

We acquired considerable anecdotal evidence on WISC-TV's relations with its audience, including the account of one person who called the station to ask about an unannounced switch in movies. He was told it was "none of your damned business."

Audience ratings can be somewhat revealing, although in the case of Madison WISC-TV enjoys high ratings because of its technical (that is, VHF) advantage. But internal fluctuations were quite interesting. We found that WISC-TV showed a drop in viewership of its local news programs in comparison to its sign-on, sign-off share of audience. A comparison with the shares of its competitors suggested that Madisonians were switching to other stations for local news.

But ratings are not a very exact measure of a community's information needs, and this is why the FCC in 1960 said that a licensee was obliged to make a "diligent, positive, and continuing effort. . .to discover and fulfill the tastes, needs, and desires of the community . . ." In 1966 the FCC further required renewal applicants to show their methods of consulting with community leaders and the general public.

WISC-TV had reported to the FCC that it conducted "personal" interviews with 297 persons, who were listed in its renewal application. We telephoned 45 of the community leaders allegedly surveyed "eyeball-to-eyeball" by a station executive. Of these, 24 confirmed that they had indeed been personally interviewed by a station executive. But six were interviewed only briefly, one had been interviewed by telephone, three by letter, and 11 (or about one-fourth) said they had never spoken to anyone from the station.

Rules and Regulations

If a citizen contemplates using legal levers to improve the performance of a station, a considerable part of his research energies must be devoted to examining FCC rules and regulations and federal cases in point. Members of Better Television for Madison are fortunate in having some background in broadcast law, and in having competent counsel.

When we wrote our original letter of intent to the broadcast bureau of the FCC, we sent a carbon copy to Chairman Dean Burch. We wrote asking that WISC-TV be included in a proposed FCC study of license renewal procedures

(especially renewal, programming and profitability) for stations in the top 50 markets. Madison is listed as 92nd (ARB net weekly circulation) but we argued that WISC-TV was in the top 50 market category in terms of its per cent of profit. WISC-TV promptly protested to the Commission that these copies were an *ex parte* — and therefore illegal — approach to the chairman. We soon received an informal letter from the commission noting that we should not send such copies. The irony is that naivete on the part of commissioners is no more than a legal fiction. Moreover, many communications attorneys have close social and professional contacts with the FCC staff and the commissioners themselves; indeed, a good many members of the communications bar have served on the FCC staff. This too argues that a citizen group should retain counsel.

Distinctions need to be drawn between the disinterested scientific researcher, the advisory policy researcher, and the involved advocate who uses research for results rather than pure knowledge.

Most of us are accustomed to working in the first role, occasionally in the second, and rarely (but increasingly, with rising social consciousness) in the third. The need for making the distinctions is akin to the newsman's need to recognize differences between objectivity, interpretation, and advocacy — and for knowing the time and place for each.

The broadcaster as advocate will also put his best foot forward. For example, in January 1970 the FCC ruled against "upgrading" in the face of competition or challenge:

"A renewal applicant, in competing with a new applicant, must run on his past record in the last license term. If, after the competing application is filed (or a petition to deny directed to program service), he 'upgrades' his operation, no evidence of such upgrading will be accepted or may be relied upon."

But upgrading is the natural and immediate response of any station under attack, and the record indicates that it is usually successful despite the policy cited above.

After learning of our action, WISC-TV (1) claimed it had been searching for a news consultant for some time, and did acquire a consultant; (2) held a short course in broadcast news for its staff; (3) hired a new general manager; (4) appointed a new program director; (5) moved the news director into a new position entitled executive producer for public affairs; (6) appointed a new news director; (7) asked BTM to review all of its programming; (8) asked BTM to advise the station on election coverage (we did and it was improved); (9) hired at least one additional news staff member (10) bought a color film processor; (11) purchased additional cameras and related equipment; (12) increased the frequency of its 30-minute public-affairs program from monthly to weekly; (13) expanded its early evening newscast from 30 to 60 minutes four nights a week (in time available under the new prime time access rule); (14) hired a community affairs director to reach local groups; (15) became more inclined to talk with groups, though not necessarily to cooperate; (16) began reading audience letters over the air during a segment of the newscast; and (17) proposed a series of interviews with the Governor, with tapes sent to other stations, in exchange for listing this as part of the station's "public service."

Another ploy of our opponents was to attack our integrity (we had done the same to them, of course). WISC-TV argued that we did not represent any "substantial part of the Madison community." We had never said we did. We replied that we represented a body of expertise in the field and that our petition should be considered on its merits. When we criticized a religious panel program for its dull format and poor time slot, we were accused of being opposed to religious programming generally.

When we wrote the station asking if a particular program had been produced by WISC-TV or by journalism students, we received no answer but were told that this was another "striking example" of the kinds of attacks we habitually made on the station. Lichty was accused of not indicating his "interest in or participation by him in" WHA-TV, a university-operated non-commercial station. In point of fact, Lichty has no connection with WHA-TV.

All of our members were accused of sharing "a deep bias toward the entire television industry as well as a limited and insular view of Madison's television situation."

So Far, So What?

On December 1, 1970, the Federal Communications Commission did not renew WISC-TV's license. Neither did it revoke the license. The station continues to function as a lame but wealthy duck because under FCC procedure a failure to renew does not vacate the license. In Washington nothing much has happened, so far as we know.

Our petition to deny is still in the files of the FCC, together with collateral filings from both sides. Today, two years after our original filing, we have yet to hear from the FCC regarding a denial or a public hearing. (All we have received from the FCC is a mild warning about sending carbon copies of letters to Chairman Burch.)

While we have never doubted the rightness of our cause, we have been candidly pessimistic about our prospects. The political and legal powers of a licensee are obvious. The FCC is tolerant to a fault and almost never looks at promises versus performance in programming. It is understaffed, over-worked, and burdened with problems much more profound than our own. What is BTM compared with AT&T, NAB, and OTP?

We are aware that if we had filed with the FCC three or six years ago we would not now be among several hundred others seeking recognition. But in those days the commission would have given us very short shrift.

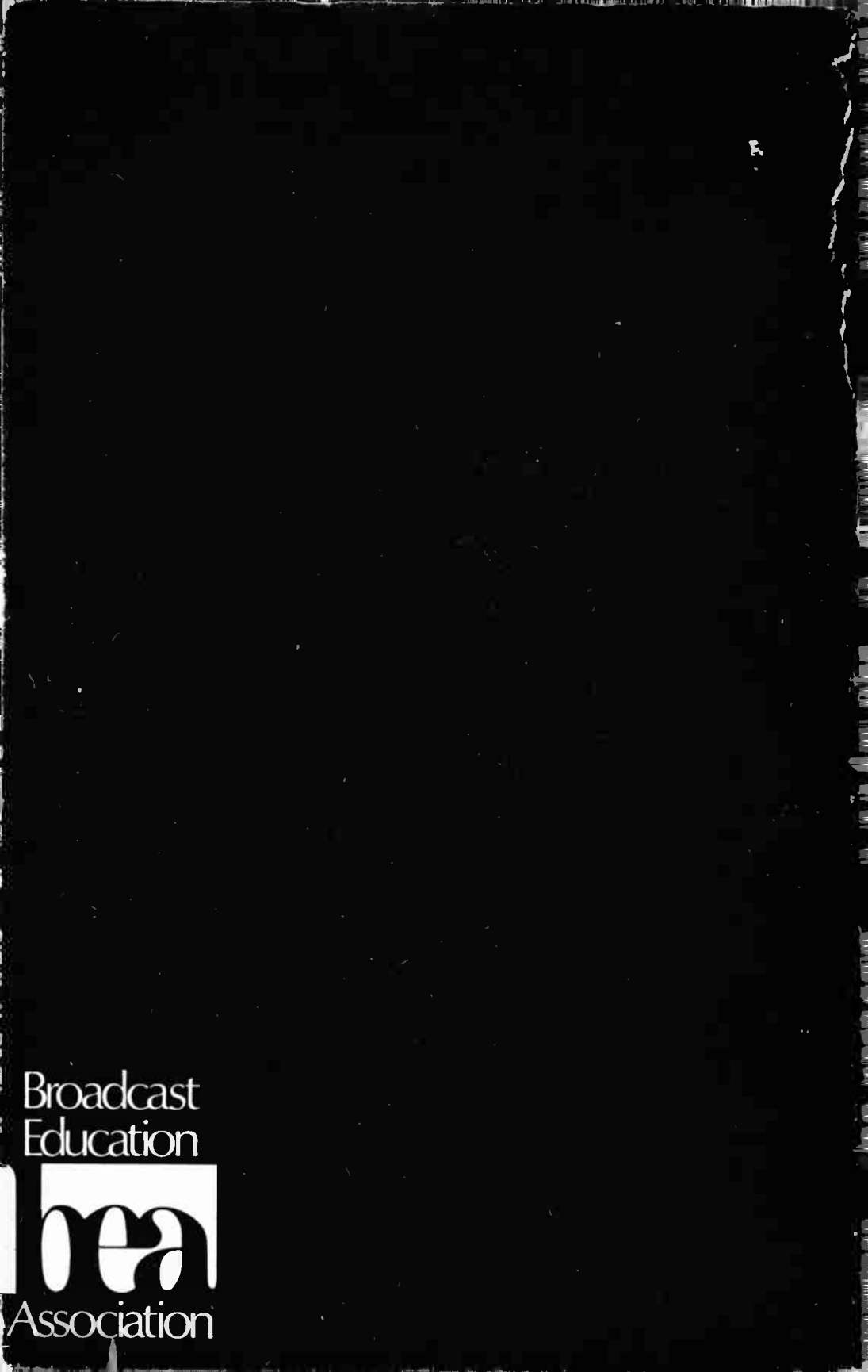
We have been buoyed when people — including other broadcasters — have told us that we are doing the right thing in the case of WISC-TV.

We have been fascinated to hear the station's attorney and general manager tell us in private conversation that what we have alleged is generally correct. But they quickly add that their station is little different from most others, and that they promise to do better in the future — and, they warn, if we succeed with the FCC we will "destroy the system."

We are in effect asking that the system be made to work. We ask the FCC to do no more than enforce its own rules, and the station to do no more than live up to its promises and capabilities. In all our filings we have not asked the station to do a single thing that it did not say (falsely) it was already doing.

In short, we've used the accepted adversary process to make the FCC do its stated — but rarely performed — duty. Ironically, this also makes us adversary to the FCC, our judge and jury.

(Messrs. Lichty and Blankenburg are, respectively, professor of communication arts and associate professor of journalism and mass communication at the University of Wisconsin, Madison. This article is excerpted from a longer paper presented at the 1972 convention of the Association for Education in Journalism.)


Broadcast
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