

CASES AND MATERIALS

ON

ELECTRONIC MASS MEDIA

RADIO, TELEVISION AND CABLE

SECOND EDITION

By

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ELECTRONIC MASS MEDIA: RADIO, TELEVISION AND CABLE

Chapter I

INTRODUCTION AND OVERVIEW

Prior to considering specific problems in broadcast regulation, a general summary of industry and regulatory practices may prove helpful. The emphasis in this summary is on television broadcasting. However, regulatory measures relating to radio broadcasting, where pertinent, are mentioned, and subsequent materials will concern radio broadcasting to some degree—although the emphasis will remain on television.

As of the end of 1978, almost 74 million households received television service. On the average each household watched television 6½ hours per day.

A. USE OF THE RADIO SPECTRUM

The single most significant characteristic of over-the-air television broadcasting is that it makes use of the electromagnetic or radio spectrum. Electromagnetic waves, produced by the acceleration or oscillation of an electric charge, radiate outward from the source at the speed of light, 300 million meters per second. These waves have a frequency, expressed in cycles per second (or Hertz), and a wavelength, generally expressed in units of the metric system. Since the speed of electromagnetic waves is constant at the speed of light, the frequency and wave length are inversely related to one another: the longer the wave length the shorter the frequency, and vice-versa. The product of the two is always equal to 300 million meters per second. The physical characteristics of radio wave propagation—distance travelled as a function of power input, susceptibility to physical obstruction, attenuation attributable to rain, etc.—vary significantly from one frequency range to another.

The radio spectrum, which ranges upwards from frequencies of 10 kilohertz (10,000 cycles per second), is used for a wide variety of purposes, most of them involving some form of communications: military and defense facilities; space technology; air and maritime navi-

gation; radio and television broadcasting; communications common carriers; business and industrial radio; police, fire and other local emergency services; air, maritime, rail, taxi and other transportation services; atmospheric and geodetic exploration; and citizens and amateur radio. In the absence of some form of regulation, use of the radio spectrum by one party for a particular purpose could create electronic interference with the use of the radio spectrum by another party for the same or a different purpose. While the phenomenon of electronic interference involves many variables, it may be said, in general terms, that interference will occur unless care is taken to assure an adequate separation between potentially interfering signals in one or a combination of four ways: (1) separation in space (one signal sufficiently remote from the other in geographical terms); (2) separation in frequency (one signal sufficiently remote from the other in frequency employed); (3) separation in time (one signal sufficiently separated from the other in time, including the use of intervals in the transmission of one signal in order to transmit another); and (4) distinction in transmission characteristics, such as polarization, in which one signal varies over one plane while the other varies over a different plane.

Over the years, the capacity of the radio spectrum has been greatly expanded, both in the range of frequencies made available for use and in the intensity of use of particular frequencies. The former development involves the utilization of progressively higher frequencies with correspondingly shorter wave lengths; even so, most present uses of the spectrum are below 15 GHz (15,000,000,000 cycles per second). The second development involves two kinds of improvement: the use of narrower frequency bands to accomplish a particular purpose, and the refinement of separation techniques so that multiple uses of the same or adjacent frequencies become more extensive.

Notwithstanding these technological developments, the demand for radio spectrum space, and for specific radio frequencies in particular, has exceeded the available supply since the early twenties, when radio broadcasting was initiated. In order to regulate electromagnetic emissions, with a view to controlling excessive electronic interference, Congress in 1927 empowered the Federal Radio Commission (FRC) to license all radio emissions of private parties under the terms of the Federal Radio Act. The Federal Communications Commission (FCC) succeeded to the responsibilities of the FRC when the Federal Radio Act was reenacted in substantial measure as Part III of the Communications Act of 1934.

Under the Communications Act, the FCC licenses all uses of the radio spectrum subject to two limitations. First, federal agencies do not require FCC approval in order to use the radio spectrum; but the radio practices of the federal agencies have been coordinated with FCC licensing procedures, since the beginning of regulation, by one or an-

other representative of the executive branch (presently the National Telecommunications and Information Administration or NTIA).¹ Second, the FCC is obligated, in formulating and implementing its licensing policies, to abide by international treaties (extensive in number and scope) which pertain to the use of the radio spectrum. Within these two limitations, however, the authority of the FCC is plenary and preempts any possibility of state or local control of the radio spectrum.²

The rationale for this extensive authority is evident from the face of the Communications Act itself, which vests in the FCC authority over radio signals which cross state or national boundaries, or which are transmitted within any federal territory or from any United States vessel or aircraft, *and also* radio signals “within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of energy, communications, or signals from within any said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State.” Since one of the enumerated effects almost invariably can be shown, even in the case of the most local radio transmission, the courts have treated every use of the electromagnetic spectrum as one involving a transmission in or affecting interstate commerce and subject to the control of the FCC.

The Communications Act also expressly proscribes the creation of any private property interests in the radio spectrum and authorizes the FCC to permit use of the spectrum only for limited periods of time. The Act provides that its purpose is “to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.” Applicants for licenses must sign “a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same,” and each license must state that it “shall not vest in the licensee any right to operate the station nor any right in the use of frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.” License terms are limited

1. NTIA is part of the Department of Commerce. Its immediate predecessor was the Office of Telecommunications Policy (OTP), part of the Office of the President. The change was made by Reorganization Plan No. 1 of 1977, 42 Fed.Reg. 56101, 91 Stat. 1633 (1977).

2. For a more extended discussion, see Note, State Regulation of Radio and Television, 73 Harv.L.Rev. 386 (1959).

to a maximum of three years for broadcast licenses and five years for other types of authorizations; but license renewals, for similar limited periods, are permitted.³

Thus, over-the-air television broadcasting must be conducted within a framework of federally regulated radio spectrum usage. This has meant, among other things, that television broadcasting has had to compete for spectrum space with other possible alternate uses, and that the amount of spectrum space available for television broadcasting has had to be limited by the need to meet the legitimate claims of other users of the radio spectrum. At present, television broadcasting is authorized in the following portions of the radio spectrum (MHz equals 1,000,000 cycles per second) with each channel 6 MHz wide:

Channels 2 to 4	54 - 72 MHz
Channels 5 and 6	76 - 88 MHz
Channels 7 to 13	174 - 216 MHz
Channels 14 to 36	470 - 608 MHz
Channels 38 to 69	614 - 806 MHz

Channel 1 was eliminated in the early days of television broadcasting because of interference with other spectrum uses. Channel 37 (608-614 MHz) is reserved for radio astronomy. And former channels 70 to 82 (806-890 MHz) have been reallocated to other purposes (private and public land mobile radio).

Channels 2 through 13 are known as VHF channels (very high frequency) and channels 14 and above are known as UHF channels (ultra high frequency). For present purposes, two general observations are pertinent:

First, the number of television channels is limited to 67, and this number is not likely to be expanded in the near future. There are two reasons for this: (1) Other demands upon spectrum space are inten-

3. On the radio spectrum and alternatives to administrative allocation, see H. Levin, *The Invisible Resource: Use and Regulation of the Radio Spectrum* (1971); Coase, *The Federal Communications Commission*, 2 *J.Law and Econ.* 1 (1959); Coase, *The Interdepartment Radio Advisory Committee*, 5 *J.Law and Econ.* 17 (1962); W. K. Jones, *Use and Regulation of the Radio Spectrum: Report of a Conference, 1968* *Wash.U.L.Q.* 71; De Vany, Eckert, Meyers, O'Hare and Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 *Stan.L.Rev.* 1499 (1969); Minasian,

Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation, 18 *J.Law and Econ.* 221 (1975); Johnson, *Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 *Law & Contemp.Prob.* 505 (1969); Robinson, *Radio Spectrum Regulation: The Administrative Process and the Problems of Institutional Reform*, 53 *Minn.L.Rev.* 1179 (1969); Office of Tel. Policy, *The Radio Frequency Spectrum: United States Use and Management* (1975); R. Park, L. Johnson and B. Fishman, *Projecting the Growth of Television Broadcasting: Implications for Spectrum Use* (Rand Corp. 1976).

sive, so much so that the FCC has reallocated broadcast space (former channels 70–82) to other uses and has permitted land mobile radio to use the lower UHF channels (14–20) in certain large cities under a sharing arrangement with television broadcasting; thus, the prospect that more spectrum space will be allocated to television broadcasting is extremely remote. (2) Television broadcasting is not likely to be able to squeeze additional channels into the spectrum space allocated to it at present; this would require changes, not only in broadcast transmission equipment, but also in television receivers in the hands of the general public; the obsolescence of the billions of dollars of consumer investment in television receivers is a substantial political impediment to the introduction of new technology narrowing the 6 MHz of bandwidth required for each television channel.

Second, VHF and UHF channels have significantly different technical and economic characteristics. At the present time, the technical differences are less significant than the economic differences, but, even from a technical point of view, UHF channel assignments are less advantageous than VHF channel assignments, because more power and antenna height are required for UHF's to obtain the same area coverage as VHF's, and UHF signals are more vulnerable to obstacles such as rough terrain. But the major problem goes back to the beginning of television operations, when technical differences were even more pronounced than they are today. VHF channels were the first ones licensed and they tended to dominate the major mass markets. Because most of the popular programming was on channels 2 through 13, there was little consumer interest in television receivers capable of receiving UHF channels. In the absence of such receivers, UHF broadcasters were unable to reach substantial audiences; they were therefore unable to interest advertisers in their programming; and, as a consequence, they lacked the financial means to underwrite popular mass audience programming. Accordingly, UHF broadcasters did not prosper and the consuming public continued to evidence a distinct lack of interest in television sets capable of receiving UHF signals.

After several other efforts to activate the UHF channels, the FCC in 1962 obtained Congressional enactment of its All-Channel Receiver statute. Acting pursuant to this statute, the FCC by rule provided that television sets manufactured after April 30, 1964, could not be shipped in interstate or foreign commerce unless they were capable of receiving all VHF and UHF channels. Since 1964, the percentage of receivers capable of receiving UHF signals has increased substantially, and there has been a revival of broadcaster interest in UHF assignments. Television homes capable of receiving UHF signals reached 94% in 1978. The number of commercial UHF stations increased from 86 in 1964 to 202 in 1978. However, some UHF assignments still lie fallow; and some UHF broadcasters have been unable to conduct profitable operations. In 1975, the UHF sector showed a profit for the first time, and by 1977 75% of UHF operations were profitable.

By contrast, VHF operations have proved highly profitable for some time, particularly in large urban areas; and with few exceptions all VHF channels are in use. Where VHF and UHF stations are in competition with one another, the VHF stations almost invariably prove to be the most successful financially.⁴

B. GEOGRAPHICAL DISTRIBUTION OF TELEVISION ASSIGNMENTS

The frequencies assigned to television broadcasting—both VHF and UHF—have a significant propagation characteristic: their signals tend to travel in a straight line. Thus, even with high-powered transmitters, propagation of television signals is limited by the horizon. Even so, given sufficient power, large areas can be covered by constructing extremely high transmission antennas and elevating reception antennas. Still larger areas can be covered by using air-borne transmitters (some actually were used in experimental educational broadcasting in the Midwest). And today, using satellites for transmission, all or large portions of the nation could be covered by a single transmitter (with some adaptation in reception antennas).⁵ Using the available frequencies for a relatively few transmitters covering large areas would maximize the number of signals available for television audiences, substantially without regard to the urban or rural location of the audiences. For policy reasons, however, the FCC has not taken this approach.

4. On UHF development, see Note, *The Darkened Channels: UHF Television and the FCC*, 75 *Harv.L.Rev.* 1578 (1962); Webbink, *The Impact of UHF Promotion: The All-Channel Television Receiver Law*, 34 *Law and Contemp. Prob.* 535 (1969); Note, *UHF and the FCC: The Search for a Television Allocations Policy*, 28 *U.Fla.L.Rev.* 399 (1976); Kittross, *A Fair and Equitable Service*, 29 *Fed.Com.B.J.* 91 (1976).

See also Webbink, *Regulation, Profits and Entry in the Television Broadcasting Industry*, 21 *J.Ind.Econ.* 167 (April 1973); S. Besen, *The Value of Television Time and the Prospects for New Stations* (Rand Corp. 1973), abridged at 42 *S.Econ.J.* 435 (1976); Besen and Hanley, *Market Size, VHF Allocations and the Viability of Television Stations*, 24 *J.Ind.Econ.* 41 (1975); R. Park and B. Fishman, *The Viability of Television Stations* (Rand Corp. 1977); R. Park, *The Value of Television Time: Some Problems and Attempted Solutions* (Rand Corp. 1977).

The FCC has attempted to reduce the UHF handicap by adopting regulations requiring television receivers to have dials which permit ease of tuning of UHF channels comparable to that of VHF channels.

5. On satellite broadcasting, see Aspen Institute Program on Communities and Society, *Control of the Direct Broadcast Satellite: Values in Conflict* (1974); A. Chayes, P. Laskin, and M. Price, *Direct Broadcasting from Satellites: Policies and Problems* (1975); Price, *The First Amendment and Television Broadcasting by Satellite*, 23 *U.C.L.A.L.Rev.* 879 (1976); Note, *Legal Implications of Direct Satellite Broadcasting—the UN Working Group*, 6 *Geo.J.Int. and Comp.L.* 564 (1976); Butler, *World Administrative Radio Conference for Planning Broadcasting Satellite Service*, 5 *J. Space Law* 93 (1977).

In the evolution of pre-television radio, the concept developed that the radio station (or at least certain classes of radio stations) should function as a local institution, operating "as a sort of mouthpiece on the air for the community [the station] serves, over which its public events of general interest, its political campaigns, its election results, its athletic contests, its orchestras and artists, and discussions of its public issues may be broadcast." The FCC undertook to apply this concept to television, and in 1952 assigned television channels to large numbers of communities. The guiding policy considerations, developed in the context of radio, were stated in this order of priority:

First, to provide all persons in the United States with at least one service.

Second, to provide each community with at least one station.

Third, to provide all persons with multiple services from which they are able to make a selection.

Finally, to provide larger communities with additional local stations.

But a system of local assignments made it difficult to provide most audiences with a large choice of signals, particularly while the UHF channels remained dormant. In order to avoid electronic interference, it is necessary to establish mileage separations, not only between stations on the same channel but between stations on adjacent channels (note that channels 4 and 5 and channels 6 and 7, while adjacent on the dial, are not adjacent in the radio spectrum). For this purpose, the United States has been divided into three zones. Zone I encompasses most of the heavily populated northeastern quadrant of the nation. Zone III is the Gulf area, which presents special tropospheric interference problems. The remainder of the United States is included in Zone II. Minimum separations for stations on the same channel are:

<u>Zone</u>	<u>Channels 2-13 (VHF)</u>	<u>Channels 14-69 (UHF)</u>
I	170 miles	155 miles
II	190	175
III	220	205

Minimum separations for stations on adjacent channels are the same for all zones: 60 miles for VHF and 55 miles for UHF.

What this means, in practical terms, is that no more than seven VHF channels can be assigned to a single city. Only New York and Los Angeles have received this maximum number. And for New York City to have channels 2, 4, 5, 7, 9, 11 and 13, these channels have had to be made unavailable to every community within 170 miles of the City, and channels 3, 6, 8, 10 and 12 can be employed only by communities located at least 60 miles from New York City's antenna site in

lower Manhattan. Most substantial cities have only three VHF channel assignments, although about a dozen have four or five.

But the FCC in 1952 assigned both VHF and UHF channels to a large number of communities, hundreds (mostly UHF) to communities with populations of 5,000 or less. The general distribution, embodied in a "Table of Assignments," was as follows:

<u>City Population (1950)</u>	<u>Number of Assignments</u>
1 million and above	6-10
250,000 to 1 million	4-6
50,000 to 250,000	2-4
Under 50,000	1-2

Many of the channel assignments, however, would not support viable stations. For the reasons indicated above, UHF stations fared poorly when compelled to compete with VHF stations; the FCC's "intermixture" of VHF and UHF stations created conditions least conducive to the survival and growth of UHF stations. In addition, many of the assignments went to communities with audience sizes insufficient to support the number of channels assigned; communities with populations sufficient to support one or more radio stations could not generate the advertising revenues necessary to support the considerably more expensive operation of television broadcasting stations. Despite assignments to 1,274 communities, all operations are now being conducted in about 275 television "markets" (many of them embracing several communities each). As of August, 1978, there were 515 VHF and 202 UHF commercial television stations operating in these markets, for a total of 717.⁶

While there has been growth in the television industry since the fifties, including some increased activation of UHF channels following the All-Channel Receiver law, the number of television signals available to most audiences is limited: six or more in the larger markets, three to five in intermediate markets, and three or less in smaller markets. And it should be emphasized that the effective service areas of television stations tend to be significantly more limited than the mileage separations. The "Grade A contour," a circular boundary line along which 70% of the audience receives good signals 90% of the time, may range anywhere from 20 to 60 miles from the transmitter depending on antenna height, transmitter power and nature of terrain. The "Grade B contour," a more remote circular boundary line along which 50% of the audience receives good signals 90% of the time, may range from 50 to 100 miles out.

6. FM channels are assigned in a manner similar to television. The geographical distribution of AM stations is the product of ad hoc determinations over a period of fifty years.

In 1978, there were 4510 AM and 3870 FM stations on the air.

The policy decision in favor of local community stations assumed that locally oriented programming was a significant desideratum and that this objective would be furthered by the proliferation of local stations. Yet the objective appears not to have been realized. Overall, the percentage of programming that is locally originated tends to be relatively small—less than 10%. Programs of the three networks—ABC, NBC and CBS—account for the lion's share—about 55 to 60% overall. The difference is made up of nationally distributed syndicated programs (mostly re-runs) and motion picture films. In the three hours of most intense viewing (equivalent to from 8:00 to 11:00 p. m. in the East) the three networks account for about 90% of the television audience.

C. CONCENTRATION OF CONTROL OF MASS MEDIA

With television developing as the nation's most popular mass medium, and with the number of television outlets (particularly VHF) severely limited, the FCC has adopted a number of measures directed toward limiting concentration of control over television and other mass media. Many of these restrictions are adaptations of measures adopted in the context of pre-television radio.

1. **Limitations on the Networks.** Without question, the networks are the dominant force in television broadcasting. Next to the FCC license, the most valuable asset a broadcaster can possess is a network affiliation. As indicated above, the networks are the most significant source of programming, surpassing all other sources combined. Network programs occupy this position because, by and large, they are the most popular and generate the largest audiences for advertisers. Popular mass appeal programs generally are expensive to produce, and the networks, by reason of their existing dominance, are in the best position to finance and distribute expensive programs. And so network dominance tends to perpetuate itself.

Largely to overcome this dominance, and to assure some measure of station autonomy and independent programming by network affiliates, the FCC has adopted a number of regulations applicable to network operations:

(1) Network affiliation agreements may not be exclusive and may not prevent the affiliated station from broadcasting the programs of another network.

(2) Network affiliation agreements may not afford the network's affiliate more than a right of "first call" on the network's programs in the community of license. If the affiliated station declines to carry a network program, the network may not be precluded from offering the same program to another station in the same community.

(3) Network affiliation agreements may not exceed two years in duration.

(4) Network affiliation agreements may not require the affiliated station to give the network an "option" on broadcast time prior to the network's agreement to schedule network programs during that time.

(5) Network affiliation agreements must assure the affiliated station the rights: (a) to reject any network program "which the station reasonably believes to be unsatisfactory or unsuitable, or contrary to the public interest," and (b) to substitute for the network program "a program which, in the station's opinion, is of greater local or national importance."

(6) Networks are not subject to special restrictions on ownership of broadcast stations except under very limited circumstances, but they are prohibited from operating more than one network in the same territory at the same time.

(7) Network affiliation agreements may not restrain the affiliated station in fixing or altering its rates for the sale of broadcast time for transmissions other than the network's programs.

(8) Networks may not represent affiliated stations in the sale of non-network time.

(9) Stations in the fifty largest television markets may not schedule programs of the three national networks for more than three hours during evening prime time (between 7:00 and 11:00 p. m. in the East). Materials previously shown on networks also are excluded from this time period. Exceptions are permitted for special types of programming, such as programs designed for children, public affairs or documentary programs, political broadcasts, programs concerned with fast-breaking news events or on-the-spot coverage of news stories, runovers of live coverage of sports events, and other broadcasts of a special nature (e. g., coverage of the Olympics).

(10) Networks may not engage in "syndication" (distributing programs other than for network exhibition) except under limited conditions, nor obtain any non-network financial interest in programs produced by others.

As indicated by the continued preponderance of network programming, the dominance of the television networks has yet to be effectively countered.⁷

2. **Limitations on ownership of multiple stations.** The number of television stations which may be brought under common control is

7. Network operations have ceased to be significant in radio. Regulations applicable to radio networking have

been rescinded, except for the prohibition against territorial exclusivity (item 2 above).

limited to seven (in different areas), no more than five of which may be VHF stations. There also is a prohibition against "regional concentration," which generally proscribes ownership of three broadcast stations (of any type) where any two are within 100 miles of the third and there is an overlap of the primary service contours of any of the stations (unified AM-FM combinations are treated as one station).

Apart from these limitations, in communities other than those in which its television stations are located, a television station operator (and non-television operators as well) may own as many as seven AM radio stations, seven FM radio stations, and an unlimited number of publications or other media of mass communications. Common ownership of facilities in the *same* community is considered next.

3. **Limitations on ownership of multiple media in the same market.** For many years, the FCC has prohibited ownership by a single firm (or its affiliates) of more than one television station in the same market. Under the so-called "anti-duopoly" rule, overlapping Grade B contours are prohibited if there is common ownership of the two or more television stations involved. Similar restrictions apply to common ownership of AM stations and common ownership of FM stations in the same market. But until recently there was no flat prohibition against common ownership of *different* mass media in the same market. Thus, a single owner could control a television station, an AM radio station, an FM radio station and one or more newspapers serving the same community.

In 1970 and 1971, the FCC adopted new regulations concerned with common ownership of different media in the same market. In general, the regulations prohibit the ownership of AM and FM stations by television stations, and vice-versa, where the primary broadcast contour of one (the Grade A contour for television) encompasses the entire community in which the other is located. Limitations were not imposed on common ownership of AM and FM stations in the same community; divestiture of existing jointly owned facilities was not required; and common ownership of UHF and AM or FM stations in the same market is to be considered on a case-by-case basis. In 1975, substantially the same limitations were imposed on common ownership of a daily newspaper of general circulation and radio or television stations encompassing the community of the newspaper's publication. Once again, the prohibition was directed primarily at new combinations and divestiture was not ordered with respect to existing combinations except in a relatively few "egregious" cases in which the only television (or radio) station in a given market was controlled by the only local newspaper and there was an absence of any countervailing circumstances.

4. **Other limitations on concentration of control.** In addition to the restrictions embodied in the network regulations, the multiple

ownership rules, and the single-market restrictions, the FCC has sought to apply a policy against undue concentration of control in individual licensing cases. The most common instance is where several applicants seek to obtain the same broadcast authorization. If all are otherwise qualified, the FCC, in making a choice among the various applicants, will give favorable consideration to a selection that does not lead to increased concentration of control over the media of mass communications (preferring an unaffiliated applicant to one with ownership interests in other broadcast facilities or in newspapers). This policy, however, has not proved to be very effective because: (a) in individual licensing cases involving multiple applicants, many factors are considered, and those unrelated to concentration of control may be held to warrant the selection of a mass media owner; (b) following the grant of a license to an unaffiliated applicant, the licensee may transfer the license to a mass media owner (although, under present transfer regulations, a delay of three years generally is required); and (c) in many instances, the only applicant for a particular broadcast authorization is a mass media owner, so no contest develops and no opportunity is afforded to select an unaffiliated applicant. The results are shown most clearly in the case of newspaper-broadcaster affiliations—in the past not controlled by any specific rule but supposedly a matter of concern in comparative cases. As of November 1967, 30 of the top 50 television markets and 15 of the top 25 television markets were characterized by common ownership of a major newspaper and a VHF television station; approximately 260 communities had local broadcast stations owned or controlled by newspapers, or with the latter holding minority interests in the stations; 76 communities had only one AM station and one daily newspaper, with cross-ownership interests between the two; and 14 communities had one AM station, one TV station, and one daily newspaper, all commonly owned.

While the FCC could refuse to license mass media applicants in cases other than multiple applicant proceedings because of undue concentration of control, it has not done so—unless the degree of concentration exceeds the limits prescribed by its regulations. Similarly, questions of undue concentration of control have been raised in connection with applications to renew or transfer licenses; but again, unless the degree of concentration exceeds the limits of its regulations, the FCC almost invariably grants its approval.

D. LICENSING OF INDIVIDUAL BROADCASTERS

As previously indicated, no person may operate a television station in the United States (or emit any other electromagnetic waves) without a license from the FCC. The licensing of individual broadcasters is conducted within the framework outlined above.

1. **Radio spectrum and other technical considerations.** An applicant for a television station must confine itself to the frequencies allocated for that purpose. In addition, technical standards must be observed in connection with equipment employed for television transmission. Regulations similarly govern the location of the transmission antenna to assure: (a) that the population in close proximity to the transmitter is not unduly large (because intense signals from the transmitter tend to "blanket" or drown out all other signals); and (b) that there are no physical obstructions in close proximity to the antenna, which might cause distortions or "radio shadows." Hazards to air navigation also must be avoided.

2. **Geographical distribution of facilities.** Applicants must confine themselves to those channels which are assigned to the particular community they seek to serve (or some other community within 15 miles of that community). If some other frequency is desired, the applicant must petition the FCC to revise the Table of Assignments to make available the frequency sought in the particular community; only if the petition is granted, and the Table is revised in a rulemaking proceeding, will the FCC entertain individual applications for use of the frequency. In general, the Table of Assignments resolves all major questions relating to geographical distribution of television broadcast facilities.

Nonetheless, other requirements involving geographical considerations recur. Thus, the television transmitter must be so located that all mileage separations underlying the Table of Assignments are observed. Also, the transmitter must render a premium level of service (specified in terms of signal strength) to the community to be served, and the operator must maintain its main studio in the community. In some cases there are disputes as to the point at which the transmitter should be located in order to optimize service to the population in the surrounding area. Finally, the frequency sought must be unoccupied. If some other broadcaster presently is using a particular frequency, a prospective applicant must wait until the incumbent's three-year license expires, and then, if so minded, seek the frequency at the time the incumbent applies for renewal of its license.

3. **Restrictions on concentration of control.** In the absence of multiple applicants for the same broadcast authorization, compliance with the multiple ownership and common market regulations normally is all that is required. Although the FCC could preclude concentrations of control which fall short of those specified in its regulations, it does not do so as a practical matter.

4. **General qualifications.** There are a number of minimum requirements, based on the terms of the Communications Act, which all applicants must satisfy.

(a) *Citizenship.* If the applicant is an individual, he must be a United States citizen. If the applicant is a partnership, all of its members must be citizens. If the applicant is a corporation, it must be organized under the laws of a United States government unit, and aliens must hold no positions as officers or directors or own more than 20% of its capital stock. Limitations also are placed on alien ownership or control of a corporation owning more than 25% of the stock of a corporate applicant, and representatives of aliens and foreign governments are excluded from receiving broadcast licenses.

(b) *Character.* An application may be denied because of the poor character of the applicant, as manifested by: past or present misrepresentations to the Commission; procurement of broadcast licenses for speculative purposes (i. e., "trafficking"); misuse of a prior broadcasting license; conviction of a serious offense or one casting doubt on the reliability of the individual in a broadcasting function; prior conduct violative of the anti-trust laws or otherwise indicating an inclination to suppress competition by resort to unfair tactics; and improper, fraudulent or deceptive business practices. However, the FCC is not always consistent in disqualifying applicants for these character defects; and some of the inquiries may turn into investigations of the prior programming practices of the applicant.

(c) *Financial ability.* The applicant must be financially qualified "to construct and operate the proposed station." Although the applicant has to show that it can commence operations, it need not be in a position to sustain losing operations over an extended period. The applicant must have sufficient funds to construct the station and operate it for three months following construction without relying on advertising revenues.⁸

(d) *Program proposals.* Applicants must submit detailed descriptions of their proposed programming, and these descriptions must be based on a survey of community needs. It should be noted that a mere compilation of program preferences does not suffice as a survey of community *needs* (which the FCC tends to equate to community problems). While the applicant is given considerable discretion in shaping proposals it believes to be responsive to community needs, the FCC occasionally rejects applications because of inadequacies in the survey. The subject of FCC review of station programming will be considered subsequently in further detail.

5. **Economic injury to existing broadcasters.** As a matter of policy, the FCC generally prefers not to consider whether the li-

8. The earlier requirement was one year's operation following construction without reliance on advertising rev-

enues. The period was shortened for radio in 1978 and for television in 1979.

censing of a new broadcast station will cause financial loss to existing broadcast stations in the same or adjacent markets. The courts, however, have insisted that the FCC consider the issue (called the *Carroll* issue) where the existing station claims that it will cease operation, or be compelled to downgrade its operation, if confronted with competition—to the detriment of the public in the community it serves. Without going into detail, it may be generalized that the FCC seeks to avoid adjudicating this issue and, on occasion, has displayed remarkable ingenuity in eliminating the issue from pending proceedings.

The *Carroll* issue has arisen almost exclusively in contests between *radio* stations (AM or FM), and not between television stations. In the context of television, the issue of financial impact generally is presented only when a VHF station seeks to compete with a UHF station. At one time, the FCC sought to minimize this competition among unequals by “deintermixture” proceedings, making some markets all-UHF and some markets all-VHF. These proceedings had to be abandoned, as a concession to Congress, in order to achieve passage of the All-Channel Receiver legislation in 1962. However, the question of adverse impact on UHF stations is frequently presented and litigated when a VHF station seeks to change its antenna location or other broadcasting pattern in such a way as to impinge on an area served by a UHF station (or to make greater inroads on such an area). In contrast to its distaste for the *Carroll* issue generally, the FCC has been quite protective of UHF stations threatened with an adverse impact from altered VHF operations. It even has afforded protection for potential UHF operations.

6. **Comparative proceedings.** In the absence of multiple applications for the same authority, the FCC will grant a television broadcast license to an applicant satisfying the requirements in the five preceding categories. Where, however, more than one qualified applicant seeks the same authority, the FCC must choose between the mutually exclusive applications in a comparative proceeding. In such cases, the FCC historically has considered a wide variety of factors: local residence of station owners; direct management of the station by its owners (integration of ownership and management); participation by owners in civic affairs; proposed station programming; broadcast experience of owners; prior broadcast record of owners; violations of law by owners or any adverse reflections on their character; diversification of control of media of mass communications (presence or absence of affiliations with other mass media); differences in areas and populations to be served by the various applicants; and other factors of lesser consequence. The presence of so many variables led to considerable confusion. In an effort to clarify the significance of the comparative criteria, the FCC in 1965 issued a comprehensive policy statement on comparative proceedings. While the statement has been of some value in indicating the role to be

played by these various factors, uncertainty and unpredictability continue to characterize the comparative proceeding.

7. **Renewal proceedings.** The renewal of an outstanding broadcast license may be impeded in one of three ways. First, the FCC may postpone or refuse renewal in the course of implementing one or more of the policies described herein; refusal to renew may be made effective only after a formal hearing. Second, a private party may file a petition to deny the renewal application; a formal hearing is required if the petition raises *prima facie* grounds for nonrenewal which present substantial and material questions of fact. Third, a newcomer may seek to be licensed in place of the incumbent; in such event, a comparative renewal hearing is held in which the merits of the incumbent are compared with those of the challenger; the FCC leans strongly in the direction of favoring the incumbent.

E. EFFORTS TO ACHIEVE PROGRAMMING DIVERSITY AND RESPONSIVENESS TO LOCAL NEEDS

1. **Reflections in other general policies.** Everyone recognizes that the essence of television is programming, and the policies of the FCC described in the preceding sections have been concerned largely with the objective of achieving programming more diverse and more responsive to local needs.

Thus, the geographical distribution of broadcast facilities has as a major purpose the advancement of locally originated (or locally oriented) programming, in contrast to a national uniformity in programming. Given the dominance of the networks, and the important secondary role played by nationally syndicated programming, the FCC's success in this area cannot be described as more than modest.

Similarly, the FCC's policies in opposition to concentration of control of the media of mass communications have been concerned with assuring diversity of program sources; the more sources, the more diverse the program offerings are likely to be. Again, the FCC's success cannot be described as more than modest. While it has prevented the emergence of commonly owned television chains of national proportions, much the same result is achieved through the network affiliation process. And despite the regulatory restrictions on the networks, network programming continues to predominate. Similarly, while the FCC has precluded common ownership of multiple television stations in the same market, it has not prevented other forms of single-market concentration (the local AM-FM-TV-newspaper combine), although there has been some recent activity in this area, as noted above.

Finally, in individual licensing cases, the FCC has given some weight to factors related to local responsiveness and dispersal of

ownership: through the requirement of local program surveys in all cases, and the preferences for local residence and diversification of media control in comparative cases. But these processes have been of limited value, characterized by uncertainty and frequent changes in emphasis.

There are three other areas, however, which are of significance.

2. **Renewal of licenses.** As previously indicated, all broadcast licenses are limited by statute to three-year terms. This means that, every three years, the FCC has an opportunity to review the performance of a television station and to refuse renewal if the performance is deemed unsatisfactory. The FCC has used this occasion in the past to exert pressure on licensees to increase diversity and local responsiveness in their programming. Pressure has taken the form of questions on the renewal applications; informal quotas for local programming and for types of broadcasts not frequently carried (programs other than entertainment and news); delays and official inquiries directed to those licensees falling short of these quotas; and the threat of a hearing on the renewal application. The intensity of the pressure has varied from substantial to nil depending on changes in FCC membership, and when the pressure has been substantial it has not been without effect. But it is difficult to measure the effect, and the area is one characterized by extraordinary erraticism in FCC policy. At present, pressure of this type appears to be negligible, and attention has focused on the proper method of conducting surveys of community needs (required of renewal applicants as well as initial applicants).

3. **Educational broadcasting.** In the geographical distribution of broadcast facilities in 1952, the FCC reserved a substantial number of channel assignments for noncommercial educational television. Unfortunately, many of these assignments were in the UHF band, and, in addition to their other problems, educational broadcasters on UHF channels suffered the same difficulties as UHF broadcasters generally. As of August, 1978, there were 270 noncommercial stations on the air (104 VHF, 166 UHF).

The major problem of educational broadcasters has not been channel availability, but financing. Commercial television has been financed by advertising, but under FCC regulations this source is not available to the educational broadcaster (and probably advertising would subvert the nature of the educational station's operations if it were to become a substantial source of financing). Educational broadcasters have relied on financing from federal, state and local governments, from foundations (particularly the Ford Foundation), from business firms, and, to a limited extent, from viewer contributions. An extensive study made in 1967 indicated the need for additional financing and recommended federal aid to be channeled through

a governmentally supported corporation specifically established for the purpose. In the Public Broadcasting Act of 1967, Congress responded by establishing the Corporation for Public Broadcasting (CPB). In addition to continuing pre-existing federal financial support for the construction of educational stations, dating back to 1962, the statute vested CPB with responsibility for program development and procurement for educational stations and facilitated interconnection arrangements among such stations. The statute authorized the FCC to permit reduced rates by communications common carriers for interconnection of educational stations. However, CPB was prohibited from owning any broadcasting station, system or network, community antenna television system, or program production facility. After extensive legislative debate, a plan for financing CPB over a five-year period emerged in 1975, but CPB still is dependent on annual Congressional appropriations.

The record of the educational stations is a spotty one. On the one hand, there is little question that educational broadcasting is a substantial factor in television. A large percentage of United States households can receive ETV signals and each week millions of homes watch educational television stations for at least brief periods. In terms of promoting program diversity, the addition of a single educational station to a market probably surpasses in effectiveness the addition of several commercial stations in the same market. On the other hand, educational television audiences are quite small in comparison to commercial television audiences, so much so that sometimes they defy measurement. Moreover, the problem of ETV financing has yet to be fully resolved. The two problems may be inter-related to some degree, since audience size undoubtedly is dependent in substantial measure upon adequate financing of programming. But the most respected study of television viewing preferences, related to 1960 viewing habits, indicates that the American television audience strongly prefers light entertainment to intellectual programming; that this preference holds even when a clear choice is accorded between high quality programs of each type; and that, despite their claims to the contrary, the more highly educated segments of the population behave in precisely the same manner as the population generally (choosing entertainment over intellectual fare when a choice is afforded). The same results were obtained in a follow-up study some ten years later.⁹

Nevertheless, ETV makes a distinctive contribution. Extended coverage of United Nations, Congressional and other hearings of special interest probably draw large numbers of viewers on sporadic occasions, and have value independent of such numbers. The popularity

9. See G. Steiner, *The People Look at Television* (1963); R. Bower, *Television and the Public* (1973).

and critical acclaim for "Sesame Street" indicate that ETV may play a leadership role in important areas such as children's programming. And educational television performs a distinct function to the extent that it carries formal instructional programs intended for classroom use or home study courses. In the area of classroom television, the ETV broadcaster is supplemented by the Instructional Television Fixed Service, which provides multiple channels for classroom instruction. The transmissions are over-the-air (sharing 2,500 to 2,890 MHz with other uses), but the transmissions are beamed to specific school antennas and are not broadcast generally.

4. **Subscription television.** In 1959, the FCC approved experimental pay-television operations subject to a series of limitations. The experiment was launched only after a most intensive struggle with opposing forces—broadcasters and theater owners primarily—which channeled their opposition through the House Committee on Interstate and Foreign Commerce. Only one experiment actually was conducted, in Hartford, Connecticut, and that experiment failed to settle most of the major matters in dispute. The proponents of subscription television contended that, by permitting audiences to pay for programs, financial support could be obtained for programs that did not appeal to audiences large enough to be supported by advertisers (advertisers generally do not pay more than three or four cents per household per hour). Opponents of pay television argued that the large revenues afforded by subscription television would "siphon" programming and talent away from advertiser-supported television, with the result that audiences either would have to pay for what they once received free or would be relegated to the inferior rejects of the subscription system. The Hartford experiment relied heavily on movies and sports—they constituted over 90% of programming—and ran at a substantial loss; however, no siphoning occurred. But all of these results might be altered in the case of a national subscription service, as opposed to a single experimental system operating in a limited market.

In 1968 and again in 1975, the FCC approved the licensing of subscription television stations under the following conditions:

(1) Four commercial nonsubscription television stations must be operational in the community the subscription television station seeks to serve.

(2) No more than one subscription television station may be authorized in a single community.

(3) In addition to subscription services, the authorized subscription television station must carry a minimum quantity of "free" programming (28 hours per week).

(4) Commercial advertisements may not be carried when programs are being offered on a subscription basis.

(5) The licensee of the subscription station must retain discretion and responsibility for all programming and determinations as to subscription charges (except that limited advance programming commitments may be made with FCC approval).

(6) Subject to limited exceptions, subscription services may not include (a) motion picture films with a general release date in the United States more than three years in advance of the proposed subscription showing; and (b) sports events which were televised live on a nonsubscription, regular basis in the community during any one of the five years prior to the proposed subscription showing. (This is the 1975 version, which differs in modest respects from the 1968 formulation.)

(7) No more than 90% of total subscription services may consist of feature films and sports events combined.

(8) Subscription firms must serve all customers at uniform rates, subject to such reasonable classifications as the Commission may approve, and subscription television decoders must be leased and not sold to subscribers.

Only a few licensees are providing over-the-air subscription services. These are on UHF channels, and thus far they have attracted relatively few subscribers. Meanwhile, some cable television systems (discussed hereafter) have offered subscription services. In 1970, cable subscription services were subjected to the same programming restrictions as over-the-air television (items 4, 6 and 7 above); but in 1977 these restrictions, as applied to cable, were invalidated on judicial review. The FCC then rescinded the same restrictions as they applied to over-the-air subscription television. Cable subscription services have been growing rapidly.

F. FCC CONTROL OF PROGRAM CONTENT

In a variety of contexts, the FCC has been concerned with direct regulation of television program content.

1. **Restrictions on objectionable programming.** In some areas, such as false and misleading advertising, the restrictions on program content parallel restrictions imposed on other media of mass communication. But in other areas, restrictions on television programming exceed the restraints applicable to other media. Thus, penalties have been imposed for vulgar or off-color programming, which clearly would not qualify as obscene in the Constitutional sense, and would not be the subject of sanctions in other contexts. Broadcast stations are severely limited in the information they may broadcast about lotteries; cigarette advertising is prohibited under recently enacted legislation; and commercial advertisements and commercial sponsorship must be identified. Restrictions on fraud and deception extend beyond advertisements to program content, such as rigged quiz shows.

2. **Political and public affairs programs.** Under the "equal time" provision of the Communications Act, a television station, if it makes time available for a "legally qualified candidate for any public office," must "afford equal opportunities to all other such candidates for that office." Moreover, as to legally qualified candidates for federal office, the station either must provide reasonable amounts of free time or permit candidates to purchase reasonable amounts of time. For 45 days prior to a primary and 60 days prior to a general election, the station must charge any candidate "the lowest unit charge of the station for the same class and amount of time for the same period." At all other times, no more than the station's regular charges may be imposed upon candidates. It should be noted that a use by a supporter of the candidate, including a member of the candidate's staff, does not qualify as a use by the candidate (there must be a personal appearance by the candidate to invoke these provisions). Furthermore, once any candidate is afforded access (whether free, at reduced rates, or at regular rates), the same opportunity under the same terms must be afforded to all legally qualified candidates for the same office, no matter how numerous they may be nor how small a following any of them may have.

In addition to the specific, and rather limited, requirements of the "equal time" provision, the FCC has evolved a "fairness doctrine," which, as codified by subsequent statutory amendment, imposes on broadcasters "the obligation . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Application of the fairness doctrine has raised a host of troublesome issues:

(1) Is the obligation solely one to present conflicting views on an issue once it is broached by the broadcaster, or is there a broader obligation to initiate discussion on "issues of public importance"? In short, can the station satisfy the doctrine simply by remaining silent on public issues? The FCC and the courts have held that stations have an obligation to initiate discussion on public issues, but the selection of issues is largely left to the discretion of the stations.

(2) If one side of a public question is presented, who is to present the other side? Ordinarily the broadcast licensee is given broad discretion on this matter. But in two contexts specific respondents must be invited: (a) where the program takes the form of an attack on the character, integrity or like qualities of a person or organization, the person or organization attacked must be invited to respond; (b) where the program takes the form of an endorsement of a political candidate, the candidates opposing the recipient of the endorsement may name their respondents.

(3) In what manner are opposing views to be presented? Again, the FCC accords the broadcaster great latitude in deter-

mining both the quality and quantity of response. There is no requirement of equal time. On one occasion, however, the FCC ruled that opponents of President Nixon's Vietnam policies must be accorded at least one uninterrupted segment of prime time to respond to the President's speeches on the subject.

(4) What kind of programming suffices to give rise to a need for response? Does the broadcast of a religious service call for a response on the merits of atheism? Does the broadcast of military recruitment appeals during a war call for a response on the merits of the war? The FCC has given negative answers to these specific questions, but it had required stations to carry antismoking messages in response to cigarette commercials and environmental groups had been given the right to respond to certain commercial advertisements. The FCC now rejects the application of the fairness doctrine to ordinary product commercials.

Closely related to the fairness doctrine is the problem of news distortion. The FCC has disclaimed any power to censor news programs to determine whether they are "true" or not. But it has investigated charges of "staged" news events and knowing distortion of the news; it has condemned the failure of a newscaster to reveal a financial conflict of interest; and it has required opportunities to reply, under the fairness doctrine, where it has concluded that a news program or documentary was too one-sided.

Needless to say, none of these restraints apply to other media of mass communications.

3. Diversity of programming and responsiveness to local needs. At the present time, the FCC's efforts in this area are largely indirect: through its geographical distribution of broadcast facilities, limitations on the networks, restrictions on concentration of control, promotion of educational broadcasting, and authorization of subscription television. But, as previously indicated, the FCC has employed direct pressures in the past to seek to achieve minimum quotas of "public service" and "local" programming. Some pressures probably remain, but they are relatively slight. However, this is an area which changes rapidly and frequently, and the future cannot be predicted with any measure of certainty. In the initial licensing of broadcast stations and on renewal some pressure toward local responsiveness is sought to be achieved by requiring applicants and existing licensees to make surveys of community needs. But the multiplicity of views obtained in any survey, and the latitude afforded the applicant in shaping its programming response to the survey, limit the effectiveness of this approach as a means of controlling broadcaster behavior.

Recent judicial determinations have required the FCC to consider changes in program format (e. g., from classical music to popular music) incident to a station transfer; but the scope of FCC review on such matters remains to be defined. The FCC recently has recognized

that broadcasters have a special (though somewhat vague) responsibility to program for young children.

4. **Limitations on commercial advertisements.** The FCC has no regulations restricting the number or frequency of commercial announcements. When it attempted to adopt such regulations in 1963, industry and Congressional pressure forced a retreat. Excessive commercialization is an issue in license renewal proceedings, but the standards are wholly informal and there is no consistency in their application. When television commercials begin to exceed 16 minutes per hour, there is at least the possibility that the FCC will delay the renewal application and demand an explanation. There are some special limitations on advertising on children's programs.

G. OTHER FCC CONTROLS OVER TELEVISION BROADCASTERS

Most of the regulatory actions of the FCC have been described in the preceding sections. They center to a large extent on initial licensing, and, at this time, the FCC considers the legal, technical, financial and character qualifications of the applicant. Restrictions on concentration of control and programming have been described in some detail. Three other areas deserve mention.

First, the FCC is rather continuously concerned with the technical performance of licensed television stations. The failure of a broadcaster to adhere to technical standards, particularly those designed to preclude electronic interference, are treated as a serious matter, whether the deficiency is raised on renewal of the license or during the course of the broadcaster's license term.

Second, the FCC does police the business practices of broadcast licensees to a limited extent. The Communications Act is explicit that broadcasters shall not be considered "common carriers," and as a general matter the FCC does not undertake to regulate the rates of broadcast stations, discrimination in the application of broadcast rates, or refusal by a station to carry the commercials of a particular advertiser. However, the FCC has intervened to interdict fraudulent billing practices in respect of advertisers, to impose penalties for activities artificially inflating a station's audience rating, and to condemn any business practice inconsistent with its proscriptions on concentration of control (e. g., the provision of incentive compensation arrangements by networks designed to discourage non-network programming, or the "tying" of access to one broadcast medium to access to another medium of communications). These are exceptions, however, to the FCC's general disinclination to intrude upon station business practices.

Finally, since 1968, the FCC has sought to assure that broadcast licensees pursue nondiscriminatory personnel practices and adopt affirmative programs to afford equal opportunity in employment. The FCC's policies in this area have provoked considerable controversy.

H. SERVICE TO SPARSELY POPULATED AREAS AND THE DEVELOPMENT OF CABLE TELEVISION

Television stations began broadcasting in large urban centers and, even after the promulgation of the FCC's Table of Assignments in 1952, many localities found themselves without television service. A number of remedies were improvised.

Beginning in 1954, the FCC authorized the construction and operation of "satellite" television stations in communities not large enough to support a full-fledged operation. The satellite received regular authority, in accordance with the Table of Assignments, but local programming was not required; the satellite, generally owned by the primary station, could rely on duplication of programs of the primary station.

In 1956, the FCC authorized the use of "translators" to extend television service to remote communities. Translators receive the signal of a primary station, convert it to a different frequency and amplify it, and then rebroadcast it for reception by the general public in the area. These supplementary stations may be operated by the primary station or by an independent organization; if the latter, the consent of the primary station must be obtained before its signals are rebroadcast. Translators may be authorized for any VHF or UHF channel as long as they do not interfere with signals of regular broadcast facilities and conform to other FCC policies.

The development of translators was preceded in the fifties by another, extralegal device—television boosters. These stations, constructed by local private or governmental groups without FCC authorization, received weak signals of primary stations and rebroadcast them on the same frequency with greater strength. The operations were clearly unlawful, but it took over a decade for the FCC to achieve a transition from illicit booster operations (which, among other things, caused "ghosting" of television signals) to lawful translator operations.

It was also during the fifties that cable television began to develop. Operations initially took the form of a community master antenna. Persons unable to receive television signals directly off the air, because of remoteness or terrain, subscribed to a system which constructed an antenna (part of the "headend" equipment) at a favorable location, and, for a fee, amplified and conveyed signals via cables to the television sets of the system's subscribers. As the industry developed, headend antennas were located further and further from the subscribers to be served, necessitating longer cable runs. Then, to expand the signals available to subscribers further, or to reach communities still further removed from television markets, television signals were relayed to the local CATV system by coaxial cable or microwave, usually the latter. Through these techniques, it be-

came possible to import television signals from remote markets over great distances.

The next major development occurred approximately in the mid-sixties when cable television operators turned their attention from bringing television signals to remote underserved rural areas to bringing supplementary television signals to major urban markets. This proved to be the most significant turning point in CATV development.

Through the fifties, and in an extensive opinion in 1959, the FCC declined to exercise jurisdiction over CATV systems on the grounds (a) that they did not use the radio spectrum to communicate with their subscribers and thus were not broadcasters, and (b) they did not have the characteristics of common carriers by wire. During the early sixties, the FCC adhered to this view but began to regulate CATV systems indirectly by regulating the microwave relay systems serving CATV (which, as users of the radio spectrum, required FCC licenses in order to operate). Some rudimentary conditions were imposed on CATV systems, as customers of the microwave relays, in order to protect economically marginal over-the-air television stations. These restrictions formed a partial basis for rules promulgated by the FCC in 1966 when it asserted jurisdiction over all CATV systems. In 1972, the FCC restated its position in more comprehensive terms.

In general, cable systems are permitted (and in most cases required) to carry local television signals. But the importing of distant signals is restricted by the FCC. Most cable systems may import two such signals, and under a variety of exceptions many systems carry more than two distant signals. Under complex rules, local stations receive varying degrees of protection against duplication of their programs on imported distant signals. The carriage of distant signals subjects cable systems to copyright liability, but by payment of governmentally prescribed fees they obtain statutorily mandated licenses.

Cable systems also may transmit signals in addition to the retransmission of over-the-air television signals. These may include local live programs, movies and taped programs, and programs provided by special cable networks. Some such programs may be sold to subscribers for a fee in addition to the charge for regular cable service. This is "pay cable," a rapidly developing aspect of the cable industry.

The FCC has adopted regulations limiting affiliations between cable systems and local telephone companies, local broadcasters and the three national networks.

Unlike over-the-air broadcasting, cable systems are subject to state and local regulation, although on many important matters (in-

cluding those indicated above), the FCC has precluded or restricted state and local regulation. Cable systems also have the potential to provide nonvideo services (transmitting other types of communications, including two-way transmissions); as yet this potential has not been significantly developed.¹⁰

10. On broadcasting and broadcast regulation generally, see N. Minow, *Equal Time, The Private Broadcaster and the Public Interest* (1964); B. Rucker, *The First Freedom* (1968); Note, *TV Service and the FCC*, 46 *Texas L.Rev.* 1101 (1968); N. Johnson, *How to Talk Back to Your Television Set* (1970); W. Emery, *Broadcasting and Government: Responsibilities and Regulations* (1971); S. Head, *Broadcasting in America* (2d ed. 1972); M. Mayer, *About Television* (1972); L. Bogart, *The Age of Television* (3d ed. 1972); *Georgetown Law Journal, Media and the First Amendment in a Free Society* (1973) (also at 60 *Geo.L.J.* 871 (1972)); *Aspen Notebook on Government and the Media* (W. Rivers and M. Nyhan ed. 1973); V. Mosco, *The Regulation of Broadcasting in the United States: A Comparative Analysis* (1975); R. Bunce, *Television in the Corporate Interest* (1976); E. Krasnow and L. Longley, *The Politics of Broadcast Regulation* (2d ed. 1978); E. Foster, *Understanding Broadcasting* (1978). See also W. Rivers and M. Nyhan, *Aspen Handbook on the Media: A Selective Guide to Research, Organizations and Publications in Communications* (1977); C. Sterling and T. Haight, *Aspen Institute Guide to Communication Industry Trends* (1978).

On the history of broadcasting, see E. Barnouw, *A History of Broadcasting in the United States: vol. I—A Tower in Babel (to 1933)* (1966), vol. II—*The Golden Web (1933-1953)* (1968), vol. III—*The Golden Image (from 1953)* (1970); E. Barnouw, *Tube of Plenty: The Evolution of American Television* (1975). See also G. Archer, *History of Radio to 1926* (1938); White, *The American Radio* (1947); C. Sterling and J. Kittross, *Stay Tuned: A Concise History of American Broadcasting* (1978); R. Coase, *British Broadcasting: A Study in Monopoly* (1950).

On the Federal Communications Commission, see Cox, *The Federal Communications Commission*, 11 *B.C.Ind. and Com.L.Rev.* 595 (1970); Johnson, *A New Fidelity to the Regulatory Ideal*, 59 *Geo.L.J.* 869 (1971); Johnson and Dystel, *A Day in the Life: The Federal Communications Commission*, 82 *Yale L.J.* 1575 (1973); Jaffe, *the Illusion of Ideal Administration*, 86 *Harv.L.Rev.* 1183 (1973); Barrow, *OTP and FCC: Role of the Presidency and the Independent Agency in Communications*, 43 *U.Cinn.L.Rev.* 291 (1974); Lee, *The FCC and Regulatory Duplication: A Case of Overkill?* 51 *Notre Dame Law.* 235 (1975); Geller, *A Modest Proposal for Modest Reform of the FCC*, 63 *Geo.L.J.* 705 (1975); McLauchlan, *Agency-Clientele Relations: A Study of the Federal Communications Commission*, 1977 *Wash. U.L.Q.* 257; B. Cole and M. Oettinger, *The Reluctant Regulators: The FCC and the Broadcast Audience* (1978); Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 *Va.L.Rev.* 169 (1978). See also Krasnow and Shooshan, *Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission*, 26 *Fed.Com.B.J.* 81 (1973) (also at 10 *Harv.J.Legis.* 297 (1973)).

On the economics of broadcasting generally, see R. Noll, M. Peck and J. McGowan, *Economic Aspects of Television Regulation* (1973); B. Owen, J. Beebe, and W. Manning, *Television Economics* (1974); B. Owen, *Economics and Freedom of Expression* (1975). See also S. Besen and B. Mitchell, *Economic Analysis and Television Regulation* (Rand Corp. 1973) (review of Noll, Peck and McGowan); Posner, *Monopoly in the Marketplace of Ideas*, 86 *Yale L.J.* 567 (1977) (review of Owen).

Chapter II

SELECTION OF A BROADCASTER FOR
AN AVAILABLE FREQUENCY

A. ECONOMIC INJURY TO EXISTING
BROADCASTERS

FCC v. SANDERS BROTHERS RADIO STATION

Supreme Court of the United States, 1940.
309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

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

January 20, 1936, the Telegraph Herald, a newspaper published in Dubuque, Iowa, filed with the petitioner an application for a construction permit to erect a broadcasting station in that city. May 14, 1936, the respondent, who had for some years held a broadcasting license for, and had operated, Station WKBB at East Dubuque, Illinois, directly across the Mississippi River from Dubuque, Iowa, applied for a permit to move its transmitter and studios to the last named city and instal its station there. August 18, 1936, respondent asked leave to intervene in the Telegraph Herald proceeding, alleging in its petition, inter alia, that there was an insufficiency of advertising revenue to support an additional station in Dubuque and insufficient talent to furnish programs for an additional station; that adequate service was being rendered to the community by Station WKBB and there was no need for any additional radio outlet in Dubuque and that the granting of the Telegraph Herald application would not serve the public interest, convenience, and necessity. Intervention was permitted and both applications were set for consolidated hearing.

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

An examiner reported that the application of the Telegraph Herald should be denied and that of the respondent granted. On ex-

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

The petitioner's contentions are that under the Communications Act economic injury to a competitor is not a ground for refusing a broadcasting license. . . .

. . .

. . . We hold that resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the petitioner must weigh, and as to which it must make findings, in passing on an application for a broadcasting license.

Section 307(a) of the Communications Act directs that "the Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act." This mandate is given meaning and contour by the other provisions of the statute and the subject matter with which it deals. The Act contains no express command that in passing upon an application the Commission must consider the effect of competition with an existing station. Whether the Commission should consider the subject must depend upon the purpose of the Act and the specific provisions intended to effectuate that purpose.

The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equip-

ment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.

In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such.¹ Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.²

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

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

Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other

1. See § 3(h), 47 U.S.C.A. § 153(h). 2. See § 308(b), 47 U.S.C.A. § 308(b).
[Some footnotes have been omitted:
others have been renumbered.]

broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter. If such economic loss were a valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives,³ which Congress would not have contemplated without granting the Commission powers of control over the rates, programs, and other activities of the business of broadcasting.

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

. . .
The judgment of the Court of Appeals is Reversed.⁴

VOICE OF CULLMAN, 14 F.C.C. 770, 6 R.R. 164 (1950). The Commission granted the application of Voice of Cullman for a new standard broadcasting station at Cullman, Alabama. Cullman Broadcasting Co., an existing standard broadcasting licensee in the same city, petitioned for rehearing on the ground that, although there was no electrical interference between the two stations, it was entitled to a hearing on its claim that there were insufficient advertising revenues in Cullman to support two stations. The petition was denied, one commissioner concurring specially.

“ . . . On the basis of petitioner's own statements there is more than sufficient revenue for at least one station to operate profitably in Cullman, even if no additional revenue results from the opera-

3. See § 311, 47 U.S.C.A. § 311, relating to unfair competition and monopoly [now § 313(b)].

4. [Ed.] Justice McReynolds did not participate.

tion of the second station. If the new applicant does not succeed in getting enough of the available business to survive, it will go under. If in the competitive struggle the new applicant attracts enough business to survive and petitioner is unsuccessful in its efforts and has to turn in its license, this is what competition means—petitioner is not protected against this risk. It is the judgment of Congress that the competition between stations to survive furnishes the best incentive to render the best possible service.

“We do not believe that the results of establishing two stations in an area which at the time can allegedly support only one can be foreseen. One station may rapidly drive the other out of business; both stations may survive either by attracting sufficient additional revenue or by reducing expenses without necessarily degrading their program service since quality of program service cannot be measured by cost alone; one or both stations may be content to operate at a loss either permanently or until the business situation permits the development of additional revenues. The possibilities are numerous, and since they lie in the future and stem from the interaction of individual purposes, energies, perseverance, and resourcefulness in a dynamic situation over a period of time, the ultimate results and even more the effect of any particular result upon the service rendered the public cannot be predicted. Detailed information of the present business situation obtained at a hearing would not make prediction substantially more possible.

“Moreover, assuming the worst possible results arose from the establishment of the new station, the situation would be self-correcting and injury to the public, if any, would be of short duration. If either station by reason of lack of revenue becomes unable to discharge its responsibility of providing a program service in the public interest, that station will likewise be unable to secure a renewal of license and must leave the field clear for the other station. If both stations should cease operations, the way would then be open for the establishment of a new station for which, in the instant case by petitioner’s own figures, there would be adequate support.

“Thus against speculative and at the most temporary injury to the public interest as a result of competition we must weigh the very real and permanent injury to the public which would result from restriction of competition within a regulatory scheme designed for a competitive industry and without the safeguards which are necessary where government seeks to guarantee to any business enterprise greater security than it can obtain by its own competitive ability. With these considerations in mind, the Commission has determined that, as a matter of policy, the possible effects of competition will be disregarded in passing upon applications for new broadcast stations. We here reaffirm that determination.”

SOUTHEASTERN ENTERPRISES, 22 F.C.C. 605, 13 R.R. 139 (1957). The licensee of an existing standard broadcast station in Cleveland, Tennessee, protested the grant of a construction permit for an additional standard broadcast station in the same community. The Commission rejected the protest, concluding that it did not have power to consider the effects of legal competition, even if the competition would result in public injury. Such a role would require the Commission to undertake a degree of regulatory control inconsistent with the statutory scheme of broadcast regulation:

“ . . . Either party could urge upon the Commission the following issues depending upon his respective advantages to be gained in the contest:

- a. Ascertainment of sufficient revenues for a newcomer to render an adequate service.
- b. What service is adequate or what programs would be adequate?
- c. How much would reasonably adequate programs cost?
- d. What would be standards of efficiencies to ascertain costs?
- e. What are potential market revenues?
- f. What portion of advertising expenditures for other than broadcasting media can be diverted to broadcasting?
- g. Are the rates for broadcasting advertising too high or too low?
- h. Is the management efficient?
- i. Is the management experienced?
- j. Is the management diligent?
- k. How does (sic) the costs for various broadcasting components compare with other stations?
- l. Can valid comparisons be made without imposing a uniform system of accounts?
- m. To what extent does (sic) depreciation policies influence the costs of operation?

“All these and a host of relevant issues could with plausibility be thrust upon the Commission for determination of whether or not competition is good for an allegedly thin or sparse market.

“Assuming this Commission finds . . . that there are insufficient revenues to support two stations in Cleveland, Tenn., it would seem that we should then determine whether the existing station or the new station should provide the only service to the community which, in turn, would involve a further determination of which program service

would be the best for the area and which would be operated the most efficiently.

“Once we have decided which of the two parties will render the service, we must assume the responsibility of preventing an avoidance of our determination or we in reality will have given that person a license to do otherwise; we must impose conditions upon him to render the service that we found was necessary and to maintain an efficient and effective operation to that end, which would be nothing more or less than the regulation of his business—to a degree even greater than exercised of common carriers.”

CARROLL BROADCASTING CO. v. FCC

United States Court of Appeals, District of Columbia Circuit, 1958.
103 U.S.App.D.C. 346, 258 F.2d 440.

PRETTYMAN, Circuit Judge.

This is an appeal from the Federal Communications Commission and concerns a license for a standard broadcasting station. Carroll, our appellant, is an existing licensee. It unsuccessfully protested the grant of a license to West Georgia, our intervenor.

Carrollton and Bremen are towns in Georgia, twelve miles apart, with populations, respectively, of 8,600 and 2300. Carroll's main studios are in Carrollton. West Georgia would broadcast from Bremen.

Three issues were prescribed by the Commission for the hearing upon the protest. One of these was upon the request of Carroll and was:

“To determine whether a grant of the application would result in such an economic injury to the protestant as would impair the protestant's ability to continued [sic] serving the public and if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other broadcast service to such areas and populations.”

. . .

On this issue the Commission held that “Congress had determined that free competition shall prevail in the broadcast industry” and that “The Communications Act does not confer upon the Commission the power to consider the effect of legal competition except perhaps” in Section 307(b) cases. Hence, said the Commission, “it is unnecessary for us to make findings or reach conclusions on this issue.” Moreover, the Commission said pursuant to other decisions by it as a mat-

ter of policy "the possible effects of competition will be disregarded in passing upon applications for new broadcast stations".

It was settled by the Sanders Brothers case⁵ that economic injury to an existing station is not a ground for denying a new application. But the Court it seems to us made clear the point that economic injury to a licensee and the public interest may be different matters. The Court said for example:⁶

"*First.* We hold that resulting economic injury to a rival station is not in and of itself and apart from considerations of public convenience interest or necessity an element the petitioner must weigh and as to which it must make findings in passing on an application for a broadcasting license."

And the Court said:⁷

"This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under with the result that a portion of the listening public will be left without adequate service; it may indicate that, by division of the field, both stations will be compelled to render inadequate service. These matters, however, are distinct from the consideration that if a license be granted competition between the licensee and any other existing station may cause economic loss to the latter."

Thus, it seems to us, the question whether a station makes \$5,000, or \$10,000, or \$50,000 is a matter in which the public has no interest so long as service is not adversely affected; service may well be improved by competition. But, if the situation in a given area is such that available revenue will not support good service in more than one station, the public interest may well be in the licensing of one rather than two stations. To license two stations where there is revenue for only one may result in no good service at all. So economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service. At that point the element of injury ceases to be a matter of purely private concern.

5. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L. Ed. 869 (1940). [Footnotes by the Court.]

6. *Id.*, 309 U.S. at page 473, 60 S.Ct. at page 696.

7. *Id.*, 309 U.S. at pages 475-476, 60 S. Ct. at page 698.

The basic charter of the Commission is, of course, to act in the public interest. It grants or denies licenses as the public interest, convenience and necessity dictate. Whatever factual elements make up that criterion in any given problem—and the problem may differ factually from case to case—must be considered. Such is not only the power but the duty of the Commission.

So in the present case the Commission had the power to determine whether the economic effect of a second license in this area would be to damage or destroy service to an extent inconsistent with the public interest. Whether the problem actually exists depends upon the facts, and we have no findings upon the point.

This opinion is not to be construed or applied as a mandate to the Commission to hear and decide the economic effects of every new license grant. It has no such meaning. We hold that, when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof, and, if the evidence is substantial (i. e., if the protestant does not fail entirely to meet his burden), should make a finding or findings.

The Commission says that, if it has authority to consider economic injury as a factor in the public interest, the whole basic concept of a competitive broadcast industry disappears. We think it does not. Certainly the Supreme Court did not think so in the Sanders Brothers case, *supra*. Private economic injury is by no means always, or even usually, reflected in public detriment. Competitors may severely injure each other to the great benefit of the public. The broadcast industry is a competitive one, but competitive effects may under some sets of circumstances produce detriment to the public interest. When that happens the public interest controls.

The Commission says it lacks the “tools”—meaning specifications of authority from the Congress—with which to make the computations, valuations, schedules, etc., required in public utility regulation. We think no such elaborate equipment is necessary for the task here. As we have just said, we think it is not incumbent upon the Commission to evaluate the probable economic results of every license grant. Of course the public is not concerned with whether it gets service from A or from B or from both combined. The public interest is not disturbed if A is destroyed by B, so long as B renders the required service. The public interest is affected when service is affected. We think the problem arises when a protestant offers to prove that the grant of a new license would be detrimental to the public interest. The Commission is equipped to receive and appraise such evidence. If the protestant fails to bear the burden of proving his point (and it is certainly a heavy burden), there may be an end to the matter. If his showing is substantial, or if there is a genuine issue posed, findings should be made.

Perhaps Carroll did not cast its proffer of proof exactly in terms of the public interest, or at least not in terms of the whole public interest. It may be argued that it offered to prove only detriment to its own ability for service. We are inclined to give it the benefit of the most favorable interpretation. In any event, whatever proof Carroll had is already in the record. If it does not support a finding of detriment to the public interest, but merely of a detriment to Carroll, the Commission can readily so find.

The case must be remanded for findings on this point.

. . .

Note on FCC Disposition of Claims of Economic Injury by Existing Licensees. Efforts by existing licensees to rely on *Carroll* to ward off competitive entry have met with varied success. The Commission has interposed several procedural obstacles:

First, the FCC tends to be strict in requiring specific pleading and proof of economic injury. Thus, in *West Georgia Broadcasting Co.*, 27 F.C.C. 161, 18 R.R. 835 (1959), the remand of the *Carroll* case to the Commission, the protestant retreated from its original position that the licensing of a new station would result in the destruction of both the old and the new station and contended instead that the grant of the new license would cause deterioration in the protestant's existing service. The FCC held that protestant had failed to sustain the burden of proving its contention, and, moreover, that any speculative public injury of the kind envisioned was outweighed by the benefits derived from licensing an additional and competitive service.

As the Commission became increasingly strict in its pleading requirements, Missouri-Illinois Broadcasting Co., 3 R.R.2d 232 (1964), the Court of Appeals for the District of Columbia felt compelled to intervene lest the Commission, by use of such strict pleading requirements, preclude any right to a hearing. See *Southwestern Operating Co. v. FCC*, 122 U.S.App.D.C. 137, 351 F.2d 834 (1965); *Folkways Broadcasting Co. v. FCC*, 126 U.S.App.D.C. 123, 375 F.2d 299 (1967). However, the FCC's insistence that the existing licensee plead sufficient data to make out a *prima facie* case was sustained in *WLVA, Inc. v. FCC*, 148 U.S.App.D.C. 262, 459 F.2d 1286 (1972). The Court observed:

"Specifically, the petitioner [incumbent licensee] must raise substantial and material questions of fact as to whether: (1) the revenue potential of the market is such that a grant will cause the petitioner to suffer a significant loss of income; (2) the effect of this loss will be to compel the petitioner to eliminate some or all of its public service programming; and (3) this loss of programming will not be offset by the increased non-network programming proposed to be offered by the applicant."

This standard is the one now followed by the Commission, leading to the rejection of many efforts to raise the *Carroll* issue.

Second, the Commission has sometimes required the existing licensee to place its own license in jeopardy as a prerequisite to insisting upon an inquiry into economic injury. In Herbert P. Michels (WAUB), 17 R.R. 557 (1958), the existing licensees of AM and FM broadcasting stations in Auburn, New York (WMBO and WMBO-FM), petitioned for reconsideration of the Commission's grant of a construction permit to a new standard broadcasting station in that city (WAUB) on the ground, inter alia, that the petitioners were entitled to a hearing on whether the grant of new authority would cause a deterioration in broadcasting service in view of the limited revenues available in the community served. The FCC concluded that the allegations of the petition did not show that the operation of WAUB would be detrimental to the public interest, but decided, in view of *Carroll*, to grant a hearing on the economic effect of the operation of WAUB. However, the Commission also ruled (three commissioners dissenting):

“ . . . Pursuant to the decision in the *Carroll* case, the Commission must determine whether the economic effect of another station in the Auburn area would be to damage or destroy service to an extent inconsistent with the public interest. But, if the answer to that question is in the affirmative, we do not believe that the public interest would be served by a denial of the WAUB application without further consideration of other public interest factors. For if, as an affirmative answer would imply, the city of Auburn has already reached the absolute limit of broadcast services which it can economically support, then it is all the more in the public interest that the limited service should be provided only by the best qualified person. In other words, if the people of Auburn are to be deprived of a choice of local programming, at the very least they should be entitled to assurance that their needs would be met to the highest possible degree. Further, under the circumstances it is highly desirable, from the viewpoint of both the public and the operators involved, that the choice of the best qualified operator should be made at the earliest possible time. Therefore, before designating the WAUB application for hearing, the Commission is directing the licensee of stations WMBO and WMBO-FM to submit applications for renewal of licenses in order that they may be consolidated for hearing in a comparative proceeding with the WAUB application, if necessary to reach such issue.”

At the request of all the parties the consolidated hearing was subsequently avoided by terminating the proceeding. *Atom Broadcasting Corp. (WAUB)*, 17 R.R. 560d (1960).

The *Michels* approach was qualified in *John Self*, 24 R.R. 1177 (1963), where the FCC ruled that, as a matter of policy, it would not advance the renewal date of the license of an existing broadcaster who had raised a *Carroll* issue. No basis for the determination was given, but the Commission observed: "Should the *Carroll* issue be resolved against the applicant for the new station, he may file an application against the existing station's renewal application, and such application for construction permit will be considered comparatively with this renewal application."

By contrast, when the renewal application of the existing station is pending, the policy of *Michels* is followed and the renewal application and the new application are consolidated for comparative consideration contingent upon resolving the *Carroll* issue against an additional station in the market. See *K-Six Television, Inc.*, 2 F.C.C. 2d 1021, 7 R.R.2d 128 (1966); *Tri-County Radio Co.*, 26 F.C.C.2d 147, 20 R.R.2d 460 (1970); *Eastern Broadcasting Co.*, 37 F.C.C.2d 783, 25 R.R.2d 554 (1972). This procedure sometimes results in withdrawal of the *Carroll* objection by the existing licensee. See *New Era Broadcasting Co.*, 16 F.C.C.2d 824, 18 F.C.C.2d 232, 20 F.C.C.2d 68 (1969).

In one area, the Commission has been receptive to an argument involving a claim of economic injury by an existing licensee. Thus, where a VHF television station proposed to move its transmitter so as to increase its geographical coverage, and the new location would have brought an improved VHF signal to a nearby city served by a UHF station, the Commission denied the VHF application on complaint of the UHF station that its economic support would be jeopardized by increased VHF competition. The leading case is *Triangle Publications, Inc. v. FCC*, 29 F.C.C. 315, 328, 17 R.R. 624 (1960), sustained 110 U.S.App.D.C. 214, 291 F.2d 342 (D.C.Cir. 1961). The argument of adverse impact on UHF is not invariably accepted. Compare *West Michigan Telecasters v. FCC*, 148 U.S.App. D.C. 375, 460 F.2d 883 (1972) (accepting the argument), with *WCOV, Inc. v. FCC*, 150 U.S.App.D.C. 303, 464 F.2d 812 (1972) (rejecting the argument). The adverse impact on UHF must be weighed against the benefits of improved VHF service.⁸

8. See *Givens, Refusal of Radio and Television Licenses on Economic Grounds*, 46 Va.L.Rev. 1391 (1960); *Meeks, Economic Entry Controls in FCC Licensing: The Carroll Case Reappraised*, 52 Iowa L.Rev. 236 (1966); *Kahn, Regulation of Intramedium "Economic Injury" by the FCC*, 13 J.

Broad. 221 (1969); *Kahn, Economic Injury and the Public Interest*, 23 Fed. Com. Bar J. 182 (1969); *Prisuta, The Impact of Media Concentration and Economic Factors on Broadcast Public Interest Programming*, 21 J.Broad. 321 (1977).

B. COMPARATIVE PROCEEDINGS

JOHNSTON BROADCASTING CO. v. FCC

United States Court of Appeals, District of Columbia Circuit, 1949.
85 U.S.App.D.C. 40, 175 F.2d 351.

PRETTYMAN, Circuit Judge.⁹

[In passing on two mutually exclusive applications, the FCC granted the application of Beach and denied the application of Johnston Broadcasting Co. Johnston appealed. The Court held that the Commission's order must be set aside because of a defect in the verification of Beach's application, but indicated that the defect might be cured by subsequent verification.]

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

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

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

. . . In respect to comparative decisions, these are . . . essentials: . . . Findings must be made in respect to every dif-

9. [Ed.] The Court's footnotes have been omitted.

ference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. [And the] final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant.

. . . The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. Neither can it base its conclusion upon a selection from among its findings of differences and ignore all other findings. It must take into account all the characteristics which indicate differences, and reach an over-all relative determination upon an evaluation of all factors, conflicting in many cases. In its judgment upon this evaluation, the Commission has wide discretion. The Supreme Court has said that the administrative tribunal under statutes such as this, is the final arbiter of the public interest. The requirement is that the judgment be within the bounds of rational derivation from the findings.

We say that the required findings need go no further than the evidence and the proposals of the parties. In essence, that is to say that there is no essential absolute in making a comparison. There are such essentials in determining whether each applicant is qualified to receive a permit. But when those individual qualifications have been established, we think that the Commission may rely upon the parties to present whatever factual matter bears upon a choice between them. When the minimum qualifications of both applicants have been established, the public interest will be protected no matter which applicant is chosen. From there on the public interest is served by the selection of the better qualified applicant, and the private interest of each applicant comes into play upon that question. Thus, the comparative hearing is an adversary proceeding. The applicants are hostile, and their respective interests depend not only upon their own virtues but upon the relative shortcomings of their adversaries. We think, therefore, that the Commission is entitled to assume that in such a proceeding the record of the testimony will contain reference to all the facts in respect to which a difference between the parties exists, and that the parties will urge, each in his own behalf, the substantial points of preference. The Commission need not inquire, on its own behalf, into possible differences between the applicants which are not suggested by any party, although in its discretion it may do so.

In sum, we think that there are no established criteria by which a choice between the applicants must be made. In this respect, a comparative determination differs from the determination of each applicant's qualifications for a permit. A choice can properly be made upon those differences advanced by the parties as reasons for the choice. To illustrate, if neither applicant presents as a material

factor the relative financial resources of himself and his adversary, the Commission need not require testimony upon the point or make a finding in respect to it, beyond the requisite ability for bare qualification. It may assume that there is no material difference between the applicants upon that point.

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

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

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

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

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

As to appellant's contention that the Commission's consideration of the proposed programs was a form of censorship, it is true that the Commission cannot choose on the basis of political, economic or social views of an applicant. But in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service. So, while the Commission cannot prescribe any type of program (except for prohibitions against obscenity, profanity, etc.), it can make a comparison

on the basis of public interest and, therefore, of public service. Such a comparison of proposals is not a form of censorship within the meaning of the statute. As we read the Commission's findings, the nature of the views of the applicants was no part of the consideration. The nature of the programs was.

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

Note on the Conduct of Comparative Proceedings by the FCC. The requirement of a comparative proceeding was articulated in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945). Fetzer, in March 1944, applied for a permit to construct a station to operate on 1230 kc in Grand Rapids, Michigan. In May 1944, before the Fetzer application had been acted upon, Ashbacker sought authority to change the frequency of its station in Muskegon, Michigan, to 1230 kc. The FCC concluded that the two applications were mutually exclusive, because of the intolerable interference which would result from simultaneous operation of both of the proposed stations. It then granted Fetzer's application and set Ashbacker's for hearing, noting that interference with the Fetzer operation would be a basis for denying the Ashbacker application.

The Supreme Court held that the granting of one of two mutually exclusive applications without a hearing deprives the other applicant of its right to a hearing; the hearing actually accorded "becomes an empty thing." Although the FCC argued that Ashbacker was not precluded from showing that its operation should be preferred to Fetzer's, and that the Commission would be free to act at a later time on the showing made, the Supreme Court concluded that the Commission's action had placed Ashbacker "in the same position as a newcomer who seeks to displace an established broadcaster." This subjected Ashbacker to a burden that would not have been imposed if the two applications had been heard simultaneously. Thus was born the requirement that mutually exclusive applications must receive contemporaneous consideration.

Where conflicting applicants propose to serve different communities, the first selection to be made is among the communities to be served. In such a case, § 307(b) is the guide. Thus, in the *Ashbacker* case, the decisive question under present practice would be whether Grand Rapids or Muskegon had a greater need for a new radio facility. If, however, there is more than one applicant for a facility in the same community, other considerations must govern, as illustrated in *Johnston Broadcasting*.

While it is probably impossible, in view of the nature of the issues, to compile an exhaustive list of the areas of comparative con-

sideration, the matters which have recurred most frequently may be briefly summarized. It should be recognized that not all of these fifteen categories are involved in every case. But it is rather common to have six to ten areas hotly controverted in a single proceeding, and the number of pertinent areas is likely to expand with the number of applicants.

As to each area in dispute, the Commission decides (a) which applicant, if any, is entitled to a preference in that area, and (b) how pronounced the preference should be. As to each category in issue, therefore, the Commission announces: (i) that no applicant is entitled to a preference; or (ii) that one or more applicants are entitled to a slight preference or a moderate preference or a substantial preference. Finally, the Commission determines which applicant will prevail. This is based on a recital of the preferences gained by that applicant; the strength of these preferences—slight, moderate or substantial; the intrinsic importance of the categories in which the applicant was preferred and their relation to one another; and, finally, their significance in light of the particular facts of the case.

The traditional areas of comparative consideration, applied through most of the period of extensive licensing of new stations (through approximately 1965), may be summarized as follows:¹⁰

(1) **Local ownership.** Preference has been given to an applicant owned by local residents. This factor may be significant (a) as tending to promote responsiveness to local needs, with which the local resident is presumed to be familiar and concerned; and (b) as tending to corroborate program proposals,

10. The discussion which follows is reproduced from Administrative Conference of the United States, Committee on Licenses and Authorizations, Licensing of Major Broadcast Facilities by the Federal Communications Commission 55-64 (1962), reprinted in Hearings before Subcommittee No. 6 of House Select Committee on Small Business, 89th Cong., 2d Sess., on Federal Communications Commission, Part 1, A87-A178 (1966) (hereafter "Administrative Conference Report on FCC"). Footnotes have been omitted.

For discussions of the comparative criteria, see Friendly, The Federal Administrative Agencies: The Need for a Better Definition of Standards, 75 Harv.L.Rev. 1055-1072 (1962); Irion, FCC Criteria for Evaluating Competing Applicants, 43 Minn.L.Rev. 479 (1959); Schwartz, Comparative Television and the Chancellor's Foot, 47 Geo.L.J. 655 (1959); Note, Criteria Employed by the Federal Communications Commission in Granting Mutual-

ly-Exclusive Applications for Television Facilities, 45 Geo.L.J. 265 (1957).

For a more recent comprehensive review, see Anthony, Toward Simplicity and Rationality in Comparative Broadcast Proceedings, 24 Stan.L.Rev. 1 (1971). See also Botein, Comparative Broadcast Licensing Procedures and the Rule of Law: A Fuller Investigation, 6 Ga.L.Rev. 743 (1972); Mayer & Botein, Ashbacker Rites in Administrative Practice: A Case Study of Broadcast Regulation, 24 N.Y.Law School L.Rev. 461 (1978).

On the value of broadcast licenses, see Levin, Economic Effects of Broadcast Licensing, 72 J.Pol.Econ. 151 (1964); Greenberg, Television Station Profitability and FCC Regulatory Policy, 17 J.Ind.Econ. 210 (July 1969); Webbink, Regulation, Profits and Entry in the Television Broadcasting Industry, 21 J.Ind.Econ. 167 (April 1973); Blau, Johnson and Ksoblech, Determinants of TV Station Economic Value, 20 J. Broad. 197 (1976).

since the local owner is presumed to be more amenable than the absentee to community pressures to live up to its programming promises. The criterion often is not easy to apply because (i) each of the several applicants usually has a number of owners, (ii) the residence qualifications of owners with local affiliations vary considerably, and (iii) it is difficult in some cases to identify the real owners or principals. Moreover, the weight given local ownership has varied considerably. In some cases the Commission has implied a responsiveness to local needs from community ties other than local ownership, and in other situations the FCC has found that the prior broadcast record of the nonresident applicant gave sufficient assurance of effectuation of program proposals and obviated the need for community pressure on a local resident. In still other cases, the local ownership factor appears to have been subordinated to other of the comparative criteria. On the other hand, an applicant has been able to gain a preference on the ground of local ownership in some instances by giving minority interests to a few local residents.

(2) **Integration of ownership and management.** A preference may be gained if the station is to be directly managed by its owners. Such direct participation is felt (a) to produce better programming, since the owner presumably will worry more about what is broadcast than will a salaried manager, (b) to increase responsiveness to local needs, where the owners are local residents, and (c) to provide assurance that programming proposals will be effectuated. Again the criterion is difficult to apply because of the necessity of identifying owners and managers and tracing the lines of authority running from one to another. Moreover, the integration criterion proves elusive when attempts are made to apply it to a large publicly held corporation or to a station operated by a municipality or an educational or fraternal group. The best that can be achieved under such circumstances is the integration of management and management and the minimization of intervening layers of control.

(3) **Diversification of the backgrounds of owners.** Variety in the backgrounds of the owners has been an advantage in a comparative hearing, but the basis of this preference is unclear. If owners come from different lines of business endeavor, there may be greater responsiveness to local needs. But this assumes that the owners are local residents; otherwise diversification of backgrounds would not seem to be particularly helpful. Yet a preference for diversification of backgrounds was accorded an applicant where most owners were nonresidents—on the ground that such diversification would be of assistance in solving the station's problems.

(4) **Participation in civic affairs.** The recognition given to the civic activities of the applicant's principals seems similarly to be concerned with responsiveness to local needs. Such an approach is consistent with an earlier Commission view discounting civic participation in a community other than the one to be served. But out-of-town civic activity sometimes has been accorded weight.

(5) **Proposed programming.** Although programming is the essence of the station's service, the Commission has been reluctant to move from the general to the specific in choosing among diverse program proposals. It has granted programming preferences based on greater "balance" (programming of different types), on more extensive local live broadcasts, and on attention to peculiar local needs (e. g., farmers). More often, the Commission finds that all applicants fall within a tolerable range and refuses to characterize one program proposal as better than another. The recent trend appears to be to emphasize the procedures employed in programming rather than the substance of the results. Emphasis is placed less on the proposed programming format and more on the manner in which it was devised; inquiry is made into consultations with local community leaders, surveys of community tastes, and the like.

(6) **Proposed program policies.** While a preference theoretically could be achieved here, this factor appears to have had little decisional significance since broadcasters invariably affirm that they will refrain from obscenity; not emphasize crime, violence and gambling; adhere to the N.A.B. code; and otherwise conduct an exemplary operation. Usually there is little to choose among in comparing proposed program policies.

(7) **Carefulness of operational planning.** This appears to be simply a corroborating circumstance, indicating that program proposals will be carried out. The Commission has refused to give a preference on this point unless a clear superiority is shown. This factor ceases to be significant if the planning of each applicant is sufficient to assure effectuation of proposals.

(8) **Relative likelihood of effectuation of proposals.** This is a summation of the search for corroborating circumstances, and may embrace the other corroborating factors individually listed. The Commission has not always accorded weight to this factor as a separate criterion.

(9) **Broadcast experience.** There is some question as to the basis for according significance to broadcast experience. On occasions it seems to be advanced merely as a circumstance corroborative of program proposals: projections into the future by an old hand may be more reliable than forecasts lacking a basis

in experience. On other occasions the factor seems to be accorded independent significance, perhaps on the ground that an experienced broadcaster will probably devise better programs than an inexperienced broadcaster. Broadcaster experience has been given considerable weight in some cases, overriding deficiencies in local residence and other comparative criteria.

(10) **Past broadcast record.** As contrasted with the bare *fact* of broadcast experience, an applicant's past broadcast record may be a significant corroborating circumstance on the issue of effectuation of programming proposals: does the applicant keep its promises? It can also be used as a means of assessing the probable quality of the applicant's programming. This places the Commission in the uncomfortable position of having to pass directly on program content; but it does so occasionally, as in giving an applicant a preference for "imagination" and "initiative" in programming award-winning shows and in acquiring special equipment in the conduct of the prior operation.

(11) **Technical facilities.** Perhaps the most significant question about technical facilities is whether they are adequate to effectuate the applicant's program proposals. On the other hand, the Commission also has engaged in assessing the comparative merits of studio toilet facilities and parking lots.

(12) **Staffing.** Competent personnel is another aspect of the applicant's ability to effectuate its program proposals, and this is stated to be the sole purpose of this criterion. At one point, however, the Commission indicated that, if one applicant's staff were more familiar with the community, this might be of some significance.

(13) **Violations of law and other reflections on character.** Obviously this is a rather special factor, reflecting a relative disadvantage. It has significance only in so far as it raises questions relative to future broadcast operations inimical to good programming or to other aspects of broadcast regulation. Violations of laws relating to monopolies, lotteries or advertising fraud are particularly significant. Misrepresentations to the Commission or attempts to influence the decisional process by *ex parte* contacts detract from an applicant's chances in a comparative proceeding, if they do not disqualify it altogether. Other adverse reflections on character may involve the conduct of an applicant's principals dating back several years.

(14) **Areas and populations to be served.** Even though several proposals are for the same community, they may differ as to areas and populations to be served because of differences in frequency, power, antenna location, or antenna height; the differences must be considered in making a comparative analysis,

although they are sometimes not considered to be part of the "standard comparative issue."

(15) **Diversification of control of the media of mass communications.** An applicant not connected with any other media of mass communications has been preferred over an applicant engaged in broadcasting, newspaper publication, or other of the mass media. This criterion applies both to media within the community to be served and media elsewhere. In some instances, ownership of multiple media in the same community has been considered more disadvantageous than ownership of quantitatively greater media in other communities. In other cases, the emphasis seems to have been reversed. The weight attached to control of other mass media has varied widely from one case to another. In some instances of applications for broadcast authority, newspaper owners have been preferred over other applicants with no media affiliations; in other cases, applicants with apparently superior qualifications have been rejected because of newspaper ownership. Compare *McClatchy Broadcasting Co. v. FCC*, 99 U.S.App.D.C. 199, 239 F.2d 15 (1956), cert. denied, 353 U.S. 918, 77 S.Ct. 662, 1 L.Ed.2d 665 (1957) (rejecting newspaper owner), with *Massachusetts Bay Telecasters Inc. v. FCC*, 104 U.S.App.D.C. 226, 261 F.2d 55 (1958), subsequent opinion, 111 U.S.App.D.C. 144, 295 F.2d 131 (1961), cert. denied, 366 U.S. 918, 81 S.Ct. 1094, 6 L.Ed.2d 241 (1961) (preferring newspaper owner).

In 1965, the FCC issued a Policy Statement in an effort to achieve more orderly comparative proceedings, modifying in some respects the criteria it traditionally had employed.

POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS

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

BY THE COMMISSION:

One of the Commission's primary responsibilities is to choose among qualified new applicants for the same broadcast facilities.¹¹ This commonly requires extended hearings into a number of areas of comparison. The hearing and decision process is inherently complex, and the subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values, some factors may be present in some cases and

¹¹ This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee

seeking renewal of a license. [Some footnotes have been omitted; others have been renumbered.]

not in others, and the differences between applicants with respect to each factor are almost infinitely variable.

Furthermore, membership on the Commission is not static and the views of individual Commissioners on the importance of particular factors may change. For these and other reasons, the Commission is not bound to deal with all cases at all times as it has dealt in the past with some that seem comparable, . . . and changes of viewpoint, if reasonable, are recognized as both inescapable and proper. . . .

This statement is issued to serve the purpose of clarity and consistency of decision, and the further purpose of eliminating from the hearing process time-consuming elements not substantially related to the public interest. We recognize, of course, that a general statement cannot dispose of all problems or decide cases in advance. Thus, for example, a case where a party proposes a specialized service will have to be given somewhat different consideration. Difficult cases will remain difficult. Our purpose is to promote stability of judgment without foreclosing the right of every applicant to a full hearing. We believe that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications. The value of these objectives is clear. Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities. Equally basic is a broadcast service which meets the needs of the public in the area to be served, both in terms of those general interests which all areas have in common and those special interests which areas do not share. An important element of such a service is the flexibility to change as local needs and interests change. Since independence and individuality of approach are elements of rendering good program service, the primary goals of good service and diversification of control are also fully compatible.

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

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

As in the past, we will consider both common control and less than controlling interests in other broadcast stations and other media of mass communications. The less the degree of interest in other stations or media, the less will be the significance of the factor. Other interests in the principal community proposed to be served will nor-

mally be of most significance, followed by other interests in the remainder of the proposed service area and, finally, generally in the United States. However, control of large interests elsewhere in the same state or region may well be more significant than control of a small medium of expression (such as a weekly newspaper) in the same community. The number of other mass communication outlets of the same type in the community proposed to be served will also affect to some extent the importance of this factor in the general comparative scale.

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

We are primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis. In assessing proposals, we will also look to the positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management. We will accord particular weight to staff positions held by the owners, such as general manager, station manager, program director, business manager, director of news, sports or public service broadcasting, and sales manager. Thus, although positions of less responsibility will be considered, especially if there will be full-time integration by those holding those positions, they cannot be given the decisional significance attributed to the integration of stockholders exercising policy functions. Merely consultative positions will be given no weight.

Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. While, for the reasons given above, integration of ownership and management is important per se, its value is increased if the participating owners are local residents and if they have experience in the field. Participation in station affairs on the basis described above by a local resident indicates a likelihood of continuing knowledge of changing local interests and

needs.¹² Previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management.

Past participation in civic affairs will be considered as a part of a participating owner's local residence background, as will any other local activities indicating a knowledge of and interest in the welfare of the community. Mere diversity of business interests will not be considered. Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence (which is expected to accompany meaningful participation) will also be accorded less weight than present residence of several years' duration.

Previous broadcasting experience includes activity which would not qualify as a past broadcast record, i. e., where there was not ownership responsibility for a station's performance. Since emphasis upon this element could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage, it will be deemed of minor significance. It may be examined qualitatively, upon an offer of proof of particularly poor or good previous accomplishment.

The discussion above has assumed full-time, or almost full-time, participation in station operation by those with ownership interests. We recognize that station ownership by those who are local residents and, to a markedly lesser degree, by those who have broadcasting experience, may still be of some value even where there is not the substantial participation to which we will accord weight under this heading. Thus, local residence complements the statutory scheme and Commission allocation policy of licensing a large number of stations throughout the country, in order to provide for attention to local interests, and local ownership also generally accords with the goal of diversifying control of broadcast stations. Therefore, a slight credit will be given for the local residence of those persons with ownership interests who cannot be considered as actively participating in station affairs on a substantially full-time basis but who will devote some time to station affairs, and a very slight credit will similarly be given for experience not accompanied by full-time participation. Both of these factors, it should be emphasized, are of minor significance. No credit will be given either the local residence or experience of any person who will not put his knowledge of the community (or area) or experience to any use in the operation of the station.

3. Proposed program service. . . . The importance of program service is obvious. The feasibility of making a comparative

12. Of course, full-time participation is also necessarily accompanied by residence in the area.

evaluation is not so obvious. Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operation. Thus, minor differences among applicants are apt to prove to be of no significance.¹³

. . . [T]he applicant has the responsibility for a reasonable knowledge of the community and area, based on surveys or background, which will show that the program proposals are designed to meet the needs and interests of the public in that area. . . . Contacts with local civic and other groups and individuals are also an important means of formulating proposals to meet an area's needs and interests. Failure to make them will be considered a serious deficiency, whether or not the applicant is familiar with the area.¹⁴

Decisional significance will be accorded only to material and substantial differences between applicants' proposed program plans. See *Johnston Broadcasting Co. v. Federal Communications Commission*, 85 U.S.App.D.C. 40, 175 F.2d 351. Minor differences in the proportions of time allocated to different types of programs will not be considered. Substantial differences will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service. For example, an unusual attention to local community matters for which there is a demonstrated need, may still be urged. We will not assume, however, that an unusually high percentage of time to be devoted to local or other particular types of programs is necessarily to be preferred. Staffing plans and other elements of planning will not be compared in the hearing process except where an inability to carry out proposals is indicated.¹⁵

In light of the considerations set forth above, and our experience with the similarity of the program plans of competing applicants, taken with the desirability of keeping hearing records free of imma-

13. Specialized proposals necessarily have to be considered on a case-to-case basis. We will examine the need for the specialized service as against the need for a general-service station where the question is presented by competing applicants. [Footnote shifted slightly.]

[Ed.] The FCC subsequently ruled that it would not permit inquiry into the relative need for different program formats "except on a predesignation showing that a proposed specialized format is not available in the particular market in a substantial amount." (George E. Cameron Jr. Communication, 45 R.R.2d 689 (1979).

14. [Ed.] The Commission's increasingly emphatic position on ascertainment has made this a matter of initial qualification. See pp. 335-352, *infra*.

15. We will similarly not give independent consideration to proposed studios or other equipment. These are also elements of a proposed operation which are necessary to carry out the program plans, and which are expected to be adequate. They will be inquired into only upon a petition to amend the issues which indicates a serious deficiency.

terial clutter, no comparative issue will ordinarily be designated on program plans and policies, or on staffing plans or other program planning elements, and evidence on these matters will not be taken under the standard issues. The Commission will designate an issue where examination of the applications and other information before it makes such action appropriate, and applicants who believe they can demonstrate significant differences upon which the reception of evidence will be useful may petition to amend the issues.

No independent factor of likelihood of effectuation of proposals will be utilized. The Commission expects every licensee to carry out its proposals, subject to factors beyond its control, and subject to reasonable judgment that the public's needs and interests require a departure from original plans. If there is a substantial indication that any party will not be able to carry out its proposals to a significant degree, the proposals themselves will be considered deficient.¹⁶

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

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

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

If a past record warrants consideration, the particular reasons, if any, which may have accounted for that record will be examined to determine whether they will be present in the proposed operation. For example, an extraordinary record compiled while the owner fully participated in operation of the station will not be accorded full credit where the party does not propose similar participation in the operation of the new station for which he is applying.

¹⁶ It should be noted here that the absence of an issue on program plans and policies will not preclude cross-examination of the parties with respect

to their proposals for participation in station operation, i. e., to test the validity of integration proposals.

5. **Efficient use of frequency.** In comparative cases where one of two or more competing applicants proposes an operation which, for one or more engineering reasons, would be more efficient, this fact can and should be considered in determining which of the applicants should be preferred. . . .

6. **Character.** The Communications Act makes character a relevant consideration in the issuance of a license. See Section 308 (b), 47 U.S.C.A. § 308(b). Significant character deficiencies may warrant disqualification, and an issue will be designated where appropriate. Since substantial demerits may be appropriate in some cases where disqualification is not warranted, petitions to add an issue on conduct relating to character will be entertained. In the absence of a designated issue, character evidence will not be taken. Our intention here is not only to avoid unduly prolonging the hearing process, but also to avoid those situations where an applicant converts the hearing into a search for his opponents' minor blemishes, no matter how remote in the past or how insignificant.

7. **Other factors.** As we stated at the outset, our interest in the consistency and clarity of decision and in expedition of the hearing process is not intended to preclude the full examination of any relevant and substantial factor. We will thus favorably consider petitions to add issues when, but only when they demonstrate that significant evidence will be adduced.

. . .¹⁷

TV 9, INC. v. FCC, 161 U.S.App.D.C. 349, 495 F.2d 929 (1973 and 1974). One of the unsuccessful applicants for television channel 9 in Orlando, Florida, was Comint Corporation. Comint relied in part on the fact that, in a community in which 25% of the population was Black but no Blacks participated in the ownership or management of any mass communications media, it had two Black principals: Mr. Perkins with a 7.17% voting stock interest and Dr. Smith with a 7% like interest. Both had lived in the local area for more than 20 years, and both had been active in advancing the interests of Black members of the community. Mr. Perkins was to be Vice President of Comint and was to devote two days a week to the station; he also was a member of the Board of Directors and of the Editorial and Community Service Committees of the Board. Dr. Smith was to be a member of the Board and of at least one of its committees, but he did not propose to devote any specific amount of time to the station.

The FCC declined to accord Comint any credit for the fact that it had two Black principals, reasoning that racial classifications were

17. [Ed.] Two Commissioners dissented and one Commissioner issued a concurring statement.

suspect on Constitutional grounds, and, further, that it had not been shown how Black ownership would provide any benefits in operation of the station. The Court of Appeals reversed on a number of grounds, one of them concerned with the Black ownership interests in Comint:

"It is consistent with the primary objective of maximum diversification of ownership of mass communications for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship . . . [W]hen minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and presentation of news."

In a supplemental opinion, the Court made clear that, while Black ownership and participation, in the context of the issues in this case, were entitled to "merit" or "favorable consideration," no automatic preference was to be accorded on this account. Other applicants, without minority owners, could seek to prove that they were better qualified to promote diversification of opinion and viewpoint. "However, in view of . . . the probability that Black persons having substantial identification with minority rights will be able to translate their positions, though not technically 'managerial,' and their ownership stake, into meaningful effect on this aspect of station programming, we think that such material factors residing in the evidence cannot reasonably be totally and rigidly excluded from favorable consideration."¹⁸

18. *TV 9* was commented upon in 9 Suff.U.L.Rev. 225 (1974); 43 U.Cinn. L.Rev. 669 (1974); 52 Texas L.Rev. 806 (1974). See Soley and Hough, *Black Ownership of Commercial Radio Stations: An Economic Evaluation*, 22 J.Broad. 455 (1978).

than meet the challenge. Expedited treatment has been given to processing of applications for licenses by minority applicants seeking to serve minority audiences. *Brothers Broadcasting Corp.*, 42 R.R.2d 1430 (1978); *Terry E. Tyler*, 42 R.R.2d 1431 (1978).

In *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979, 42 R.R.2d 1689 (1978), the FCC indicated that, in sales to minorities, it would give favorable consideration to: (1) issuance of "tax certificates" (allowing deferral of capital gains), and (2) allowing "distress sales" where a licensee is challenged and seeks to sell its facility rather

than meet the challenge. Expedited treatment has been given to processing of applications for licenses by minority applicants seeking to serve minority audiences. *Brothers Broadcasting Corp.*, 42 R.R.2d 1430 (1978); *Terry E. Tyler*, 42 R.R.2d 1431 (1978).
On other FCC policies relating to minority ownership of broadcast facilities, see *Minority Ownership of Broadcast Facilities*, 69 F.C.C.2d 1591, 44 R.R.2d 1051 (1978); *Part-Time Programming*, 43 Fed.Reg. 55804 (1978); *Financial Qualifications*, 69 F.C.C.2d 407, 43 R.R.2d 1101 (1978), and 45 R.R.2d 925 (1979).

Chapter III

CHALLENGES TO INCUMBENT BROADCASTERS

A. COMPARATIVE RENEWAL PROCEEDINGS

Note on the WHDH Case ¹

A. HISTORICAL BACKGROUND

The initial proceeding to select a licensee to operate on Channel 5 in Boston began in 1954 with consideration of four mutually exclusive applications. Three years later, the Commission announced the granting of the application of WHDH, Inc., a wholly owned subsidiary of the corporate publisher of the Boston Herald-Traveler newspaper. 22 F.C.C. 767. The station began broadcasting in the same year. While the decision was on appeal in this court, it came to the court's attention that the Commission's award might be subject to an infirmity by virtue of improper *ex parte* contacts with the Chairman of the Commission. Retaining jurisdiction, we remanded to the Commission for an evidentiary hearing. *Massachusetts Bay Telecasters, Inc. v. F.C.C.*, 104 U.S.App.D.C. 226, 261 F.2d 55 (1958), cert. denied, 366 U.S. 918, 81 S.Ct. 1094, 6 L.Ed.2d 241 (1961).

At the supplemental hearing before a Special Hearing Examiner, Honorable Horace Stern, formerly Justice of the Pennsylvania Supreme Court, it developed, inter alia, that during the pendency of the initial license proceedings, Mr. Robert Choate of WHDH, Inc., had arranged two luncheons with Mr. George C. McConnaughey, then Chairman of the FCC. The first of these, in the winter of 1954-55, was used by Mr. Choate for the simple purpose of "sizing up" the new chairman. The second, however, in the spring of 1956 (after the initial hearing examiner's decision favoring another applicant, but before oral argument on exceptions to that decision), was arranged to allow Mr. Choate to discuss certain legislative matters, unspecified in advance, with Mr. McConnaughey. The matters in question proved to be the Harris-Beamer bills, which would have limited the Commission in its policy of encouraging the diversification of ownership of mass media of communication, and which had been opposed in Mr. McConnaughey's testimony before Congress. At the second luncheon Mr. Choate attempted to hand Mr. McConnaughey a draft amend-

1. [Ed.] This summary is taken from *Greater Boston Television Corp. v. F. C. C.*, 444 F.2d 841 (D.C.Cir. 1970), af-

firming the FCC determinations at 16 F.C.C.2d 1 (1969) and 17 F.C.C.2d 856 (1969).

ment to the pending bills, which he hoped would moderate the Chairman's opposition. The Chairman, however, rebuffed Mr. Choate's attempt at discussion, and later called public attention to the matter in testimony before the House Committee on Legislative Oversight.

The Special Hearing Examiner concluded that WHDH's construction permit should be allowed to stand, that Choate could not fairly be condemned as having made an improper attempt to influence the Commission as to this particular adjudication, that there was no reason for the Chairman or any other member of the Commission to disqualify himself from participation, and that the award made to WHDH was neither void nor voidable. The Commission felt otherwise. It discerned a meaningful and improper, albeit subtle, attempt to influence the Commission, and condemned it as an effort that "does violence to the integrity of the Commission's processes." . . . It filed its report with this court—which had retained jurisdiction over the original appeal, and ordered the status quo maintained. The Commission's finding and report concluded that while the original grant to WHDH was not void ab initio, it was voidable and action should be taken to set it aside, that the conduct of WHDH while not disqualifying had been such as to reflect adversely upon it in the comparison of applicants. The course which the Commission concluded represented the best exercise of its discretion consisted of setting aside the permit; granting at the same time a special temporary authorization for WHDH to continue broadcasting on Channel 5; and reopening the entire proceeding for a comparative proceeding between WHDH and the other applicants then before it. 29 F.C.C. 204 (1960). We approved the plan and remanded accordingly. *Massachusetts Bay Telecasters, Inc. v. F.C.C.*, 111 U.S.App.D.C. 144, 295 F.2d 131, cert. denied, 366 U.S. 918, 81 S.Ct. 1094, 6 L.Ed.2d 241 (1961).

In October, 1961, the Commission held new hearings, this time among three of the four original applicants. On September 25, 1962, it again awarded a construction permit to WHDH. 33 F.C.C. 449. It ascribed a demerit to WHDH because of Choate's improper approaches to the Commission Chairman. In the same order it made a grant to WHDH of an operating license for only four months—stating that it was exercising its discretion to grant a license for such a short term, as contrasted with the 3-year term permissible and normally provided, because it believed this in the public interest due to "the inroads made by WHDH upon the rules governing fair and orderly adjudication." 33 F.C.C. at 454. In 1963, after WHDH filed for its renewal, the FCC took the unusual step of assuring that comparative consideration would be given to competing applications filed within a specified 60-day "safe" period. By order of October 24, 1963, it designated for comparative hearing the WHDH renewal and the mutually exclusive applications filed during that period by BBI (intervenor before this court) and Charles River and Greater Boston TV

Corp. (II), appellants, for determination, on a comparative basis, which of the proposed operators would best serve the public interest in the light of significant differences among applicants as to (a) background and experience bearing on ability to operate the TV station; and (b) proposals for management and operation of the proposed TV station; and (c) proposed programming. 1 R.R.2d 468, 472.

Meanwhile, the grant of the 4-month license had been appealed to this court, both by WHDH (which protested the conclusion of impropriety on the part of Choate and the short term of the license) and by Greater Boston TV Corp. (I). On December 21, 1963, while this appeal was pending, Mr. Choate died. We remanded again to determine what effect his death would have on the awards. Being aware of the impending comparative hearings on the renewal of WHDH's temporary license, we authorized the Commission to combine the renewal proceedings with the proceedings, on remand, for reconsideration of the award of the construction permit and the 4-month operating license, both to be conducted on a comparative basis assessing the public interest in the light of the absence of Mr. Choate. *Greater Boston Television Corp. v. F. C. C.*, 118 U.S.App.D.C. 162, 334 F.2d 552 (1964).

B. THE CURRENT COMPARATIVE PROCEEDING

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

1. Hearing Examiner's Decision

On August 10, 1966, Hearing Examiner Herbert Sharfman issued an exhaustive Initial Decision, in favor of granting the renewal by WHDH. He concluded that the taint of Mr. Choate's activities had passed with his death, since none of the associates who might have been able to stop him were even aware, so far as the record shows, of the intention of the "imperious" Mr. Choate, and that an extension of disability on the part of WHDH would not be deterrent or prophylactic but only vengeful.

In the bulk of his conclusions, related to a comparison of the applicants, the Hearing Examiner took account of the evidence pertaining to the various criteria laid down in the Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (July 28, 1965):—past performance; diversity of ownership; integration of ownership and management; and program proposals. In determining the weight he felt appropriate under the circumstances of the case, the Examiner placed primary emphasis on the actual operating record of WHDH under the temporary authorizations of the preceding nine years.

The Examiner conceded that the position of WHDH was weak in regard to the integration criterion (participation in station management by owners), and that both BBI and Charles River were proposed by a distinguished and indeed "star-studded" group of civically active residents, offering strong claims on the score of area familiarity. The Examiner acknowledged that both BBI and Charles River proposed a diversity of excellent programs, though he offset this by noting that in the case of program proposals a new applicant enjoys a "literary advantage" over an existing operator. He further noted that the abbreviated nature of the WHDH tenure conferred by the Commission made it clear that WHDH was not entitled to a competitive advantage merely because it is a renewing station. Yet the Examiner concluded that it would be a sterile exercise to decide this case on the basis of the traditional methods of comparison of new applicants. In his view the dominant factor on balance was that the proven past record of good performance is a more reliable index of future operations in the public interest than mere promises of new applicants, which have no means of validation except as the criteria may be helpful in predicting ability to comply with proposals. The WHDH operating record was considered favorable on the whole, notwithstanding its unwillingness to grasp the nettle of some local problems. As to diversification, the Examiner concluded that while the concentration of ownership of a Boston newspaper and other broadcast facilities would probably have ruled out the WHDH application if this were an all-initial license case, in this case the preference for WHDH on past record was not materially affected.² This, the Examiner felt, was in accordance with the Commission's long-standing policy in renewal proceedings, as established in Hearst Radio, Inc. (WBAL), 16 F.C.C. 141 (1951).

2. Commission's Decision of January 22, 1969

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

Past Performance of WHDH: The Commission's decision stated that the principles of the 1965 Policy Statement would be applied to the proceedings. Specifically it invoked the provision of its 1965 Policy Statement that an applicant's past record was to be given an affirmative preference only if it were outside the bounds of average performance. It read the Examiner's findings of fact as showing that the record of WHDH-TV was "favorable" on the whole—except for its failure to editorialize—but concluded that it was only within the

2. The fourth applicant, Greater Boston Television Corp. (II), was disqualified for failing to surmount two preliminary (noncomparative) questions: it had not made an independent

evaluation of the community's program needs, nor had it been able to secure its proposed antenna site. (Some footnotes have been omitted; others have been renumbered.)

bounds of average performance, and "does not demonstrate unusual attention to the public's needs or interests." 16 F.C.C.2d at 10.

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

The Commission further referred to the contention of WHDH that since it had never editorialized there existed a factor that minimized the charge of concentration of control. The Commission disagreed, stating that licensees have an obligation to devote reasonable broadcast time to controversial programs, and the failure to editorialize, if anything, demonstrated the wisdom of the Commission's policy for diversification of control of media of mass communications. On the factor of diversification, it concluded by awarding a substantial preference to both BBI and Charles River as against WHDH, and giving BBI a slight edge over Charles River (which also operates an FM radio station in Waltham, Massachusetts devoted to serious music).

Integration of Ownership with Management: The Commission affirmed the Examiner's conclusion that the applications of both Charles River and BBI reflect an integration—which in FCC parlance means integration of ownership with management—of substantially greater degree than WHDH, whose integration is small. It restated its view that the public interest is furthered through participation in operation by proprietors, as increasing the likelihood of greater sensitivity to an area's changing needs and programming to serve these needs.

As between Charles River and BBI, the Commission found that BBI rated a significant preference on integration (six of BBI's stockholders propose to serve as full-time management, two of whom have had significant television experience, as opposed to only one Charles River participating owner, whose experience was limited to radio).

Proposed Program Service: The Commission agreed that both BBI and Charles River proposed generally well-balanced program schedules, and concluded that neither proposal demonstrated such a substantial difference as to constitute a "superior devotion to public service." 16 F.C.C.2d at 15.

The Commission assigned a slight demerit to BBI because of its insufficiently supported proposal for local live programs, for which it projected an extraordinary percentage of 36.3% of 160.5 hours of

weekly programming. It adopted the findings of the Hearing Examiner that this was only a "brave generality" which generated the suspicion that it was flashed for its supposed value in a comparison.

The Commission assessed a slight demerit against Charles River in view of the fact that all its stock is owned by Charles River Civic Foundation, a charitable foundation complying with Section 503(c) (3) of the Internal Revenue Code. "Although Charles River proposes to editorialize, it is manifest that there are limitations on the amount of time that could be devoted to controversial questions which may be legislatively related, and that such limitations are not found in ordinary television station operations." 16 F.C.C.2d at 17.

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

Other Factors: The Commission assessed a demerit against WHDH because of a failure to obtain the approval of the Commission on the transfer of de facto control when Choate was selected as president following the death of his predecessor, and when his death was followed by the accession of Akerson. However, since there was no attempt at misrepresentation or concealment it was concluded that the circumstances did not reflect so adversely on character qualifications as to warrant the absolute disqualification of WHDH.

The Commission's Vote: The Commission voted to grant the application of BBI. Its Decision was written by Commissioner Bartley, who was joined by Commissioner Wadsworth. Three commissioners did not participate in the decision (Hyde, Cox and Rex Lee). Commissioner Johnson concurred, with a statement indicating his strong opposition to the application of WHDH, and noting that this was supported not only by diversity of media, but also by the "healthy" result of having at least one network-affiliated VHF television station that is independently and locally owned. "I feel no passion," he remarked, about the choice between BBI and Charles River, and stated that while normally he would not participate in a case that essentially involved a reconsideration of matters that arose before he became a member of the FCC,— "In this instance, however, my participation is necessary to constitute a working majority for decision. Accordingly I concur in today's decision." 16 F.C.C.2d at 27. Commissioner Robert Lee dissented, voting to grant the application of WHDH, and abstaining from any choice as between BBI and Charles River.

3. The Commission's Action on Reconsideration

Reaction to the Commission's decision was swift. One distinguished commentator characterized it as a "spasmodic lurch toward 'the left'." ³ The television industry began organizing its forces to

3. Jaffe, WHDH: The FCC and Broadcasting License Renewals, 83 Harv.L.Rev. 1693, 1700 (1969).

seek legislative reversal of what seemed to be a Commission policy, reversing *Hearst*, that placed all license holders on equal footing with new applicants every time their three-year licenses came up for renewal. On May 19, 1969, the Commission adopted a separate Memorandum Opinion and Order on the petitions of all parties for a re-hearing. 17 F.C.C.2d 856.

While the Commission granted in part the petition for reconsideration by WHDH essentially its second opinion restated and reinforced the views stated in the Decision. It may be useful to mention the explication put forward, as it happens in response to exceptions by the favored applicant (BBI), which urged that the FCC state explicitly that its decision did not reaffirm the earlier grant to WHDH. BBI sought clarification of the status of WHDH as an applicant for initial license, rather than for renewal of license. Instead the FCC recited that WHDH's application was treated as one for the renewal of its license, and explicitly adopted the Examiner's conclusion that modification of the FCC's 1962 decision (granting a 4-month license) would not serve the public interest, that no change in that ruling was required as a result of Choate's death, and that re-evaluation of the original record would be contrary to the public interest best served by terminating this lengthened proceeding.

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

CITIZENS COMMUNICATIONS CENTER v. FCC

District of Columbia Circuit Court of Appeals, 1971.
145 U.S.App.D.C. 32, 447 F.2d 1201.

J. SKELLY WRIGHT, Circuit Judge:

Appellants and petitioners in these consolidated cases challenge the legality of the "Policy Statement on Comparative Hearings Involving Regular Renewal Applicants," 22 F.C.C.2d 424, released by the Federal Communications Commission on January 15, 1970, and by its terms made applicable to pending proceedings. Briefly stated, the disputed Commission policy is that, in a hearing between an incumbent applying for renewal of his radio or television license and

a mutually exclusive applicant, the incumbent shall obtain a controlling preference by demonstrating substantial past performance without serious deficiencies. Thus if the incumbent prevails on the threshold issue of the substantiality of his past record, all other applications are to be dismissed without a hearing on their own merits.⁴

Petitioners contend that this policy is unlawful under Section 309(e) of the Communications Act of 1934 and the doctrine of Ash-

4. [Ed.] The reasoning underlying the FCC's position is indicated in the following excerpts:

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

"We note also the question of the applicability here of our policy of diversification of the media of mass communications. We do not denigrate in any way the importance of that policy or the logic of its applicability in a comparative hearing involving new applicants. . . . We have stated, however, that as a general matter, the renewal process is not an appropriate way to restructure the broadcast industry. . . . Where a renewal applicant with other media interests has in the past been awarded a grant as consistent with the Commission's multiple ownership rules and policies, and thereafter proceeded to render good service to his area, it would appear unfair and unsound to follow policies whereby he could be ousted on the basis of a comparative demerit because

of his media holdings. Here again, the stability of a large percentage of the broadcast industry, particularly in television, would be undermined by such a policy. Our rules and policies permit multiple ownership, and the industry has made substantial commitments based on those rules and policies. These rules are not sacrosanct, and indeed should and must be subject to periodic review. . . . If any rulemaking proceeding, now pending or initiated in the future, results in a restructuring of the industry, it will do so with proper safeguards, including most importantly an appropriate period for divestment. . . . In short, whatever action may be called for in special hearings where particular facts concerning undue concentration or abusive conduct in this respect are alleged, the overall structure of the industry, so far as multiple ownership and diversification are concerned, should be the subject of general rulemaking proceedings rather than ad hoc decisions in renewal hearings.

"We recognized that there can be concern whether this policy will prevent a new applicant willing to provide a superior service from supplanting an existing licensee who has broadcast a substantial, but less impressive, service. But . . . there are obvious risks in accepting promises over proven performance at a substantial level, and we see no way, other than the one we have taken, adequately to preserve the stability and predictability which are important aspects of the overall public interest. We believe that there will still be real incentives for those existing broadcasters willing to provide superior service to do so, since the higher the level of their operations, the less likely that new applicants will file against them at renewal time. And as the Commission spells out, in decided cases, the elements which constitute substantial service, it will serve the private inter-

backer Radio Corp. v. F.C.C., 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945). The 1970 Policy Statement is also attacked by petitioners on grounds that it was adopted in disregard of the Administrative Procedure Act and that it restricts and chills the exercise of rights protected by the First Amendment.

We find that the judicial review sought by petitioners is appropriate at this time. Without reaching petitioners' other grounds for complaint, we hold that the 1970 Policy Statement violates the Federal Communications Act of 1934, as interpreted by both the Supreme Court and this court.

With the great expansion of the broadcast media after World War II, the Commission was under heavy pressure to develop specific criteria for choosing among competitors seeking licenses for the quickly diminishing number of unallocated frequencies. The criteria were developed through a series of comparative hearing decisions and were reviewed and given final statement in the Commission's 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393. The 1965 Policy Statement defines the purpose of the comparative hearing as choosing the applicant who will provide the "best practicable service to the public" and who will insure the "maximum diffusion of control of the media of mass communications." The basic criteria relating to the determination of which applicant will provide the best service to the public are listed as full-time participation in station operation by owners, proposed program service, past broadcast record, efficient use of frequency, and character. Diversification of control of the media of mass communication is elevated in the 1965 Policy Statement to a factor of primary significance; and in an effort to resolve the inherent contradiction between the goal of diversification and its tradition of according an advantage to initial applicants with past broadcasting experience, the Commission states that it will not consider a past broadcast record which is "within the bounds of average performance." Only records which demonstrate "unusual attention to the public's needs and interests" are to be given favorable consideration, since average performance is expected of all licensees.

Although the 1965 Policy Statement explicitly refrains from reaching the "somewhat different problems raised where an applicant is contesting with a licensee seeking renewal," the Communications Act itself places the incumbent in the same position as an initial applicant. Under the 1952 amendment to the Act, both initial and renewal applicants must demonstrate that the grant or continuation

ests of broadcasters to make certain that their operations fall clearly into that class of service. Thus the public interest will be served by the con-

tinuing efforts of broadcasters to minimize the chances of the filing of competing applications."

of a license will serve the "public interest, convenience, and necessity." The Communications Act itself says nothing about a presumption in favor of incumbent licensees at renewal hearings; nor is an inability to displace operating broadcasters inherent in government management, as is established by the fact that in its early years of regulation the Federal Radio Commission often refused to renew licenses.

Nonetheless, the history of Commission decision and of the decisions of this court reflected until recently an operational bias in favor of incumbent licensees; despite Commissioner Hyde's observation in his dissent to the 1965 Policy Statement that there was no rational or legal basis for its purported nonapplicability to comparative hearings involving renewals, it was commonly assumed that renewal decisions would continue to be governed by policy established in the well known *Hearst*⁵ and *Wabash Valley*⁶ cases. These two cases, which began with the unassailable premise that the past performance of a broadcaster is the most reliable indicator of his future performance, were typical of the Commission's past renewal rulings in that their actual effect was to give the incumbent a virtually insuperable advantage on the basis of his past broadcast record *per se*. In *Hearst* the Commission ruled that the incumbent's unexceptional record of past programming performance, coupled with the unavoidable uncertainty whether the challenger would be able to carry out its program proposals, was sufficient to overcome the incumbent's demerits on other comparative criteria. And in *Wabash Valley* the Commission held that a newcomer seeking to oust an incumbent must make a showing of superior service and must have some preference on other comparative criteria.

Then, in the very controversial WHDH case, the Commission for the first time in its history, in applying comparative criteria in a renewal proceeding, deposed the incumbent and awarded the frequency to a challenger. Indicating a swing away from *Hearst* and *Wabash Valley*, in practical if not theoretical terms, the Commission stated its intention to insure that "the foundations for determining the best practicable service, as between a renewal and a new applicant, are more nearly equal at their outset." Finding that because the incumbent's programming service had been "within the bounds of the average" it was entitled to no preference, and that the incumbent was inferior on the comparative criteria of diversification and integration, the Commission awarded the license to one of the challengers.

The WHDH decision became the immediate subject of fierce attack, provoking criticism from those who feared that it represented a radical departure from previous law and that it threatened the stability of the broadcast industry by undermining large financial in-

5. *Hearst Radio, Inc. (WBAL)*, 15 F. C.C. 1149 (1951). (Some footnotes have been omitted; others have been renumbered.)

6. *Wabash Valley Broadcasting Corp. (WTHI-TV)*, 35 F.C.C. 677 (1963).

vestments made by prominent broadcasters in reliance upon the assumption that licenses once granted would be routinely renewed. While the Commission's decision was still on appeal to this court, ultimately to be affirmed, the broadcast industry sought to obtain from Congress the elimination or drastic revision of the renewal hearing procedure. A bill introduced by Senator Pastore, Chairman of the Communications Subcommittee of the Senate Commerce Committee, proposed to require a two-stage hearing wherein the renewal issue would be determined prior to and exclusive of any evaluation of challengers' applications. The bill provided that if the Commission finds the past record of the licensee to be in the public interest, it shall grant renewal. Competing applications would be permitted to be filed only if the incumbent's license is not renewed. Although more than 100 congressmen and 23 senators quickly announced their support, the bill was bitterly attacked in the Senate hearings by a number of citizens groups testifying, *inter alia*, that the bill was racist, that it would exclude minorities from access to media ownership in most large communities, and that it was inimical to community efforts at improving television programming.

The impact of such citizen opposition measurably slowed the progress of S. 2004. Then, without any formal rulemaking proceedings, the Commission suddenly issued its own January 15, 1970 Policy Statement, and the Senate bill was thereafter deferred in favor of the Commission's "compromise." The 1970 Policy Statement retains the single hearing approach but provides that the renewal issue must be determined first in a proceeding in which challengers are permitted to appear only for the limited purpose of calling attention to the incumbent's failings. The Policy Statement sets forth that a licensee with a record of "substantial" service to the community, without serious deficiencies, will be entitled to renewal notwithstanding promise of superior performance by a challenger. Only upon a refusal to renew because of the incumbent's past failure to provide substantial service would full comparative hearings be held. Thus, in effect, the Policy Statement administratively "enacts" what the Pastore bill sought to do. The Statement's test for renewal, "substantial service," seems little more than a semantic substitute for the bill's test, "public interest," and the bill's two-stage hearing, the second stage being dependent on the incumbent's failing the test, is not significantly different from the Statement's summary judgment approach. The "summary judgment" concept of the 1970 Policy Statement, however, runs smack against both statute and case law . . .

Superimposed full length over the preceding historical analysis of the "full hearing" requirement of Section 309(e) of the Communications Act is the towering shadow of *Ashbacher*, *supra*, and its progeny, perhaps the most important series of cases in American administrative law. *Ashbacher* holds that under Section 309(e), where two or

more applications for permits or licenses are mutually exclusive, the Commission must conduct one full comparative hearing of the applications. Although *Ashbacker* involved two original applications, no one has seriously suggested that its principle does not apply to renewal proceedings as well. This court's opinions have uniformly so held, as have decisions of the Commission itself.

It is not surprising, therefore, that the Commission's 1970 Policy Statement implicitly accepts *Ashbacker* as applicable to renewal proceedings. To circumvent the *Ashbacker* strictures, however, it adds a twist: the Policy Statement would limit the "comparative" hearing to a single issue—whether the incumbent licensee had rendered "substantial" past performance without serious deficiencies. If the examiner finds that the licensee has rendered such service, the "comparative" hearing is at an end and, barring successful appeal, the renewal application must be granted. Challenging applicants would thus receive no hearing at all on their own applications, contrary to the express provision of Section 309(e) which requires a "full hearing."

In *Ashbacker* the Commission had promised the challenging applicant a hearing on his application after the rival application was granted. The Supreme Court in *Ashbacker* said that such a promise was "an empty thing." At least the Commission here must be given credit for honesty. It does not make any empty promises. It simply denies the competing applicants the "full hearing" promised them by Section 309(e) of the Act. Unless the renewal applicant's past performance is found to be insubstantial or marred by serious deficiencies, the competing applications get no hearing at all. The proposition that the 1970 Policy Statement violates Section 309(e), as interpreted in *Ashbacker*, is so obvious it need not be labored.⁷

Early after *Ashbacker* this court indicated what a "full hearing" entailed. In *Johnston Broadcasting Co. v. F. C. C.*, 85 U.S.App.D.C. 40, 45-46, 175 F.2d 351, 356-357 (1949), we explained that the statutory right to a full hearing included a decision upon all relevant criteria

7. Although the broadcast industry was perhaps less satisfied with the substantive result in *WHDH* than it had been with the results in *Hearst* and *Wabash Valley*, it should be clear from our earlier historical review that the procedure by which the Commission came to its decision was precisely the same in all three of these cases. It is true that the 1965 Policy Statement on Comparative Broadcast Hearings specifically refrained from reaching the "somewhat different problems" raised by renewal applications. But the Commission itself concluded within the same year, and consistently with its own past practice,

that the same comparative criteria set out in the Statement (if not the weight assigned to each such criterion) must also be considered in renewal hearings. *Seven (7) League Productions, Inc. (WHH)*. Thus, without impinging at all upon the Commission's substantive discretion in weighing factors and granting licenses, our holding today merely requires the Commission to adhere to the comparative hearing procedure which it has followed without fail since *Ashbacker* and which has rightly come to be accepted by observers as a part of the due process owed to all mutually exclusive applications.

We, as well as the Commission, have consistently applied the teaching of *Johnston Broadcasting* to renewal proceedings. See *South Florida Television Corp. v. F. C. C.*, 121 U.S.App.D.C. 293, 349 F.2d 971 (1965); *Community Broadcasting Corp. v. F. C. C.*, 124 U.S.App.D.C. 230, 363 F.2d 717 (1966). Particularly since the 1965 Policy Statement, in a comparative hearing involving a renewal application each applicant has been aware that its task is "to make the best case possible on the basis of program offering, integration, diversification, past performance and any other matters the parties asked the Commission to consider as pertaining to licensee fitness." WHDH, *supra*, 143 U.S.App.D.C. at 399, 444 F.2d at 857.

We do not dispute, of course, that incumbent licensees should be judged primarily on their records of past performance. Insubstantial past performance should preclude renewal of a license. The licensee, having been given the chance and having failed, should be through. Compare WHDH, *supra*. At the same time, *superior* performance should be a plus of major significance in renewal proceedings.⁸ Indeed, as *Ashbacher* recognizes, in a renewal proceeding, a new applicant is under a greater burden to "make the comparative showing necessary to displace an established licensee." 326 U.S. at 332, 66 S. Ct. at 151. But under Section 309(e) he must be given a chance. How can he ever show his application is comparatively better if he does not get a hearing on it? The Commission's 1970 Policy Statement's summary procedure would deny him that hearing.⁹

8. The court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service. Given the incentive, an incumbent will naturally strive to achieve a level of performance which gives him a clear edge on challengers at renewal time. But if the Commission fails to articulate the standards by which to judge superior performance, and if it is thus impossible for an incumbent to be reasonably confident of renewal when he renders superior performance, then an incumbent will be under an unfortunate temptation to lapse into mediocrity, to seek the protection of the crowd by eschewing the creative and the venturesome in programming and other forms of public service. The Commission in rule making proceeding should strive to clarify in both quantitative and qualitative terms what constitutes superior service. See Comment, 118 U. Pa.L.Rev. at 406. Along with elimination of excessive and loud advertising and delivery of quality programs, one test of superior service should certainly be whether and to what extent the

incumbent has reinvested the profit on his license to the service of the viewing and listening public. . . .

9. Since one very significant aspect of the "public interest, convenience, and necessity" is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it. . . . The Supreme Court itself has on numerous occasions recognized the distinct connection between diversity of ownership of the mass media and the diversity of ideas and expression required by the First Amendment. . . .

. . . As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies. According to the uncontested testimony of petitioners, no more than a dozen of 7,500 broadcast licenses issued are owned by racial minorities. The

The suggestion that the possibility of nonrenewal, however remote, might chill uninhibited, robust and wide-open speech cannot be taken lightly. But the Commission, of course, may not penalize exercise of First Amendment rights. And the statute does provide for judicial review. Indeed, the failure to promote the full exercise of First Amendment freedoms through the broadcast medium may be a consideration against license renewal. Unlike totalitarian regimes, in a free country there can be no authorized voice of government. Though dependent on government for its license, independence is perhaps the most important asset of the renewal applicant.

The Policy Statement purports to strike a balance between the need for "predictability and stability"¹⁰ and the need for a competitive spur. It does so by providing that the qualifications of challengers, no matter how superior they may be, may not be considered unless the incumbent's past performance is found not to have been "substantially attuned" to the needs and interests of the community. Unfortunately, instead of stability the Policy Statement has produced *rigor mortis*.¹¹ For over a year now, since the Policy Statement substantially limited a challenger's right to a full comparative hearing on the merits of his own application, not a single renewal challenge has been filed.

Petitioners have come to this court to protest a Commission policy which violates the clear intent of the Communications Act that the award of a broadcasting license should be a "public trust." As a unanimous Supreme Court recently put it, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Our decision today restores healthy competition by repudiating a Commission policy which is unreasonably weighted in favor

effect of the 1970 Policy Statement, ruled illegal today, would certainly have been to perpetuate this dismaying situation. While no quota system is being recommended or required, and while the fairness doctrine no doubt does serve to guarantee some minimum diversity of views, we simply note our own approval of the Commission's long-standing and firmly held policy in favor of decentralization of media control. Diversification is a factor properly to be weighed and balanced with other important factors, including the renewal applicant's prior record, at a renewal hearing. . . .

10. The Commission's fears for the stability of the industry seem groundless in view of the fact that in the year following the WILDII opinion—that is,

in the period when feared instability was greatest—only eight out of approximately 250 (or three per cent of) television license renewals were challenged.

11. The recent report of the United States Commission on Civil Rights commented that the kinds of competitive proceedings eliminated under the 1970 Policy Statement are "an effective mechanism for bringing about greater racial and ethnic sensitivity in programming, nondiscriminatory employment practices, and other affirmative changes which otherwise might not take place." U. S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort 283 (1971).

of the licensees it is meant to regulate, to the great detriment of the listening and viewing public.

12

FIDELITY TELEVISION, INC. v. FCC, 515 F.2d 684 (D.C.Cir. 1975). Fidelity, a new enterprise, challenged RKO (a subsidiary of General Tire) when RKO sought renewal of television channel 9 in Los Angeles. A comparative hearing was held and the FCC renewed the license of RKO and denied the application of Fidelity. The Court of Appeals affirmed.

Although both RKO and General Tire had engaged in reciprocity practices, and the practices had become the subject of an antitrust consent decree, the FCC had declined to disqualify RKO or to award it a comparative demerit. The Court sustained the FCC's position that the practices were considered legal when undertaken and were precluded in the future by the consent decree.

RKO's programming, despite some deficiencies, was held to be average. RKO, though lacking in integration of ownership and management, was held to be equal to Fidelity because: (1) Fidelity's integration proposals were not credible; and (2) RKO's management personnel at the Los Angeles station were involved in local community affairs. On diversification, RKO was not awarded a demerit, notwithstanding its substantial media interests in Los Angeles and elsewhere, because: (a) RKO operated each of its facilities autonomously, and (b) Los Angeles contained numerous other mass media (126 radio stations, 12 commercial television stations, and 350 newspapers, including two general circulation dailies). The Court found support for the Commission's conclusions on each of these points. On diversification, it observed:

"Though the Commission has vacillated over the years in its general approach to diversification, its determination in this case was not in direct conflict with any rule or any policy as enunciated in prior decisions, and we cannot say that the approach here was an unreasonable or unlawful application of existing diversification principles to this renewal case."

The FCC considered the two contenders to be equal on the basis of comparative criteria and awarded the license to the incumbent in the interest of providing greater security to licensees and greater stability to the industry. The Court of Appeals affirmed that, "when faced with a fairly and evenly balanced record, the Commission may, on the basis of the renewal applicant's past performance, award him the license."

12. [Ed.] The concurring opinion of Judge MacKinnon has been omitted.

CENTRAL FLORIDA ENTERPRISES, INC. v. FCC

United States Court of Appeals, District of Columbia Circuit, 1978.
— F.2d —, 44 R.R.2d 345, on rehearing — F.2d —, 44 R.R.2d 1567 (1979).

WILKEY, CIRCUIT JUDGE:

Appellant, Central Florida Enterprises, Inc. (Central), appeals a decision and accompanying orders by the Federal Communications Commission (Commission) denying its application for a construction permit for a new commercial television station to operate on Channel 2 in Daytona Beach, Florida, and granting the mutually exclusive application for renewal of license to Intervenor Cowles Florida Broadcasting, Inc. (Cowles). Appellant contends that the Commission acted unreasonably and without substantial record support in preferring Cowles' renewal application. We agree, vacate the Commission's orders, and remand for further proceedings.

I. ISSUES IN COMPARATIVE RENEWAL PROCEEDINGS,
PAST AND PRESENT

What is at issue here is the validity of the process by which the competing applications of Central and Cowles were compared and the adequacy of the Commission's articulated rationale for its choosing to renew Cowles' license. This may well be a typical comparative renewal case, hence the careful scrutiny we give the Commission's procedure and rationale herein.

Aside from the specific facts of this case, there is other evidence indicating the state of administrative practice in Commission comparative renewal proceedings is unsatisfactory. Its paradoxical history reveals an ordinarily tacit presumption that the incumbent licensee is to be preferred over competing applicants. Because the Federal Communications Act fairly precludes any preference based on incumbency *per se*,¹³ the practical bias arises from the Commission's discretionary weighing of legally relevant factors. . . .

13. The Communications Act of 1934 included language expressly referring the decision to renew a license to "the same considerations and practice which affect the granting of original applications," ch. 652, § 307(d), 48 Stat. 1084 (1934). Apparently to preclude the inference that an incumbent could not adduce evidence of its past broadcast record, Congress in 1952 deleted the language subjecting renewal applicants to "the same considerations and practice" as original applicants and substituted the present language subjecting all applications to the standard of "public interest, convenience, and necessity," 47 U.S.C.A. § 307(d) (1970). See *Citizens Communications Center v. FCC*, 145 U.S.App. D.C. at 37, 38, and n. 13, 447 F.2d at 1206-07 and n. 13. But see Report of the Federal Communications Commis-

sion to the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce of the House of Representatives Re the Comparative Renewal Process, Joint Appendix (J.A.) at 172, 182 (1976) [hereinafter cited as Report] (suggesting that the 1952 amendment may have codified the Commission's informal presumption of renewal). The Communications Act contains numerous other passages suggesting that the grant of a license creates no preferential rights in the incumbent, providing, *inter alia*, that "no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license," 47 U.S.C.A. § 301; that an applicant waives any claim to a frequency "because of the previous use of the same," 47 U.S.C.A. § 304; that no li-

Despite the apparent statutory assurance of a freewheeling inquiry into the relative merit of challenger and incumbent licensee, the history of Commission practice reveals a strong preference for renewal. Further, until fairly recently, such choices by the Commission were routinely affirmed by this court. This general phenomenon has been rationalized into what we have called on occasion "a renewal expectancy." The question arises, material in this case, to what extent such an expectancy is compatible with the full hearing guaranty of Section 309(e). This was essentially the question we confronted in *Citizens Communication Center v. FCC* [447 F.2d 1201 (D.C.Cir. 1971).] . . . *Citizens* . . . stands for the proposition that "the Commission may not use renewal expectancies of incumbent licenses to shortcircuit the comparative hearing."

We did note the relevance of the incumbent's past performance: We do not dispute, of course, that incumbent licensees should be judged primarily on their records of past performance. Insubstantial past performance should preclude renewal of a license. . . . At the same time, superior performance should be a plus of major significance in renewal proceedings. . . . The Court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service.

Despite the language in *Citizens*, it is fair to say that the law governing comparative renewal proceedings remained unclear. Although *Ashbacher* had said a challenger could not be denied a hearing and *Citizens* apparently assured some kind of substantive comparison, the nature of the inquiry and the pertinence of "renewal expectancies" was left uncertain.

As an original matter, of course, a "renewal expectancy" could be shorthand for any of several plausible theories of the public interest standard contained in section 309. For example, expectations *could* be confined to the likelihood that an incumbent would prevail under the customary 1965 criteria without any special regard for the quality of its past performance one way or the other. It would hardly be sensible, however, to ignore the past, for it affords the "best evidence" of what the incumbent's future performance will be, and it has never been the Commission's practice to do so. Conceding therefore, that an incumbent's past performance is highly relevant, an incumbent with a meritorious record would possess a natural advantage insofar as its actual performance made its proposals more credible than the "paper promises" of a challenger. Some such con-

license granted "shall be for a longer term than three years," 47 U.S.C.A. § 307(d); and that a license does "not vest in the licensee any right . . . in the use of the frequencies . . . beyond the term thereof," 47 U.S.C.A.

§ 309(h) (1970). See also *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 60 S.Ct. 693, 84 L.Ed. 869 (1940). [Some footnotes have been omitted; others have been renumbered.]

parative assessment of *likely* performances would, in fact, seem inescapable. It would then follow naturally from discounting the promises of challengers that incumbents would prevail more often, thereby assuring more “continuity” in the industry. The certainty thus afforded a meritorious incumbent through its natural comparative advantage may in turn induce it to commit enough resources to perpetuate its quality of service. An expectation raised by the probability of prevailing in the overall inquiry is, of course, fully compatible with the comparison assured by section 309.

We understand the Commission’s present idea of renewal expectancies may be more expansive—that an “expectancy” may be generated by something less than or different from more meritorious service. An incumbent is said entitled to expect renewal if it has “served the public interest in . . . a substantial manner.” Apparently, a “substantial” past record would be a factor weighed in the incumbent’s favor *irrespective* of which applicant were predicted to perform better in the future. Such an entitlement would be provided to promote security directly and to induce investment which otherwise may not be made. Whether and in what manner placing such a thumb on the balance in an otherwise comparative inquiry may be reasonable are, we think, open and difficult questions.

In a number of cases before and after *Citizens* this court has had occasion to refer to renewal expectancies without much inquiry into the notion’s content. Thus, in dictum in *Greater Boston Television Corp. v. FCC*, we observed there were “legitimate renewal expectancies implicit in the structure of the Act.” We said that “such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest.” [44 F.2d 841, at 854.] In 1975, in our *Fidelity Television* opinion, confronted with a weak licensee and a weak contender, both only “minimally acceptable applicants,” we said “when faced with a fairly and evenly balanced record, the Commission may on the basis of the renewal applicant’s past performance, award him the license.” [515 F.2d 684, at 702.]

Finally, last term the Supreme Court observed, in the context of reviewing the FCC’s regulations barring certain newspaper-broadcast combinations, that industry stability has consistently been a concern in comparative renewal proceedings. It said:

In the past, the Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proven broadcast service to the public, and in its indirect consequence of rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance. Thus, although a broadcast license must be renewed every three years, and the licensee must satisfy the Com-

mission that renewal will serve the public interest, both the Commission and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause. *Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 444 F.2d 841, 854 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); see *Citizens Communications Center v. FCC*, 145 U.S.App.D.C. 32, 44 and n.35, 447 F.2d 1201, 1213 and n.35 (1971); *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process*, [66 F.C.C. 2d at 420].¹⁴

Thus, although not a precise concept, renewal expectancies derived from "meritorious service" (to use the Supreme Court's terminology) are a natural aspect of the public interest inquiry carried on under section 309(e). Moreover, "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance."¹⁵

II. THE COURSE OF THE LITIGATION

Intervenor Cowles has operated its station, WESH-TV, on Channel 2 in Daytona Beach since it purchased the station in 1966. On 31 October 1969 Cowles filed its application for renewal of license. Central submitted its competing application for a construction permit for a new television station to operate on the same channel on 2 January 1970. The two applications were set for hearing by Commission order released 10 March 1971, and redesignated by orders released 20 August 1971 and 24 February 1972.

In addition to inquiry into diversification of media ownership and "best practicable service," which comprise the customary comparative issues, certain special issues were designated for hearing. These were (a) whether contrary to Commission regulation, Cowles had moved its main studio without prior Commission approval; and (b) whether alleged mail fraud by five related corporations supported inferences adverse to Cowles' character. Following extensive findings, the Administrative Law Judge (ALJ) concluded that renewal of Cowles' license would best serve the public interest. By a 4-3 vote the Commission affirmed with certain modifications.

A. *The Initial Decision*

1. *Designated Issues.*

[Discussion of the ALJ's determinations on the issues of mail fraud and the unauthorized move of the main studio have been omitted.]

14. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 805-806, 98 S.Ct. 2096, 2117-2118, 56 L.Ed.2d 697 (1978) (footnotes omitted).

15. *Id.* at 810, 98 S.Ct. at 2120. [The Supreme Court opinion is set forth *infra* at pp. 108-124.]

2. *Standard Comparative Issues.*

a. *Diversification of Media Ownership*

The ALJ concluded that "the advantage lies with Central" under the diversification factor because it had "no connection of any sort with any other mass media outlet." Cowles' parent, CCI, owned an AM-FM TV combination in Des Moines, Iowa, and another CCI subsidiary owned AM and FM radio stations in Memphis, Tennessee. While these interests were "remote" from Daytona Beach, the ALJ held that they remained a "significant factor in the ultimate choice." The ALJ further noted that CCI owned a substantial stock interest in the New York Times Company, which publishes the *New York Times* and has extensive publishing and broadcast holdings. Gardner Cowles, Chairman of CCI, was then a director of the New York Times Company. In addition, certain CCI stockholders had substantial mass media interests. The Des Moines Register and Tribune Company owned 9% of CCI's stock and had an 11% stock interest in the Minneapolis Star and Tribune Company. But the ALJ concluded these related mass media interests were of "little decisional significance" because CCI did not control the New York Times Company, nor did the Des Moines Register and Tribune Company control CCI. Thus, no potential existed for compelling the media involved to "speak with a common voice," and the basic policy underlying the diversification standard was "not disserved."

The ALJ then concluded that although Central's advantage was "clear," it would not be "compelling" unless Central were shown likely to render public service "at least as good" as that of Cowles. This was especially true in the present context where renewal "would not increase the existing concentration of control." The ALJ found that Cowles' incumbency evinced a prior Commission determination that its media connections were not contrary to the public interest. Moreover, the ALJ noted the Commission's reluctance to employ comparative renewal proceedings to restructure the broadcast industry. In his view, the benefits from increased diversification had to be balanced against the public necessity of a stable broadcast industry. Accordingly, the ALJ concluded that a comparative renewal hearing should occasion an increase in diversification only if the competing applicant appeared likely to render service at least as good as that which the public had been receiving.

b. *Best Practicable Service*

Under the criterion of "best practicable service" the ALJ made findings with respect to two matters: (1) Central's proposals regarding the participation of owners in the station management; and (2) the quality of Cowles' past service.

(1) *Integration of Ownership and Management*

The ALJ found Central's integration proposals to be "very weak," and concluded that Central's owners would probably not play more

than a nominal role in station affairs. He noted full time participation by station owners is of substantial importance under the 1965 criteria. But here, full time participation was proposed by only three of Central's shareholders, collectively owning 10.5% of Central's stock. While "not inconsequential," this ownership interest was not sufficient to control corporate policy. Further, the proposed integration was largely temporary. The important positions of General Manager and Program Director would be held by Mr. Stead and Mrs. Goddard, respectively, but Stead would serve only in Central's "formative stages," and Mrs. Goddard only until the station were "thoroughly organized and stabilized." The ALJ consequently found it unlikely that the benefits of integration would continue throughout the license period. Moreover, the shareholders' lack of broadcast experience, ordinarily unimportant because remediable, became significant in light of the limited tenure contemplated. In sum, the ALJ found that full time integration of management and ownership would be limited to Mr. Chambers, a 3.5% stockholder who would be supervisor of Administration. His duties were undefined and nothing indicated that he would be involved in determining the nature or content of program service.

The ALJ conceded several of Central stockholders would participate in management on a part-time basis, primarily as consultants, but noted that little weight attached to such participation under the *Policy Statement*. In his view, part-time contributions by those who are "essentially dilettantes" rarely has a material effect on overall station operations.

(2) Cowles Past Service

The ALJ found that Cowles' past performance had been "thoroughly acceptable." He observed that Cowles had developed and presented "a substantial number of programs . . . designed to serve the needs and interests of its community." A number of local residents and community leaders had expressed satisfaction with the station's performance, and there had been no complaints concerning the station's operation. Moreover, the ALJ found "no reason to believe that future performance would be less satisfactory." Although the unauthorized move of the main studio warranted a "comparative demerit," since it was not done in bad faith and had not lowered the quality of service to Daytona Beach, it would not support a conclusion that Cowles was unlikely to continue to provide "proper service."

c. The Public Interest Finding on the Two Standard Comparative Issues

In the end, the ALJ concluded that Cowles merited a "distinct preference" under the best practicable service criterion and that that preference outweighed Central's preference under the diversification criterion. The ALJ reasoned that absent a showing that the degree of industry concentration which had existed when Cowles was

originally licensed had "actually disserved the public interest," the more compelling objective was obtaining the best practicable service

B. *The Commission Decision.*

The Commission affirmed the decision of the ALJ with certain modifications. It concluded that the ALJ had correctly disposed of the main studio issue. Thus, the Commission rejected both Cowles contention that there had been no *de facto* move of the main studio and Central's argument that the finding without more should have disqualified Cowles. Further, the Commission generally approved the ALJ's treatment of the factors mitigating the effect of the studio move.

The Commission sustained the ALJ again with respect to the mail fraud issue, finding he had properly refused "to impart decisional significance" to the evidence of wrongdoing. Inasmuch as Cowles was not shown to be implicated in the [improper] PDS practices [of corporate affiliates] and there appeared to be no criminal case against CCI or its personnel, the Commission declined "to attribute the sins of the PDS's to CCI and then visit them on Cowles' head."

Again, by the Commission's reasoning on the two specially designated issues, Cowles lost no ground. The Commission then turned to the two standard issues, diversification and service.

Reviewing the ALJ's treatment of the diversification issue, the Commission affirmed the award of a preference, finding Central's advantage "clear." The Commission agreed that the significance of the preference was reduced by the fact that CCI's other broadcast and newspaper interests were remote from Daytona Beach and were not shown to dominate their markets. Moreover, the Commission reiterated its reluctance to use the diversification criterion to restructure the broadcast industry, observing that "the need for industry stability had its own decisional bearing here." In a subsequent order, the Commission expanded its discussion, finding that the autonomy which CCI accorded to the local station management further reduced the significance of Central's preference. Inasmuch as the Commission could find no evidence in the record "that the dangers of concentration . . . exist in this case," the preference was found to be "of little decisional significance."

The ALJ's conclusions with respect to the best practicable service issue were modified in light of this court's *TV-9* decision, [495 F.2d 929 (1974),] and the Commission's finding that insufficient weight had attached to Cowles' broadcast record. The Commission held that the minority group participation proposed by Central entitled it to a merit under our *TV-9* decision. Nonetheless, even when considered in conjunction with the merit to which Central was admittedly entitled for integration of ownership and management, the additional merit was not sufficient to outweigh the facts in Cowles' favor under the best practicable service criterion.

Finally, the Commission revised the ALJ's characterization of Cowles' record as "thoroughly acceptable." Finding this phrase "too vague to be meaningful," and not adequately expressing "the outstanding quality of Cowles' past performance," the Commission found that performance to have been "superior" in the sense in which we used the word in our *Citizens* opinion—"justifying a plus of major significance," and inferentially, supporting an expectation of renewal. In a subsequent order, the Commission clarified its use of the word "superior." It had meant that the level of service provided by Cowles was "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal." It had not intended to suggest that the performance was exceptional when compared to other stations.

The Commission thus articulated the final and decisive tally:

The Commission—and the Court—have consistently recognized that a record of past programming performance is the very best indication of future performance. It is for this reason that we make clear that a substantial performance—i. e. sound, favorable—is entitled to legitimate renewal expectancies. Under the circumstances here, this consideration is decisive. Central's preference under the diversification criterion is of little decisional significance and Central is entitled to no preference under the integration criterion. These factors, even considering Cowles' slight demerit for the studio move and Central's merit for the Black ownership it proposes definitely do not outweigh the substantial service Cowles rendered to the public during the last license period.

III. ANALYSIS

The Commission's rationale in this case is thoroughly unsatisfying. The Commission purported to be conducting a full hearing whose content is governed by the 1965 *Policy Statement*. It found favorably to Central on each of diversification, integration and minority participation, and adversely to Cowles on the studio move question. Then simply on the basis of wholly noncomparative assessment of Cowles' past performance as "substantial," the Commission confirmed Cowles' "renewal expectancy." Even were we to agree (and we do not agree) with the Commission's trivialization of each of Central's advantages, we still would be unable to sustain its action here. The Commission nowhere even vaguely described how it aggregated its findings into the decisive balance; rather, we are told that the conclusion is based on "administrative 'feel.'" Such intuitional forms of decision-making, completely opaque to judicial review, fall somewhere on the distant side of arbitrary.

The Commission's treatment of the standard comparative issues—diversification of media ownership and best practicable ser-

vice—is the most worrisome aspect of this case. The Commission plainly disfavors use of the 1965 criteria in comparative renewal proceedings. This in turn is largely because the Commission dislikes the idea of comparative renewal proceedings altogether—or at least those that accord no presumptive weight to incumbency *per se*. . . .

Since the 1965 *Statement* admits little room for a presumption of renewal, the Commission has reconstructed the criteria in a manner creating a *de facto* presumption. Whether justified in precedent or logic, the process has been straightforward and comports at least formally with the requirement of a “full hearing”: (1) the criteria of diversification and integration were converted from structural questions (challengers usually prevailed on the simple numbers) to functional questions regarding the consequences of other media ownership and autonomous management (but challengers could rarely show injury to the public service); (2) a finding of “substantial,” if not above average, past performance by the incumbent would be given decisive weight; and (3) other comparative or designated issues favoring the challenger would be noted, but would not be dispositive “even in conjunction with other factors,” unless pertaining to grievous misconduct by the incumbent.

This usual procedure, we believe, although the Commission nowhere tells us, is essentially what occurred here. The development of Commission policy on comparative renewal hearings has now departed sufficiently from the established law, statutory and judicial precedent, that the Commission’s handling of the facts of this case make embarrassingly clear that the FCC has practically erected a presumption of renewal that is inconsistent with the full hearing requirement of § 309(e).

A. *The Designated Issues.*

[The Court held that remand was necessary to further consider the issues of mail fraud and main studio move.]

B. *Standard Comparative Issues.*

1. *Diversification.*

The effect of the Commission’s reconstruction of the diversification criteria is obvious in its belittling of Central’s advantage there. Because of its lack of other media interests, as contrasted with those of Cowles, Central was found by the ALJ and the Commission to have a “clear advantage” and was consequently accorded a “clear preference.” However, the Commission found that the significance of the “clear preference” was reduced by several factors and that, in the end, the preference was “of little decisional significance.”

We fail to see how a “clear preference” on a matter which the Commission itself has called a “factor of primary significance” can fairly be of “little decisional significance.” We should have thought

the relevance of unconcentrated media *ownership* to the public interest inquiry was well-settled. We said—and rather plainly said—in *Citizens* that:

the Commission simply cannot make a valid public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.

In light of this the Commission itself has stated “whatever policy is developed [in the future] will take into account diversification as a factor that must be considered in a comparative renewal hearing.” Nor, as we have noted, does the Commission in this case purport to disregard the diversification factor. It merely found the applicants’ clear difference uninteresting as there was no showing “that the dangers of concentration . . . exist in this case.”¹⁶

Apart from the obvious unfairness of placing this novel burden on Central without fair notice, the question arises whether this has not seriously undercut the utility of the diversification criterion. The brief answer must be that it has.

There is *some* support for the relevance of the factors on which the Commission relied. The *1965 Policy Statement* did say that related media interests within the service area were usually *more* important than more distant interests. It did not nearly say that interests outside the service area were unimportant. In fact, the fairer inference, and the one more consistent with other Commission policy, is that related media interests anywhere in the nation are quite material.

More troubling still is the Commission’s reliance on the autonomy which CCI accorded the local management of Cowles. This, in conjunction with the “remoteness” of CCI’s other media interests, led the Commission to conclude that there had been “no adverse effect upon the flow of information to those persons in WESH-TV’s service area.” Further:

We can find no evidence in the record that the dangers of concentration, which we have characterized as any national or other uniform expression of political, economic, or social opinion, exist in this case.

The theory that management autonomy may satisfy the function of diversification was wholly novel when presented to this court in

16. 62 F.C.C.2d at 957. In setting aside the Commission’s disposition of the diversification issue, we have taken the Commission’s assumption as our own that the matter is relevant to a comparative renewal inquiry. See 62 F.C.C.2d at 956-57; 60 F.C.C.2d at 422; . . . cf. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 803, 98 S.Ct. at

2116. We thus confine our objections to the *manner* in which the Commission analyzed the concededly relevant factor, not intending to prescribe the weight which the Commission generally should accord media concentration in the context of comparative renewal hearings. See *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 803, 807, 98 S.Ct. at 2116, 2118.

Fidelity Television, Inc., v. FCC. There we were faced with a “nothing” applicant “who offers little more and is likely in fact to provide somewhat less than the incumbent.” We held that the FCC had not acted unlawfully in finding that local autonomy met the objectives of diversification “sufficiently to withstand the competition of a ‘nothing’ competitor.” Whether it would have been more appropriate in *Fidelity* to concede the challenger’s advantage under diversification but to conclude that that need not carry the day, is not now before us.

In any case we are reluctant to expand the relevance of local autonomy much beyond the facts of *Fidelity* for two reasons. First, the prospect of inquiry into the content of programming as would be entailed in defining “uniform expression” raises serious First Amendment questions. Indeed, the Commission was sensitive to the threat of just such intrusions when it declined to employ quantitative program standards in comparative renewal hearings. Second, to require a showing of the “dangers of concentration” in each case would remove the customary presumption on which the structural approach to increasing ownership diversification has rested. Given the likely difficulties of proof in such matters, widespread reliance on the autonomy excuse would effectively repeal the diversification criterion.

Summarizing, we conclude that inasmuch as the Commission correctly found that Central’s advantage was “clear,” it was unreasonable then to accord the diversification finding “little decisional significance.” On remand, it will be appropriate for the Commission to reconsider its conclusions in light of the following: (1) the conceded relevance of diversification of media ownership in the comparative renewal context; (2) the materiality of related media interests *anywhere in the nation*; and (3) the evident hazards of relying on local management autonomy as a surrogate for diversification of media ownership.

2. *Best Practicable Service.*

Whatever weight the Commission may have given to Central’s advantages under the integration and minority participation criteria, it was not enough to “outweigh” Cowles’ unexceptional record. This puzzling result appears more bizarre as it is thought about. First we note there was no direct inquiry into whether Central’s proposed service would be “superior” or even just “substantial.” The Commission rejected that question as too speculative, preferring to rely on those structural characteristics identified in the 1965 statement. These it supposed were less susceptible of puffery than representations concerning future programming. That is probably correct. The fly in the analysis is that the Commission judges incumbents largely on the basis of their broadcast record, to which there will be nothing comparable on the side of a challenger in any case. The “comparison” thus necessarily ends up rather confused.

For at the end of a hearing the Commission is left on the one hand with a series of comparative findings pertaining to integration, etc., and on the other hand with a wholly incommensurable and noncomparative finding about the incumbent's past performance. Of course the incumbent's past performance is some evidence, and perhaps the best evidence, of what its future performance would be. But findings on integration and minority participation are evidence as well, and are both *the only evidence comparing the applicants and also the only evidence whatsoever pertaining to the challenger.*

In a comparative inquiry evidence of past performance is ordinarily relevant only insofar as it predicts whether future performance will be better or worse than that of competing applicants. The Commission nowhere articulated how Cowles' unexceptional, if solid, past performance supported a finding that its future service would be better than Central's. In fact, as we have noted, *Central prevailed on each of the questions supposedly predicting which applicant would better perform*—the same criteria the Commission uses for this purpose in nonrenewal comparative hearings. It is plain then that this record will not support a finding that Cowles would give the best practicable service.

In light of this we leave to conjecture what leap of faith would be required to find that Cowles prevailed in the overall inquiry. On remand, the Commission will have to reconsider its manner of deriving a preference under the best practicable service criterion, and if appropriate, how such a preference should be balanced against other factors in the more general public interest inquiry. To avoid, if possible, further appeal in this case, we address ourselves to more specific objections to the disposition of the best practicable service question.

a. *Integration*

We confess we were unable to make sense of the Commission's treatment of the integration issue, though we will reconstruct its language. The ALJ found that Central's integration proposals were "very weak." The Commission agreed, although it found Central's showing "somewhat stronger than that of Cowles." The Commission then noted that the ALJ's findings should be amended in light of this court's intervening *TV-9* decision; it thus gave Central a "merit" for its proposed black participation. Pre-figuring the outcome, the Commission said that the "merit" and the "slight preference" (for integration) were insufficient to outweigh the factors in Cowles' favor under the best practicable service criterion. Oddly, four paragraphs later the Commission rethought the integration matter and decided that "neither is entitled to a preference"—not even a slight one—though Central was entitled to a "merit." Odder still, this "merit" (distinct from the *TV-9* merit) is never heard of again.

More troubling is the manner by which Central's integration "preference" became a "merit." In a way wholly analogous to the diversification question, the Commission replaced the customary integration criterion (under which Cowles fared miserably, being absentee-owned by CCI) with a functional inquiry into whether management autonomy had been an adequate surrogate for owner-management. Unsurprisingly, the Commission concluded that on this record it had. This permitted it to conclude "that the integration proposals of both applicants are substantially similar." Mildly put, this finding is incredible if anything remains of the customary integration criterion.

This further repeal of the 1965 standards again derives some support from our opinion in *Fidelity*. Like the reconstructed diversification analysis, the notion of functional integration was novel when presented in that case, and we have already recounted the special circumstances presented there. It may well have seemed, recalling the court's characterization of *Fidelity* as a "nothing" applicant, that the modifications of the 1965 criteria left the substance of the comparative hearing unimpaired. On the facts of this case, the same cannot be said. The Commission's treatment of the integration criterion, in light of its treatment of diversification and Cowles' past performance, has denied Central the substance of its right to a full hearing, and is *ipso facto* unreasonable. The Commission may not, comfortably with the hearing mandate of § 309(e), practically abandon the 1965 criteria without providing an alternate scheme affording a thorough and intelligible comparison. On remand, the Commission will have occasion to reconsider its findings on the integration issue.

b. *Cowles' Past Performance*

For anyone who remained hopeful that Central's now-shrunken advantages would carry the day, the treatment of Cowles' past performance was plainly the *coup de grace*. The Commission recharacterized as "superior" the record which the ALJ had found "thoroughly acceptable." Evidently, the Commission felt that a recitation of the idiom in *Citizens* would permit it to recognize Cowles' "renewal expectancy." If that were correct, we might be more inclined to resist the Commission's characterization.¹⁷ However, a finding of

17. Chairman Wiley was similarly skeptical about the "superiority" of Cowles' performance. Dissenting from the Commission's first order, 60 F.C.C. 2d at 430, the Chairman concluded that Cowles' "thoroughly acceptable" performance was "insufficient to offset [its] disadvantage under the other comparative criteria." *Id.* at 431. Then in light of the Commission's subsequent opinion, Chairman Wiley

concurred in the renewal, predicated now on a more modest characterization of Cowles' performance:

In its original opinion, the majority adopted the requirement of "superior service" as set forth in dictum in *Citizens Communication Center v. FCC*. I dissented to this determination on the grounds that WESH-TV's service, while "thoroughly adequate" so as to justify

“superior” service is not an end to the inquiry; it is rather, as we stated in *Citizens*, a “plus of major significance” to be factored into the comparative analysis. In its reconsideration, the Commission resisted general use of the word “superior” preferring the word “substantial” to describe records such as Cowles’. This the Commission felt would not “convey the impression that . . . past programming was exceptional when compared to other broadcast stations in service area or elsewhere.” If by this the Commission means either (1) that “substantial” service will justify renewal *more or less* without regard to comparative issues; or (2) that “substantial” performance which is not above the average is entitled to “a plus of major significance,” it is plainly mistaken. We emphasize that lawful renewal expectancies are confined to the likelihood that an incumbent will prevail in a fully comparative inquiry. “Superior” or above average past performance is, of course, highly relevant to the comparison, and might be expected to prevail absent some clear and strong showing by the challenger under the comparative factor (either affirmative bearing on the challenger’s projected program performance, or negative regarding the incumbent’s media ties or perhaps discovered character deficiencies) or other designated issues. But we do not see how performance that is merely average, whether “solid” or not, can warrant renewal or, in fact, be of special relevance without some finding that the challenger’s performance would likely be no more satisfactory.¹⁸

On remand, the Commission will have occasion to reconsider its characterization of Cowles’ past performance and to articulate clearly the manner in which its findings are integrated into the comparative analysis.

IV. CONCLUSION

We remand this case in light of our abiding conviction that the Commission’s order is unsupported by the record and the prior law

renewal under any rational renewal system, was simply not “superior.” On reconsideration, the majority now articulates the required standard of service as “solid and favorable” (as opposed to superior in terms of exceptional or of the highest possible level).

As indicated, *I did not—and do not now—find Cowles’ service to be superior (in the sense of exceptional)*. However, *I did—and do now—find that service to be sufficiently substantial (in the sense of solid and favorable) to warrant renewal*. Accordingly, given the majority’s clarification of intent, *I find myself able to concur in this matter*.
 (62 F.C.C.2d at 958–59 (emphasis added)). Although the Commission majority in its clarification, did not ex-

pressly find that Cowles’ performance was *not* superior, it did decline to find that it *was superior in the sense of being exceptional*. 62 F.C.C.2d at 956. It being conceded that Cowles’ record was not exceptional, we have no quarrel with the Commission’s assessment, which is amply supported. See 60 F.C.C.2d at 421.

18. This case does not raise the question whether, between equally qualified applicants, the renewal applicant lawfully may be preferred on the basis of a renewal expectancy. E. g., *Fidelity Television, Inc. v. FCC*, 169 U.S. App.D.C. at 243, 515 F.2d at 702. We contemplate that such instances of equipoise will be exceedingly rare if the Commission seriously undertakes a full comparison.

on which it purported to rely. We are especially troubled by the possibility that settled principles of administrative practice may be ignored because of the Commission's insecurity or unhappiness with the substance of the regulatory regime it is charged to enforce. Nothing would be more demoralizing or unsettling of expectations than for drifting administrative adjudications quietly to erode the statutory mandate of the Commission and judicial precedent.

On Petition for Rehearing

PER CURIAM.

The FCC and intervenors in this matter seek a rehearing, complaining *inter alia* that our opinion disregards the "legitimate renewal expectancies implicit in the structure of the [Communications] Act." In light of the ambiguity of the phrase "renewal expectancies" and the frequency with which they are asserted to insulate an incumbent from license challenge, we think some clarification is called for, both generally and insofar as such an expectation may have been undercut in this case.

The content of the comparative proceeding at issue was governed by the Commission's 1965 Policy Statement; however, the weight to be given findings under the various criteria was, as in all *renewal* proceedings, dependent upon the particular facts of the case. The Commission renewed the incumbent's license after a hearing. It summarized as follows its rationale for doing so:

Our conclusions in this regard do not mean—or suggest—that a challenger is denied an opportunity to show that a grant of his application will better serve the public interest. They do mean that a challenger is in a less favorable position, however, because he asks the Commission to speculate whether his untested proposal is *likely* to be superior to that of an incumbent. The Commission—and the Court—have consistently recognized that a record of past programming performance is the very best indication of future performance. It is for this reason that we make clear that a substantial performance—i. e. sound, favorable—is entitled to legitimate renewal expectancies. Under the circumstances here, this consideration is decisive. Central's preference under the diversification criterion is of little decisional significance and Central is entitled to no preference under the integration criterion. These factors, even considering Cowles' slight demerit for the studio move and Central's merit for the Black ownership it proposes definitely do not outweigh the substantial service Cowles rendered to the public during the last license period.

We set aside the renewal. Our principal reason for doing so was that the Commission's manner of "balancing" its findings was wholly unintelligible, based it was said, on "administrative 'feel.'" Admittedly, licensing in the public interest entails a good many discretionary choices, but even if some of them rest inescapably on agency intuition (not a comfortable idea), we may at least insist that they do not contradict whatever rules for choosing do exist. We think it plain that the Commission violated the rules. In our opinion we observed:

the Commission purported to be conducting a full hearing whose content is governed by the 1965 *Policy Statement*. It found favorably to Central on each of diversification, integration, and minority participation, and adversely to Cowles on the studio move question. Then simply on the basis of [a] wholly noncomparative assessment of Cowles' past performance as "substantial," the Commission confirmed Cowles' "renewal expectancy."

The dispositive question is, of course, the relevance of the incumbent's past performance. We thought it relevant "only insofar as it predicts whether future performance will be better or worse than that of competing applicants." From much of the Commission's language (apart from its holding), it appeared to agree. We understand, of course, that it does not. If we were correct, the Commission's decision cannot stand, for as we noted:

Of course the incumbent's past performance is some evidence, and perhaps the best evidence, of what its future performance would be. But findings on integration and minority participation are evidence as well, and are both *the only evidence comparing the applicants and also the only evidence whatsoever pertaining to the challenger*.

. . . The Commission nowhere articulated how Cowles' unexceptional, if solid, past performance supported a finding that its future service would be better than Central's. In fact, as we have noted, *Central prevailed on each of the questions supposedly predicting which applicant would better perform*—the same criteria the Commission uses for this purpose in non-renewal comparative hearings. It is plain then that this record will not support a finding that Cowles would give the best practical service.

However, there is the possibility that an incumbent's meritorious record had literally untold significance. *If it were given enough weight* (entirely apart from predicting the future), as, for example, to assure industry stability, *the incumbent could conceivably prevail even were the challenger otherwise thought the better applicant*. There are probably many policies, more or less inferable from the "public interest" which might be balanced together with the predicted

quality of programming.¹⁹ We understand the Commission, in pressing renewal expectancies, to be concerned with disincentive effects of uncertainty. It argues in its petition for rehearing:

Moreover, under the panel's ruling, substantially-performing incumbents are deprived of the "renewal expectancies" which this Court in *Greater Boston* viewed as "ordinary", "legitimate", and "implicit in the structure of the Act." As the Court there explained, "such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security." Pursuant to these expectancies a "substantial" or "meritorious" past record is a relevant factor to be weighed in the incumbent's favor. In this sense, a "meritorious" past record deserves appropriate weight in the overall "public interest" determination, irrespective of the predictive value of past performance and, contrary to the panel's view (slip op. at 37, 190 U.S.App.D.C. at —, — F.2d at —), irrespective of any finding concerning the challenger's likely future performance.

This, we admit, appears at least a plausible construction of the "public interest."

The trouble is, apart from several unenlightening recitals that there are expectations implicit in the Act, *there were few intimations that this was the Commission's inchoate rationale.*²⁰ Of course, even had we guessed, we could not have sustained the Commission by further speculating about the weight constructively given the incumbent's past performance.²¹ Nor may we review a rationale presented for the first time in this court. *The place for a new rationale in this case, if one is to be logically developed, is on remand.* Moreover, if through rule-making or adjudication the Commission decides to accord weight to such non-comparative values as industry stability, it will have to do so in a manner that is susceptible of judicial re-

19. Diffusion of media ownership is in some sense such a policy.

20. See, e. g., 60 F.C.C.2d at 422; 62 F.C.C.2d at 958. The FCC also suggests in its Petition for Rehearing, at 6, that our opinion precludes it from taking account of the natural "credibility" of even an "average incumbent's" proposals derived from the "common sense logic that substantial past performance is the most dependable indicator of substantial future performance." This is incorrect. We said "we do not see how performance that is merely average, whether 'solid'

or not, can warrant renewal or, in fact, be of especial relevance without some finding that the challenger's performance would likely be no more satisfactory." Slip op. at 37, 190 U.S. App.D.C. at —, — F.2d at —. We plainly contemplated that the Commission would consider the likelihood of applicants effecting their proposals, as would be only sensible.

21. Thus, conclusory references to the need for industry stability are hardly a substitute for the statutorily mandated and particularized balancing.

view.²² This would seem to require that the Commission describe with at least rough clarity how it takes into account past performance, and how that factor is balanced alongside its findings under the comparative criteria. Although mathematical precision is, of course, impossible, something more than the Commission's customary recitals, "completely opaque to judicial review," must be provided. The choice of procedures through which an intelligible analysis could be composed is, as we have said, for the Commission.

Since the FCC petition for rehearing displayed a certain agitated concern that our decision in this case would destroy legitimate renewal expectancies of licensees, with baleful commercial consequences and harm to the general public, we thought it relevant to inquire of the Commission as to just how strong those renewal expectancies have been in the past, based on the action actually taken by the Commission and reviewing court.

The history of comparative renewal proceedings since 1 January 1961 (the date from which the data was requested) discloses that incumbents rarely have lost, and then only because they were disqualified on some non-comparative ground. From 1961 to 1978 the Commission has conducted seventeen comparative television license renewal proceedings, seven of which are still pending.²³ In only two cases did the incumbent lose its license,²⁴ and in *neither* of those cases were the comparative criteria the grounds of decision. In one case the incumbent was disqualified because of its fraudulent conduct,²⁵ and in the other the incumbent failed to pursue its renewal application, so the challenger won by default.²⁶

22. We recall that the Commission's license to define the public interest, although broad, is not unbounded. . . . The Communications Act is very clear that "no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C.A. § 301 (1976). The Act's disfavor of vested license rights reflects the need, which has long informed the public interest standard as well, for "diverse and antagonistic sources of information." *Citizens Communications Center v. FCC*, 145 U.S.App.D.C. 32, 44 n.36, 447 F.2d 1201, 1213 n.36 (1971). The point at which a renewal expectation would become an impermissible vested property right is a worrisome question about which we intimate no view.

23. Letter of Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, to George A. Fisher, Clerk, United States Court of

Appeals, District of Columbia Circuit, 11 December 1978.

24. This does not include the much-publicized case of WHDH-TV, Boston, Massachusetts, which was treated as though it were a comparative proceeding between "new" applicants. See *Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971).

25. *Western Communications, Inc. (KORK-TV), Las Vegas, Nevada*, 59 F.C.C.2d 1441 (1976), reconsideration denied, 61 F.C.C.2d 974, aff'd in part and rev'd and remanded in part sub nom., *Las Vegas Broadcasting Co. v. FCC*, — U.S.App.D.C. — 589 F.2d 594 (1978) (affirming the denial of renewal but reversing the disqualification of the challenger).

26. *Gerico Investment Co.*, 31 F.C.C. 625 (1961).

The story is not much different in radio licensing. No license has been denied on a comparative basis.²⁷

Plainly, incumbents can "expect" in a statistical sense that their license will be renewed. We doubt that any realistic appraisal of the remand in this single case, calling upon the Commission to perform its duty in accord with its own expressed standards, could reasonably create the nervous apprehension among licensees claimed by the Commission. The only legitimate fear which should move licensees is the fear of their own substandard performance, and that would be all to the public good.

NATIONAL BLACK MEDIA COALITION v. FCC, 589 F.2d 578, 44 R.R.2d 547 (D.C.Cir. 1978). In *Standards for Substantial Program Service*, 66 F.C.C.2d 419, 40 R.R.2d 763 (1977), the FCC refused to adopt quantitative standards to judge whether an incumbent licensee, challenged in a comparative renewal proceeding, was providing substantial or superior service. The standards initially proposed included percentages for both prime time and the entire broadcast day for local programming (10–15%), news (5–10%), and public affairs (3–5%). The FCC concluded that "increasing the amount of [local and informational] programming would not necessarily improve the service a station provides its audience." The FCC was concerned that the degree of concreteness achieved would be at the expense of flexibility, and that licensee discretion would be restricted without any guarantee as to quality of performance. The FCC concluded that the quantitative standards would not provide significantly greater certainty as to what constituted substantial performance and that it would still be necessary, in the context of each case, to evaluate the quality of performance of the renewal applicant. On judicial review, the Court of Appeals ruled that the determination was one of policy within the discretion of the Commission, rejecting an argument premised on the First Amendment:

"Petitioners claim that the lack of guidelines violates First Amendment principles because broadcasters are allegedly left to the 'subjective' standards used in the ad hoc comparative renewal proceedings. . . . [However,] the limitation on

27. From 1961 to 1978 there were thirty-one comparative radio renewal proceedings, twelve of which are still pending. No incumbent radio licensee has been displaced on the basis of the comparative criteria. Three licensees were disqualified for misconduct, five other renewal applications were dis-

missed, and the challengers' applications granted. See letters of Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, to George A. Fisher, Clerk, United States Court of Appeals, District of Columbia Circuit, 11 and 13 December 1978.

the broadcasters' discretion that the guidelines would cause would not be balanced by a benefit of certainty or 'objective' standards in the comparative renewal process. . . . [E]ven if the percentage guidelines were adopted, an ad hoc hearing would be required to weigh the effect of other factors in each individual case. In addition, the quantitative guidelines would limit editorial discretion without any guarantee of improved service."²⁸

B. PETITIONS TO DENY

Note on Petitions to Deny. Private parties not seeking to replace an existing broadcaster, and therefore not in a position to file a competitive application at the time of renewal of the broadcaster's license, may seek to have the broadcaster removed by filing a petition to deny the broadcaster's renewal application.

Under 47 U.S.C.A. § 309(d), a "party in interest" may file a petition to deny a renewal application. The term "party in interest" has been broadly construed and includes representatives of the station's audience or any segment thereof. *Office of Communication of United Church of Christ v. FCC*, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966). The petition must "contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [public interest, convenience, and necessity]." "If the Commission finds on the basis of the application, the pleadings filed, or other matters it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with [public interest, convenience, and necessity], it shall make the grant, deny the petition, and issue a concise

28. On comparative renewal proceedings, see Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 *Harv.L.Rev.* 1693 (1969); Goldin, "Spare the Golden Goose"—The Aftermath of WHDH in FCC License Renewal Policy, 83 *Harv.L.Rev.* 1014 (1970); Note, *The FCC and Broadcasting License Renewals: Perspectives on WHDH*, 36 *U.Chi.L.Rev.* 854 (1969); Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity*, 118 *U.Pa.L.Rev.* 368 (1970); Comment, *Implications of Citizens Communications Center v. FCC*, 71 *Colum.L.Rev.* 1500 (1971); Note, *Media Reform Through Comparative License-Renewal Proceedings—The Citizens Case*, 57 *Iowa L.Rev.* 912 (1972); Goldberg, *A Proposal to Deregulate Broadcast Programming*, 42 *Geo.Wash.*

L.Rev. 73 (1973); Kramer, *An Argument for Maintaining the Current FCC Controls*, 42 *Geo.Wash.L.Rev.* 93 (1973); Comment, *FCC License Renewal Policy: The Broadcasting Lobby vs. The Public Interest*, 27 *Sw.L.J.* 325 (1973); Hyde, *FCC Policy and Procedures Relating to Hearings on Broadcast Applications in Which a New Applicant Seeks to Displace a Licensee Seeking Renewal*, 1975 *Duke L.J.* 253; Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 *Va.L.Rev.* 471 (1975); Comment, *Comparing the Incomparable: Towards a Structural Model for FCC Comparative Broadcast License Renewal Hearings*, 43 *U.Chi.L.Rev.* 573 (1976).

statement of reasons for denying the petition” Otherwise, the Commission shall set the application for formal hearing.

These provisions were interpreted in *Stone v. FCC*, 151 U.S.App. D.C. 145, 466 F.2d 316 (1972). The *Evening Star*, licensee of Washington, D.C., television station WMAL-TV, sought renewal of its broadcasting license. Sixteen Washington community leaders filed a petition to deny. The FCC rejected the petition and renewed the broadcast license. The Court of Appeals affirmed.

The petition to deny relied on five grounds:

(1) That WMAL-TV did not adequately survey the black community in its efforts to ascertain the needs of the Washington area. The licensee’s initial survey was admittedly deficient, but the Commission ruled that the licensee had remedied the deficiencies in a subsequent survey. The Court held that the FCC acted properly in considering the second survey, and that the second survey complied in all respects with FCC requirements.

(2) That the licensee had misrepresented facts to the Commission in claiming “close personal association” and “daily and continuing activity” to describe its contacts with black Washington community leaders. On the basis of affidavits, the FCC concluded that the licensee’s contact with community leaders was sufficiently regular to qualify as “continuing” and that the use of the word “daily” did not indicate “contact *daily* with *each* of the community leaders.” The Court held that, while use of some words by the licensee might have been “careless,” it was “well within the discretion of the Commission to decide that there was no intent on the part of the station to deceive.”

(3) That WMAL-TV’s programming did not serve the public interest, specifically in that it did not meet the needs of the Washington black community. The Commission found that the licensee’s programming was within the scope of its discretion in responding to community needs, and that the objections of the community leaders were lacking in specificity. The Court observed: “There was no challenge to the fact that [specific] programs were broadcast. The [community leaders] made the argument before the FCC that this programming was inadequate, and this argument was rejected. We fail to see that a full-scale hearing would have added anything for either the Commission or this court to consider.” The Court also agreed that the program objections were too conclusory and generalized to provide a basis for a hearing.

(4) That WMAL-TV’s employment practices were discriminatory against blacks. The Commission found that there were no allegations of specific instances of refusal of WMAL-TV to

hire on racial grounds, and that the undisputed evidence of numbers of minority employees at WMAL-TV were not so low as to constitute a prima facie showing of a pattern of discrimination. There also were affidavits describing the licensee's minority recruitment and placement efforts. The Court concluded: "In evidence before the FCC was data that approximately 24% of the entire Washington, D.C. metropolitan area is black. WMAI's employment of approximately 7% blacks out of this total metropolitan area is within the zone of reasonableness."²⁹

(5) That common ownership of WMAL-TV and the Evening Star, a Washington daily newspaper, as well as WMAL-TV's ownership of two Washington radio stations, created excessive concentration in the Washington communications media. The Commission observed that there were no allegations of specific abuses resulting from the common ownership, and that the common ownership was consistent with existing regulations (revision of which was being considered in a pending rulemaking proceeding). The Court agreed that the objection did not provide a basis for a hearing. "What [the community leaders] are actually challenging is the wisdom of the Commission's multiple ownership rules. However, . . . the FCC is currently investigating—in the context of a rulemaking proceeding—whether it should adopt rules which would require divestiture by newspapers or other multiple owners in a given market . . . [R]ulemaking proceedings are the most appropriate forum for Commission consideration of basic changes in policy."

In general terms, the Court observed that no hearing is "required to resolve undisputed facts. And, where the facts required to resolve a question are not disputed and the 'disposition of [an appellant's] claims [turn] not on determination of facts but inferences to be drawn from facts already known and the legal conclusions to be drawn from

29. For the Commission's regulations on equal employment opportunities, see 47 C.F.R., § 73.2080 (all broadcast services), 76.311 (cable television). See also NAACP v. FCC, 425 U.S. 662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976).

For recent developments on employment discrimination, see Nondiscrimination in Employment Policies and Practices, 60 F.C.C.2d 226, 37 R.R.2d 1641 (1976), reversed in part, Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977); Black Broadcasting Coalition v. FCC, 556 F.2d 59 (D.C.Cir. 1977); Bilingual Bicultural Coalition v. FCC, 595 F.2d 621, 42 R.R.2d 1523 (D.C.Cir. 1978);

Los Angeles Women's Coalition v. FCC, 584 F.2d 1089 (D.C.Cir. 1978); FCC-EEOC Memorandum of Understanding, 43 R.R.2d 1505 (1978); Annual Employment Report, 45 R.R.2d 15 (1978); Nondiscrimination—CATV Employment Practices, 69 F.C.C.2d 1324 (1978).

See also N. Bowie and J. Whitehead, A Study of the Federal Communication Commission's Equal Employment Opportunity Regulations—An Agency in Search of a Standard (Citizens Communication Center 1976); Note, Use of Petitions by Minority Groups to Deny Broadcast License Renewals, 1978 Duke L.J. 271.

those facts,' the Commission need not hold a hearing. Finally, a hearing is not required to resolve issues which the Commission finds are either not 'substantial' or 'material,' regardless of whether or not the facts involved are in dispute."³⁰

30. On the renewal process generally, see Cox and Johnson, *Broadcasting in America and the FCC's License Renewal Policy: An Oklahoma Case Study*, 14 *F.C.C.2d* 1 (1968); Abel, Clift and Weiss, *Station License Revocations and Denials of Renewal, 1934-1969*, 14 *J.Broad.* 411 (1970); Shelby, *Short-Term License Renewals: 1960-1972*, 18 *J.Broad.* 277 (1974).

On the significance of citizen groups and the role of petitions to deny, see Pember, *The Broadcaster and the Public In-*

terest: A Proposal to Replace an Unfaithful Servant, 4 *Loy. of L.A.L.Rev.* 83 (1971); Padden, *The Emerging Role of Citizens Groups in Broadcast Regulation*, 25 *Fed.Comm.Bar.J.* 82 (1972); Note, *Judicial Review of FCC Program Diversity Regulation*, 75 *Colum. L.Rev.* 401 (1975); D. L. Guimary, *Citizens' Groups and Broadcasting* (1975); J. Grundfest, *Citizen Participation in Broadcast Licensing Before the FCC* (Rand Corp. 1976); Note, *Petitioning to Deny Broadcast License Renewals*, 16 *Washburn L.J.* 375 (1977).

Chapter IV

CONCENTRATION OF CONTROL OF MASS MEDIA ¹

A. CONTROL OF MEDIA WITHIN A SINGLE MARKET

Note on FCC Limitations on Commonly Owned Stations With Overlapping Service Areas. Restrictions on "duopoly," or overlapping service areas of commonly owned stations, originated in individual licensing proceedings involving AM facilities. Thus, in *Genessee Radio Corp.*, 5 F.C.C. 183 (1938), the owners of the only radio station in Flint, Michigan, applied for a license to operate a second station in Flint. The same individual was to be manager of both stations and the programming format and network affiliations of the two stations were to be the same. However, different staffs and advertising rates were proposed. Flint received service from about six other stations. The Commission denied the application:

" . . . In the present case, there is no showing that the new station would offer a program service better in kind or quality, or more diversified or serving a wider range of interests than that now offered, nor is any basis shown for a future expectancy that this result would be brought about. . . .

" . . . The interests which control the existing broadcast station at Flint and those which would control the proposed station are identical. The managerial policy of the two stations would be the same. The two stations would not be engaged in actual or substantial competition with each other in the rendering of service. Further, to permit the entry into the field of this applicant might well, from an economic standpoint, prevent the future entry into the field by an applicant who would offer a new, different, improved and competitive service. It is not in the public interest to grant the facilities for an additional broadcast station to interests already in control of the operation of a station of the same class in the same community, unless there is a compelling showing upon the whole case that public convenience, interest or necessity would be served thereby.

1. On concentration of control of the media generally, see Johnson and Hoak, *Media Concentration: Some Observations on the United States Experience*, 56 Iowa L.Rev. 267 (1970); Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 Fed.Com. B. 1 (1974); Note, *Diversity Ownership in Broadcasting: Affirmative Policy in Search of an Author*, 27 U.

Fla.L.Rev. 502 (1975); W. S. Baer et al., *Concentration of Mass Media Ownership: Assessing the State of Current Knowledge* (Rand Corp. 1974); A Branscomb, *The First Amendment as a Shield or a Sword: An Integrated Look at Regulation of Multi-Media Ownership* (Rand Corp. 1975). See also authorities cited supra p. 26.

“In order to assure a substantial equality of service to all interests in a community, to assure diversification of service and advancements in quality and effectiveness of service, the Commission will grant duplicate facilities to substantially identical interests only in cases where it overwhelmingly appears that the facility, apart from any benefit to the business interests of the applicant, is for the benefit of the community, fulfilling a need which cannot otherwise be fulfilled.”

In 1940, in its general rules relating to FM, the Commission provided that a proposed station would not be licensed if it would “serve substantially the same service area” as an FM station already owned or controlled by the applicant.² A similar provision was included in the television regulations promulgated in 1941.³ And in 1944, the Commission codified the approach of the *Genessee* case by amending its AM rules to provide that a license generally would not be granted to a station which proposed to render “primary service to a substantial portion of the primary service area of another” AM station already owned or controlled by the applicant.⁴ These prohibitions against duopoly or overlapping service areas were codified in more specific terms in 1964.⁵ In the case of AM broadcasting, for example, it was provided that no license would be granted to a party owning one or more AM stations where the grant would “result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations.”⁶ In connection with the latter amendment, the Commission based its anti-duopoly position on two considerations: “First, in a system of broadcasting based upon free competition, it is more reasonable to assume that stations owned by different people will compete with each other for the same audience and advertisers, than stations under the control of a single person or group. Second, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have ‘an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.’ ”⁷

2. 5 Fed.Reg. 2382, 2384 (1940).

3. 6 Fed.Reg. 2282, 2284 (1941).

4. 8 Fed.Reg. 16,065 (1944).

5. Amendment of Multiple Ownership Rules, 2 R.R.2d 1588, 3 R.R.2d 1554 (1964).

6. 47 C.F.R. § 73.35(a). A similar rule was made applicable to FM stations,

47 C.F.R. § 73.240(a). In the case of television, “overlap of the Grade B contours of the existing and proposed stations” was prohibited. 47 C.F.R. § 73.636(a)(1). In each case, exceptions to the general prohibitions were specified.

7. 2 R.R.2d at 1591-1592.

MULTIPLE OWNERSHIP OF STANDARD, FM AND TV BROADCAST STATIONS

22 F.C.C.2d 306, 18 R.R.2d 1551 (1970), on reconsideration,
28 F.C.C.2d 662, 21 R.R.2d 1551 (1971).

BY THE COMMISSION:

THE COMMISSION'S PROPOSAL

In this proceeding, the Commission proposed to amend the present multiple-ownership rules so as to prohibit the granting of any application for a broadcast license if after the grant the licensee would own, operate, or control two or more full-time broadcast stations within the market. The proposed amended rules would apply to all applications for new stations and for assignment of license or transfer of control except assignment and transfer applications filed pursuant to the provisions of section 1.540(b) or 1.541(b) of the rules (i. e., pro forma or involuntary assignments and transfers) and applications for assignment or transfer to heirs or legatees by will or intestacy. Divestiture, by any licensee, of existing facilities would not be required. The remainder of this section sets the proposal in perspective.

The multiple-ownership rules of the Commission have a twofold objective: (1) Fostering maximum competition in broadcasting, and (2) promoting diversification of programming sources and viewpoints. The rules are essentially the same for the standard, FM, and television broadcast services and, respectively, appear in 47 CFR §§ 73.35, 73.240, and 73.636 (1969). Each of these sections is divided into two parts, the first of which is known as the duopoly rule, and the second of which is often called the concentration of control rule.⁸

While the concentration of control rules aim at attaining the twofold objective nationally and regionally, the duopoly rules are designed to attain it locally and regionally by providing that a license for a broadcast station will not be granted to a party that owns, operates, or controls a station in the same broadcast service a specified contour of which would overlap the same contour of the station proposed to be licensed. (For AM stations the predicted or measured 1-mv./m. groundwave contours must not overlap; for FM, the predicted 1-mv./m. contours; for TV, the predicted grade B contours.) In broader language, the duopoly rules prohibit a party from owning, operating, or controlling more than one station in the same broadcast service in the same area. However, they do not prevent a single party from owning, operating, or controlling more than one station in the same area if each station is in a different service. Hence, a single

8. [Ed.] The concentration of control rule is discussed *infra* at p. 128.

licensee often has a standard, an FM, and a television broadcast station in one community.

The proposal in this proceeding is in essence an extension of the present duopoly rules, since it would proscribe common ownership, operation, or control of more than one unlimited-time broadcast station in the same area, regardless of the type of broadcast service involved.

THE RULES ADOPTED HEREIN

. . . .
 The new rules retain the previous duopoly rules intact, that is, they proscribe common ownership of television stations if the grade B contours overlap, of AM stations if the 1-mv./m. contours overlap, and of FM stations if the 1-mv./m. contours overlap. However, in extending the duopoly rules to proscribe common ownership of stations in different broadcast services in the same area, the standard is different: Common ownership of a TV station and an AM station is prohibited if the grade A contour of the former encompasses the entire community of license of the latter, or if the 2-mv./m. contour of the latter encompasses the entire community of license of the former. The same principle applies to FM stations in relation to TV stations, with the 1-mv./m. contour of the FM station being the criterion. . . . The aforementioned encompassment standard applies whether the stations in question are licensed to serve the same community or different communities.

The new rules are phrased in terms of proscribed overlap, for stations in the same broadcast service (that is, the previously existing duopoly rules), and proscribed encompassment, for stations in different broadcast services; they do not use the term "market." However, since the proposal in the notice used the term and invited comments on how it should be defined, and since the comments therefore use it, the following discussion herein uses it also. When used, of course, it means stations with the proscribed overlap or encompassment.

. . . .
 No divestiture, by any licensee, of existing facilities will be required at this time. The rules will apply to all applications for new stations and for assignment of license or transfer of control except assignment and transfer applications filed pursuant to the provisions of section 1.540(b) or 1.541(b) of the rules (that is, pro forma or involuntary assignments or transfers) or applications for assignment or transfer to heirs or legatees by will or intestacy that would not result in violation (for example, the licensee of an existing full-time station could not, as heir or legatee, be the assignee or transferee of other stations that would be in the same market as the existing station).

THE BASIS AND PURPOSE OF THE RULES

Basic to our form of government is the belief that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (*Associated Press v. United States*, 326 U.S. 1, 20 (1945).)⁹ Thus, our Constitution rests upon the ground that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Justice Holmes dissenting in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

These principles, upon which Judge Learned Hand observed that we had staked our all, are the wellspring, together with a concomitant desire to prevent undue economic concentration, of the Commission's policy of diversifying control of the powerful medium of broadcasting. For, centralization of control over the media of mass communications is, like monopolization of economic power, per se undesirable. The power to control what the public hears and sees over the airwaves matters, whatever the degree of self-restraint which may withhold its arbitrary use.

It is accordingly firmly established that in licensing the use of the radio spectrum for broadcasting, we are to be guided by the sound public policy of placing into many, rather than a few hands, the control of this powerful medium of public communication. ("Amendment of Sections 3.35, etc.," 18 F.C.C. 288 (1953), affirmed *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); 99 U.S.App. D.C. 369, 240 F.2d 55 (1956).) This basic principle, enforceable in ad hoc proceedings or through rulemaking, applies to the judgment of whether an individual application should be granted as well as to the comparison of competing applicants.

It is true that section 315 of the Communications Act, the Commission's Fairness Doctrine, and the Commission's rules relating to personal attacks and station editorials on candidates for public office all contribute substantially toward insuring that, whatever a station's ownership, and the views of the licensee, each station will present conflicting viewpoints on controversial issues. However, this is not enough. For, as was stated in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 89 U.S.App.D.C. 13, 19, 189 F.2d 677, 683 (1951), cert. den. 342 U.S. 830, the key to the question is the pub-

9. This is because "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." (*United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y., 1943) affirmed 326 U.S. 1 (1945).) Thus our rules are not based upon the proposition disputed by Prof. George H.

Litwin, in his study submitted on behalf of the NAB, that common ownership within one medium or of more than one medium results in any particular degree of control of what people think and how they act. [Some footnotes have been omitted; others have been renumbered.]

lic interest in acquiring information from diverse and antagonistic sources, and news communicated to the public is subject to selection and, through selection, to editing, and . . . in addition there may be diversity in methods, manner and emphasis of presentation. This is true not only with respect to news programs, but also the entire range of a station's treatment of programs dealing with public affairs.

As pointed out above, the governing consideration here is power, and power can be realistically tempered on a structural basis. It is therefore no answer to the problem to insist upon a finding of some specific improper conduct or practice. The effects of joint ownership are likely in any event to be so intangible as not to be susceptible of precise definition. The law is clear that specific findings of improper harmful conduct are not a necessary element in Commission action in this area, and that remedial action need not await the feared result.

Application of the principles set forth above dictates that one person should not be licensed to operate more than one broadcast station in the same place, and serving substantially the same public, unless some other relevant public interest consideration is found to outweigh the importance of diversifying control. It is elementary that the number of frequencies available for licensing is limited. In any particular area there may be many voices that would like to be heard, but not all can be licensed. A proper objective is the maximum diversity of ownership that technology permits in each area. We are of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe local social crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated. We see no existing public interest reason for being wedded to our present policy that permits a licensee to acquire more than one station in the same area.

It is true that many communities have multiple broadcast and other communications media. But it is also true that the number of daily newspapers has been decreasing, a fact which increases the significance of the broadcast medium. Material attached to the NAB reply comments shows the number of cities with commercially competing local dailies to be 45 in 1968. In 1962 the figure was 61. In our view, as we have made clear above, there is no optimum degree of diversification, and we do not feel competent to say or hold that any particular number of outlets of expression is enough. We believe that the increased amount of broadcast service now available also forms the basis for the conclusion that, with the exceptions mentioned later herein, it is no longer necessary to permit the licensing of combined

operations in the same market, as was the case in the early days of broadcasting, in order to bring service to the public. It is urged that the Commission not only permitted but encouraged AM licensees to become TV licensees in their own area, and again, later, to acquire FM stations in their area, that it is inequitable now not to permit such common ownership for it robs such owners of the fruits of their risk taking, and that the rules will hinder FM and UHF development. At the time that such encouragement was given to AM licensees, we considered that the objective of encouraging the larger and more effective use of radio was overriding, for TV and FM channels were lying unused. But conditions have changed, and we are obligated to change the priority of our objectives, in the public interest.

It is said that the good profit position of a multiple owner in the same market results in more in-depth informational programs being broadcast and, thus, in more meaningful diversity. We do not doubt that some multiple owners may have a greater capacity to so program, but the record does not demonstrate that they generally do so. The citations and honors for exceptional programming appear to be continually awarded to a very few licensees—perhaps a dozen or so multiple owners out of a total of hundreds of such owners. Although multiple owners may have more funds for experimental programming and innovation, there has been no showing that the funds are spent for these purposes. However, accepting *arguendo* that some multiple licensees do a better programming job in this respect than do single station licensees, we are not reducing the holdings of multiple licensees.

Finally, the argument is made that rules prohibiting a present owner of a single full-time station in a community from obtaining additional stations there would be illegally discriminatory because they would prevent him from competing effectively with combination owners in the area and would make a privileged class out of combination owners. Therefore, it is argued, if the rules are adopted, divestiture should be required. The decision to refuse to permit additional local concentration in the future does not necessarily require that existing situations all be uprooted. On an overall basis, there has been no showing that single stations cannot compete effectively with combination owners. . . . Individual cases can of course always be dealt with where necessary to preserve adequate competition. But a line must be drawn somewhere, and the application of new policy to new applications is a clearly reasonable approach.

Although the principal purpose of the proposed rules is to promote diversity of viewpoints in the same area, and it is on this ground that our above discussion is primarily based, we think it clear that promoting diversity of ownership also promotes competition. A number of comments were made with respect to the competitive advantage that licensees of co-owned stations have over the single station licensee in the same area. Thus, the Department of Justice points out that

AM, FM, and TV are for many purposes sufficiently interchangeable to be directly competitive, and that competitive considerations support adoption of the rules. It mentions that one effect of combined ownership of broadcast media in the same market is to lessen the degree of competition for advertising among the alternative media. Another, it is averred, is that a combined owner may use practices which exploit his advantage over the single station owner. These practices may include special discounts for advertisers using more than one medium, or cumulative volume discounts covering advertising placed on more than one medium. . . .

Opponents of the proposed rules state that there is no hard evidence that multiple licensees generally engage in practices of this kind. CBS says that the argument about such practices provides no justification for the rules for the Commission long ago addressed itself to the matter (Combination Advertising Rates, 24 Pike & Fischer, R.R. 930 (1963)),¹⁰ and there is no significant problem in this area. A study commissioned by WGN and others purports to find no statistical evidence that revenue yields for multiple owners are significantly different from yields of single-station owners (using revenue per thousand audience as an indication of superiority). However, we note that it does show significantly higher revenue yields for multiply owned radio stations, particularly in their national spot business, which appears to hold true in all sizes of markets (at pp. 17-20 of the study).

NBC, in its reply comments (directed against the Justice comments), argues that the market shares of the largest owners in the larger markets are well below the points which are generally considered danger points by antitrust standards. The basic data on market shares which it presents, in spite of the conclusion of NBC, do show high concentration in some markets. For example, in Washington, D.C., if the market is considered to be only the broadcast media, the top three owners have a 64-percent market share; if the market is considered to be broadcast and newspaper media, the top two owners have a 68-percent share. In any event, we find that distributing ownership more broadly will strengthen competition by removing the potential of competitive advantage over single station owners. There is no need to find specific abuses in order to provide a healthier competitive environment of benefit to smaller licensees.

DISCUSSION OF THE RULES

STATIONS IN THE SAME "MARKET"

. . . Under the new rules, as under the previous duopoly rules, increases in overlap of specified contours between commonly owned

10. [Ed.] For a more recent treatment, see *Combination Advertising Rates*, 51 F.C.C.2d 679, 32 R.R.2d 1527 (1975).

on reconsideration, 59 F.C.C.2d 894, 37 R.R.2d 785 (1976).

stations in the same broadcast service are proscribed. Thus, for example, an application to increase power of one of two commonly owned AM stations with overlapping 1-mv./m. contours would be prohibited since this would result in increased overlap. However, for commonly owned stations in different broadcast services the standard is not one of contour overlap but, rather, one of community encompassment—a standard aimed at preventing a single owner from bringing more than one primary service to a community of license. Hence the method of treating major changes will be different. The new rules are silent on the point, but we here announce that if proscribed encompassment already exists and if after grant of an application for major change it would still exist, the rules will not bar the grant.

CHARACTERISTICS OF DIFFERENT "MARKETS"

A widely held view of opponents is that the proposed rules are too sweeping and not tailored to the specific requirements of particular situations. It is said that all markets are not alike and that the rules should treat different markets differently. Some urge that large markets should be exempted because of the great number of independently owned mass media serving them. Others urge exemption for small markets because viability there often depends on having combined operations, and point to the fact that the Commission recognized financial difficulties in smaller markets when it exempted them from the AM-FM duplication rules. Still others proposed that if a market has a specified number of "voices," it be exempted on the ground that it presumptively has an adequate amount of diversity so that the rules are not needed. And some suggest that weights or points be given for various types of media and that a single owner be permitted to have only a specified number of points in a market.

We agree with those who say that rules should be reasonably related to the ends sought, and believe that the rules adopted herein are. They represent a particularization of our conception of the public interest (*National Broadcasting Co.*, [319 U.S. 190,] at 218), and deal with a recurring problem which we believe is best dealt with by general rules. Though they are general in nature, they take into account the precarious positions of many existing FM stations, . . . peculiar problems of satellite television stations, the policy of fostering UHF development, and other matters.

COMPARABILITY OF AM, FM, AND TV

Opponents of the proposal aver that the three services are not comparable and therefore that the rules are inapt since the different services have different audiences in kind and size and eliminating common ownership in the same market does not mean that individual members of the public will receive more voices.

What opponents appear to be saying is that if, for example, one owner has three stations in the same market and each serves the same audience, then if the stations were sold and became separately owned that audience would be exposed to three voices instead of one and diversity of viewpoints would have been promoted. However, according to their argument, if each of the stations serves a different audience, and they say each would, then having three separate owners instead of one merely means that although each audience would be exposed to a different voice, it would still be just one voice, and the listeners would have no increased diversity.

The rules are designed to prevent any possible undue influence on local public opinion by relatively few persons or groups. They can do this by either bringing more voices to the same audience, or by assuring that no one person or entity transmits its single voice to each of three audiences. Assuming separate audiences for each of the three services, a commonly owned AM-FM-TV combination sends a single voice to the sum of all three audiences which might well constitute most of the community. With three separate owners, no one person or entity could so reach the entire community. Each would reach a part of it and this would act to reduce possible undue influence. Insofar as there is overlap of audiences of the three services, separate ownership, of course, would bring more voices to the overlapping audiences. Such overlap may be substantial.

. . . UHF DEVELOPMENT

Some parties urge that the rules would be contrary to the policy of fostering UHF development, since often the local AM licensee might be the only one willing to undertake to build a UHF station, so that may be the only way that UHF may develop in many communities.

. . .

We find the arguments of opponents persuasive. Surely independent UHF stations still need all the support they can receive. Although AM stations have shown little inclination in the past to build or acquire such UHF stations, combinations of UHF with AM stations, or, should the occasion arise, with FM stations or with AM-FM combinations, will be dealt with on an ad hoc basis, as indicated in note 7 to the revised section 73.636.

. . .

MISCELLANEOUS MATTERS

Television satellite stations are handled on a case-by-case basis under the present duopoly rules because of special problems pertaining to them (see "Multiple Ownership" (docket No. 14711), 29 F.R. 7535, 7539 (1964)). This practice, for the same reasons, is carried over into the new rules.

MINORITY CROSS-INTERESTS

ABC, Auburn, and GEBCO state that since the notice did not mention minority cross-interests, they assume that the present proceeding is not directed at broadening the duopoly rules to embrace such interests, and that if the Commission decides to take such a step they will be given an opportunity to comment pursuant to provisions of the Administrative Procedure Act. We agree that the notice did not refer to minority cross-interests, and the rules we adopt today contain no new language thereon.¹¹ Inasmuch as the new rules are an extension of the present duopoly rules, we are announcing that the rulings that we have made in the past on minority cross-interests in duopoly cases will be carried over and applied to cases involving such interests under the new rules.¹²

The subject of minority cross-interests, involving, for example, less than complete cross-ownership, interlocking directorates, partial ownership in one station and employment by another, and other matters, is in need of reexamination and we intend to give it consideration which may lead to actions looking toward the issuance of interpretative or other regulations.¹³

ON RECONSIDERATION:

AM and FM stations. . . . Among other things, opponents of the proposed rules urged that they would hinder FM development, that in many communities independent FM operation is not viable, that FM channels would lie fallow as the result of the rules, and that in selling AM-FM combinations often there would be no buyer for the FM station separately and the result would be that the FM station would go off the air. It was also urged that the AM-FM non-duplication rule recognized that AM-FM combinations in small markets are

11. By a report and order in docket No. 15627 ("Multiple Ownership of AM, FM, and TV Stations," 13 F.C.C.2d 357 (1968)) amendments to the multiple-ownership rules were adopted. . . . Although not going into the question of minority cross-ownership interests in detail, new note 2 of the rules as amended therein states that partial as well as total ownership interests in corporate broadcast licensees are considered in administering the duopoly rules.

12. See conditions applied against cross-interests in two overlapping television stations, WECT-TV, Wilmington, N.

C., public notice of Jan. 13, 1966, mimeograph No. 78695. Roy H. Park, who held control of one of two overlapping stations, WNCT-TV, Greenville, N. C., and also a minority stock interest in WECT-TV, Wilmington, N. C. (the second overlapping station), was precluded from holding an office in or participating in the management of WECT-TV.

13. [Ed.] Concurring and dissenting opinions have been omitted, as have those portions of the FCC's opinion which were revised on reconsideration.

not in a position to program even 50% separately, yet the proposed rules would not only require 100% separate programming, but separate ownership as well.

Supporters of the proposal, on the other hand, argued that the effect of combined ownership in the same market is to lessen diversity of news and information sources available and to reduce the degree of competition for advertising, that separate ownership would require 100% separate programming with consequent greater diversity, that common ownership results in similar views being broadcast on commonly owned stations, and that common ownership of AM and FM stations restricts FM development.

In arriving at our decision concerning AM and FM stations, we acknowledged the fact that in most cases existing AM-FM combinations in the same area may be economically and/or technically interdependent, and that financial data submitted to the Commission by independent FM stations indicated that they are generally losing money. We therefore adopted rules permitting the assignment or transfer of combined AM-FM stations to a single party if a showing was made that established the interdependence of such stations and the impracticability of selling and operating them as separate stations. In so doing, we observed that although this would not foster our objective of increasing diversity, it would prevent the possible closing down of many FM stations, which could only decrease diversity.

Although the rules did not require the breaking up of AM-FM combinations and made the aforementioned provisions for the sale of existing AM-FM combinations, they proscribed the formation of new combinations on the ground that there is no shortage of aural service. . . .

The matter of common ownership of AM and FM stations in the same market is raised again in the petitions for reconsideration. Having consequently reviewed the subject once more, we are now of the opinion that although it is a close question, it is the better course to delete the rules pertaining thereto. Hence, there will be no rule barring the formation of new AM-FM combinations. And there will be no requirement of a special showing on the sale of such combinations. In other words, applications involving such matters will be treated in the same fashion as before the institution of this proceeding. The so-called one-to-a-market rules will thus apply only to combinations of VHF television stations with aural stations in the same market.¹⁴ . . .

14. Until early 1977, the FCC's regulations permitted FM stations to duplicate the programs of commonly owned AM stations, subject to a limit of 50 percent in cities of over 100,000.

Thereafter the restriction was made more stringent, and by May 1, 1979, the rule was that, where AM and FM stations were owned by the same licensee and served the same area, if

[In all other respects the FCC denied petitions for reconsideration, with separate concurrences and partial dissents.]

Note on Proposals to Restrict Common Ownership of Broadcasting and Publishing Businesses. Following intimations in several licensing cases that applicants not associated with newspaper publishers would be preferred over applicants affiliated with newspapers,¹⁵ the Commission in 1941 instituted an "investigation to determine what statement of policy or rules, if any, should be issued concerning applications for [FM stations] with which are associated persons also associated with the publication of one or more newspapers [and also] concerning future acquisition of standard broadcast stations by newspapers."¹⁶ In a further notice, the Commission broadened the scope of its inquiry to consider the relation between newspapers and radio broadcasting generally.¹⁷

In conjunction with this investigation, the Commission issued a subpoena to obtain the testimony of a publisher; the publisher refused to comply, insisting that the Commission's investigation was unauthorized. In *Stahlman v. FCC*,¹⁸ the validity of the investigation and of the subpoena was upheld. But the court observed: "If in this case it had been made to appear . . . that the Commission's investigation was solely for the purpose of the consideration or adoption of a hard and fast rule or policy, as the result of which newspaper owners may be placed in a proscribed class and thus made ineligible to apply for or receive broadcast licenses, we should be obliged to declare that such an investigation would be wholly outside of and beyond any of the powers with which the Congress has clothed the Commission. For . . . there is nothing in the Act which either prevents or prejudices the right of a newspaper, as such, to apply for and receive a license to operate a radio broadcast station." However, the court did not consider that the investigation was limited to such an improper purpose. The Commission eventually discontinued the investigation without formulating any rules, adverting to

"either the AM or FM station is licensed to a community of over 25,000 population, the FM station shall not operate so as to devote more than 25 percent of the average program week to duplicated programming." Duplication was defined as "simultaneous broadcasting of a particular program over both the AM and FM stations or the broadcast of a particular program by one station within 24 hours before or after the identical program is broadcast over the other station." 47 C.F.R. § 73.242.

15. Stephenson, Edge & Korsmeyer, 8 F.C.C. 497 (1941); Stevens and Stevens, 5 F.C.C. 177 (1938); cf. United States Broadcasting Co., 2 F.C.C. 208, 240 (1936) (dissenting opinion).

16. High Frequency Broadcast Stations (FM), 6 Fed.Reg. 1580 (1941).

17. Hearings on Joint Association of Newspapers and Broadcast Stations, 6 Fed.Reg. 3302 (1941).

18. 75 U.S.App.D.C. 176, 126 F.2d 124 (D.C.Cir. 1942).

the "grave legal and policy questions involved."¹⁹ It stated that a license should not be denied "merely because the applicant is engaged or interested in a particular line of business"; but that the Commission would not "permit concentration of control in the hands of the few to the exclusion of the many who may be equally well qualified to render such public service as is required of a licensee."

The Commission's attitude toward newspaper ownership resulted in protests which precipitated Congressional investigations of the Commission's policies. Members of the Commission appeared before Congressional committees at various times in succeeding sessions to assure the legislators that the Commission was not "discriminating" against newspapers. The high-water mark of Congressional criticism occurred in the course of the 1952 amendments to the Communications Act. The House passed an amendment providing:

"The Commission shall not make or promulgate any rule or regulation of substance or procedure, the effect or result of which is to effect a discrimination between persons based upon interest in, association with, or ownership of any medium primarily engaged in the gathering and dissemination of information and that no application for a construction permit or station license, or for the renewal, modification, or transfer of such a permit or license, shall be denied by the Commission solely because of any such interest, association, or ownership."

This provision was omitted from the measure reported by the Conference Committee and ultimately passed by the Congress because it was thought to be "unnecessary." The Committee stated its view "that under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with, a newspaper or other medium for gathering and disseminating information. Also the Commission could not arbitrarily deny any application solely because of any such interest or association."²⁰

Nonetheless, the Commission continued to apply an approach in comparative proceedings which sometimes denied licenses to newspaper applicants on grounds of concentration of mass media while awarding licenses to other newspaper applicants.²¹

MANSFIELD JOURNAL CO. v. FCC, 86 U.S.App.D.C. 102, 180 F.2d 28 (1950). Mansfield Journal, publisher of the only newspaper in Mansfield, Ohio, applied for several radio licenses, not all of which

19. Newspaper Ownership of Radio Stations. 9 Fed.Reg. 702 (1944). 21. See pp. 42-54, *supra*.

20. House Rep.No.2426, 82d Cong., 2d Sess. 18 (1952).

were subject to mutually exclusive applications of others. Previously, in order to increase its newspaper advertising at the expense of an existing Mansfield station, Mansfield Journal had refused to sell newspaper advertising space to firms who advertised over the local station and refused to carry the program log of the station or any favorable comments concerning it. The FCC denied all of Mansfield Journal's applications because it found that the above actions were taken for the purpose of suppressing competition and of securing a monopoly of mass advertising and news dissemination, and that such practices were likely to continue and be reenforced by the acquisition of a radio station. Applicant contended that the FCC's order was unlawful because, *inter alia*, it constituted an *ultra vires* attempt to enforce the antitrust laws. Sustaining the Commission's order, the Court reasoned:

" . . . [W]hether appellant has been guilty of a violation of [the antitrust] laws is not here in issue. The fact that a policy against monopoly has been made the subject of criminal sanction by Congress as to certain activities does not preclude an administrative agency charged with furthering the public interest from holding the general policy of Congress to be applicable to questions arising in the proper discharge of its duties. Whether Mansfield's activities do or do not amount to a positive violation of law, and neither this court nor the Federal Communications Commission is determining that question, they still may impair Mansfield's ability to serve the public. Thus, whether Mansfield's competitive practices were legal or illegal, in the strict sense, is not conclusive here. Monopoly in the mass communication of news and advertising is contrary to the public interest, even if not in terms proscribed by the antitrust laws.

"It may be that appellant is contending that if the Commission's findings of fact were correct, then appellant has violated the antitrust laws, and that in such case the Commission is without jurisdiction to consider these matters. There is no merit in such a contention. It is provided in the Federal Communications Act itself that the Federal Communications Commission may refuse a license to any person who 'has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly . . . or to have been using unfair methods of competition' 47 U.S.C.A. § 311. The Mansfield Journal has not been convicted of any such violation. But the statute does not for that reason place the Journal's past conduct with regard to monopoly and the antitrust laws beyond the consideration of the Commission.

" 22

22. The *Mansfield Journal* case is discussed in 50 *Colum.L.Rev.* 849 (1950); 18 *Geo.Wash.L.Rev.* 430 (1950); 63

Harv.L.Rev. 1274 (1950); 59 *Yale L.J.* 1342 (1950).

**FCC v. NATIONAL CITIZENS COMMITTEE FOR
BROADCASTING**

Supreme Court of the United States, 1978.
436 U.S. 775, 56 L.Ed.2d 697, 98 S.Ct. 2096.

Mr. Justice MARSHALL delivered the opinion of the Court.

At issue in these cases are Federal Communications Commission regulations governing the permissibility of common ownership of a radio or television broadcast station and a daily newspaper located in the same community. Second Report and Order (Docket No. 18110), 50 F.C.C.2d 1046 (1975) (hereinafter cited as Order), as amended upon reconsideration, 53 F.C.C.2d 589 (1975), codified in 47 CFR §§ 73.35, 73.240, 73.636 (1976). The regulations, adopted after a lengthy rulemaking proceeding, prospectively bar formation or transfer of co-located newspaper-broadcast combinations. Existing combinations are generally permitted to continue in operation. However, in communities in which there is common ownership of the only daily newspaper and the only broadcast station, or (where there is more than one broadcast station) of the only daily newspaper and the only television station, divestiture of either the newspaper or the broadcast station is required within five years, unless grounds for waiver are demonstrated.

The questions for decision are whether these regulations either exceed the Commission's authority under the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C.A. § 151 et seq., or violate the First or Fifth Amendment rights of newspaper owners; and whether the lines drawn by the Commission between new and existing newspaper-broadcast combinations, and between existing combinations subject to divestiture and those allowed to continue in operation, are arbitrary or capricious within the meaning of § 10(e) of the Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A). For the reasons set forth below, we sustain the regulations in their entirety.

I

A

[In general,] “[d]iversification of control of the media of mass communications” has been viewed by the Commission as “a factor of primary significance” in determining who, among competing applicants in a comparative proceeding, should receive the initial license for a particular broadcast facility. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394–395 (1965) (*italics omitted*). Thus, prior to adoption of the regulations at issue

here, the fact that an applicant for an initial license published a newspaper in the community to be served by the broadcast station was taken into account on a case-by-case basis, and resulted in some instances in awards of licenses to competing applicants.

Diversification of ownership has not been the sole consideration thought relevant to the public interest, however. The Commission's other, and sometimes conflicting, goal has been to ensure "the best practicable service to the public." *Id.*, at 394. To achieve this goal, the Commission has weighed factors such as the anticipated contribution of the owner to station operations, the proposed program service, and the past broadcast record of the applicant—in addition to diversification of ownership—in making initial comparative licensing decisions. See *id.*, at 395–400. Moreover, the Commission has given considerable weight to a policy of avoiding undue disruption of existing service. As a result, newspaper owners in many instances have been able to acquire broadcast licenses for stations serving the same communities as their newspapers, and the Commission has repeatedly renewed such licenses on findings that continuation of the service offered by the common owner would serve the public interest. See Order, at 1066–1067, 1074–1075.

B

Against this background, the Commission began the instant rulemaking proceeding in 1970 to consider the need for a more restrictive policy toward newspaper ownership of radio and television broadcast stations. Further Notice of Proposed Rulemaking (Docket No. 18110), 22 F.C.C.2d 339 (1970). Citing studies showing the dominant role of television stations and daily newspapers as sources of local news and other information, *id.*, at 346; see *id.*, at 344–346,²³ the notice of rulemaking proposed adoption of regulations that would eliminate all newspaper-broadcast combinations serving the same market, by prospectively banning formation or transfer of such combinations and requiring dissolution of all existing combinations within five years, *id.*, at 346. The Commission suggested that the proposed regulations would serve "the purpose of promoting competition among the mass media involved, and maximizing diversification of service sources and viewpoints." *Ibid.* At the same time, however, the Commission expressed "substantial concern" about the disruption of service that might result from divestiture of existing combinations. *Id.*, at 348. Comments were invited on all aspects of the proposed rules.

23. The studies generally showed that radio was the third most important source of news, ranking ahead of magazines and other periodicals. See

22 F.C.C.2d, at 345. [Some footnotes have been omitted; others have been renumbered.]

The regulations at issue here were promulgated and explained in a lengthy report and order released by the Commission on January 31, 1975. . . . The Order . . . explained that the prospective ban on creation of co-located newspaper-broadcast combinations was grounded primarily in First Amendment concerns, while the divestiture regulations were based on both First Amendment and antitrust policies. *Id.*, at 1049. . . .

After reviewing the comments and studies submitted by the various parties during the course of the proceeding, the Commission then turned to an explanation of the regulations and the justifications for their adoption. The prospective rules, barring formation of new broadcast-newspaper combinations in the same market, as well as transfers of existing combinations to new owners, were adopted without change from the proposal set forth in the notice of rulemaking.²⁴ While recognizing the pioneering contributions of newspaper owners to the broadcast industry, the Commission concluded that changed circumstances made it possible, and necessary, for all new licensing of broadcast stations to "be expected to add to local diversity." Order, at 1075.²⁵ In reaching this conclusion, the Commission did not find

24. The rules prohibit a newspaper owner from acquiring a license for a co-located broadcast station, either by transfer or by original licensing; if a broadcast licensee acquires a daily newspaper in the same market, it must dispose of its license within a year or by the time of its next renewal date, whichever comes later. See Order at 1074-1076, 1099-1107. Noncommercial education television stations and college newspapers are not included within the scope of the rules. 47 CFR § 73.636, and n. 10. For purposes of the rules, ownership is defined to include operation or control, *id.*, § 73.636 n. 1; a "daily newspaper" is defined as "one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication," *id.* § 73.636 n. 10; and a broadcast station is considered to serve the same community as a newspaper if a specified service contour of the station—"grade A" for television, 2mV/m for AM, and 1mV/m for FM—encompasses the city in which the newspaper is published, Order, at 1075.

25. The Commission did provide, however, for waiver of the prospective ban in exceptional circumstances. See Order, at 1076 n. 24, 1077; Memorandum Opinion and Order (Docket No. 18110), 53 F.C.C.2d 589, 591, 592 (1975).

[Ed.] On UHF stations the FCC observed:

"The Commission's present rules proscribing acquisition of common ownership of stations in different services in the same market apply with full force to VHF television stations. However, as to UHF stations, the prohibitions do not apply. Instead, a case-by-case approach is followed. After careful consideration we have decided not to follow this distinction in connection with newspaper-television common ownership. . . . [T]he level of concern over common ownership of an FM station and a UHF television station (a matter handled on a case-by-case basis) is not the same as with a daily newspaper and UHF stations. The latter combination results in a much more imposing entity in most cases. Sometimes, of course, the broadcast-broadcast common ownership situation would raise a problem; hence we provide for treatment of these cases on an *ad hoc* basis. Here the reverse of the broadcast-broadcast combination situation is to be expected. Presumptively, the creation of new television station-daily newspaper combinations or a sale of an existing combination raises a problem. This may not always be the case, but since parties can seek waiver, there is a protection in the event that in a particular case our approach could be unduly harsh."

that existing co-located newspaper-broadcast combinations had not served the public interest, or that such combinations necessarily "speak[] with one voice" or are harmful to competition. *Id.*, at 1085, 1089. In the Commission's view, the conflicting studies submitted by the parties concerning the effects of newspaper ownership on competition and station performance were inconclusive, and no pattern of specific abuses by existing cross-owners was demonstrated. See *id.*, at 1072-1073, 1085, 1089. The prospective rules were justified, instead, by reference to the Commission's policy of promoting diversification of ownership: increases in diversification of ownership would possibly result in enhanced diversity of viewpoints and, given the absence of persuasive countervailing considerations, "even a small gain in diversity" was "worth pursuing." *Id.*, at 1076, 1080 n. 30.

With respect to the proposed across-the-board divestiture requirement, however, the Commission concluded that "a mere hoped for gain in diversity" was not a sufficient justification. *Id.*, at 1078. Characterizing the divestiture issues as "the most difficult" presented in the proceeding, the Order explained that the proposed rules, while correctly recognizing the central importance of diversity considerations, "may have given too little weight to the consequences which could be expected to attend a focus on the abstract goal alone." *Ibid.* Forced dissolution would promote diversity, but it would also cause "disruption for the industry and hardship for individual owners," "resulting in losses or diminution of service to the public." *Id.*, at 1078, 1080.

The Commission concluded that in light of these countervailing considerations divestiture was warranted only in "the most egregious cases," which it identified as those in which a newspaper-broadcast combination has an "effective monopoly" in the local "marketplace of ideas as well as economically." *Id.*, at 1080-1081. The Commission recognized that any standards for defining which combinations fell within that category would necessarily be arbitrary to some degree, but "[a] choice had to be made." *Id.*, at 1080. It thus decided to require divestiture only where there was common ownership of the sole daily newspaper published in a community and either (1) the sole broadcast station providing that entire community with a clear signal, or (2) the sole television station encompassing the entire community with a clear signal. *Id.*, at 1080-1084.²⁶

26. Radio and television stations are treated the same under the regulations to the extent that, if there is only one broadcast station serving a community—regardless of whether it is a radio or television station—common ownership of it and a co-located daily newspaper is barred. On the other hand, radio and television stations are given different weight to the extent that the

presence of a radio station does not exempt a newspaper-television combination from divestiture, whereas the presence of a television station does exempt a newspaper-radio combination. The latter difference in treatment was explained on the ground that "[r]ealistically, a radio station cannot be considered the equal of either the paper or the television station

The Order identified eight television-newspaper and 10 radio-newspaper combinations meeting the divestiture criteria. *Id.*, at 1085, 1098. Waivers of the divestiture requirement were granted *sua sponte* to one television and one radio combination, leaving a total of 16 stations subject to divestiture. The Commission explained that waiver requests would be entertained in the latter cases,²⁷ but, absent waiver, either the newspaper or the broadcast station would have to be divested by January 1, 1980. *Id.*, at 1084–1086.²⁸

C

[T]he Court of Appeals affirmed the prospective ban on new licensing of co-located newspaper-broadcast combinations, but vacated the limited divestiture rules, and ordered the Commission to adopt regulations requiring dissolution of all existing combinations that did not qualify for a waiver under the procedure outlined in the

in any sense, least of all in terms of being a source for news or for being the medium turned to for discussion of matters of local concern." Order, at 1083. The Commission also explained that the regulations did not take into account the presence of magazines and other periodicals, or out-of-town radio or television stations not encompassing the entire community with a clear signal, since—aside from their often small market share—these sources could not be depended upon for coverage of local issues. See, *id.*, at 1081–1082.

27. While noting that the Commission "would not be favorably inclined to grant any request premised on views rejected when the rule was adopted," the Order stated that temporary or permanent waivers might be granted if the common owner were unable to sell his station or could sell it only at an artificially depressed price; if it could be shown that separate ownership of the newspaper and the broadcast station "cannot be supported in the locality"; or, more generally, if the underlying purposes of the divestiture rule "would be better served by continuation of the current ownership pattern." *Id.*, at 1085.

28. As to existing newspaper-broadcast combinations not subject to the divestiture requirement, the Commission indicated that, within certain limitations, issues relating to concentration of ownership would continue to be considered on a case-by-case basis in

the context of license renewal proceedings. Thus, while making clear the Commission's view that renewal proceedings were not a proper occasion for any "overall restructuring" of the broadcast industry, the Order stated that diversification of ownership would remain a relevant consideration in renewal proceedings in which common owners were challenged by competing applicants. *Id.*, at 1088 (emphasis in original); see *id.*, at 1087–1089. . . . The Order suggested, moreover, that where a petition to deny renewal is filed, but no competing applicant steps forward, the renewal application would be set for hearing if a sufficient showing were made of specific abuses by a common owner, or of economic monopolization of the sort that would violate the Sherman Act. Order, at 1080 n. 29, 1088.

The Order does not make clear the extent to which hearings will be available on petitions to deny renewal that do not allege specific abuses or economic monopolization. Counsel for the Commission informs us, however, that the Order was intended to "limit" such challengers only to the extent that [the Commission] will not permit them to re-argue in an adjudicatory setting the question already decided in this rulemaking, i. e., in what circumstances is the continued existence of co-located newspaper-broadcast combinations per se undesirable." Reply Brief for Petitioner FCC 8

Order. 181 U.S.App.D.C. 1, 555 F.2d 938 (1977); . . . The court held . . . that the prospective ban was a reasonable means of furthering "the highly valued goal of diversity" in the mass media, at 17, 555 F.2d, at 954, and was therefore not without a rational basis.

After affirming the prospective rules, the Court of Appeals invalidated the limited divestiture requirement as arbitrary and capricious within the meaning of § 10(e) of the Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A). The court's primary holding was that the Commission lacked a rational basis for "grandfathering" most existing combinations while banning all new combinations. The court reasoned that the Commission's own diversification policy, as reinforced by First Amendment policies and the Commission's statutory obligation to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C.A. § 303(g), required the Commission to adopt a "presumption" that stations owned by co-located newspapers "do not serve the public interest," at 26, 555 F.2d, at 962-963. The court observed that, in the absence of countervailing policies, this "presumption" would have dictated adoption of an across-the-board divestiture requirement, subject only to waiver "in those cases where the evidence clearly discloses that cross-ownership is in the public interest." *Id.*, at 29, 555 F.2d, at 966. The countervailing policies relied on by the Commission in its decision were, in the court's view, "lesser policies" which had not been given as much weight in the past as its diversification policy. *Id.*, at 28, 555 F.2d, at 965. And "the record [did] not disclose the extent to which divestiture would actually threaten these [other policies]." *Ibid.* The court concluded, therefore, that it was irrational for the Commission not to give controlling weight to its diversification policy and thus to extend the divestiture requirement to all existing combinations.²⁹

The Court of Appeals held further that, even assuming a difference in treatment between new and existing combinations was justifiable, the Commission lacked a rational basis for requiring divestiture in the 16 "egregious" cases while allowing the remainder of the

29. The Court of Appeals apparently believed that, under the terms of the Order, future petitions to deny license renewal to existing cross-owners could be set for hearing only if they alleged economic monopolization, and not if they alleged specific programming abuses. See, at 29 n. 108, 555 F.2d, at 966 n. 108. On the basis of this assumption, the court held that the standards for petitions to deny were unreasonable. Since we do not read the Order as foreclosing the possibility of a hearing upon a claim of spe-

cific abuses, and since the Commission itself is apparently of the view that the only issue foreclosed in petitions to deny is the question of whether newspaper-broadcast ownership is *per se* undesirable . . . , we cannot say that the Order itself unreasonably limits the availability of petitions to deny renewal. The reasonableness of the Commission's actions on particular petitions to deny filed subsequent to the Order is, of course, not before us at this time.

existing combinations to continue in operation. The court suggested that "limiting divestiture to small markets of 'absolute monopoly' squanders the opportunity where divestiture might do the most good," since "[d]ivestiture . . . may be more useful in the larger markets." *Id.*, at 29, 555 F.2d, at 966. The court further observed that the record "[did] not support the conclusion that divestiture would be more harmful in the grandfathered markets than in the 16 affected markets," nor did it demonstrate that the need for divestiture was stronger in those 16 markets. *Ibid.* On the latter point, the court noted that, "[a]lthough the affected markets contain fewer voices, the amount of diversity in communities with additional independent voices may in fact be no greater." *Ibid.*

II

Petitioners NAB and ANPA contend that the regulations promulgated by the Commission exceed its statutory rule-making authority and violate the constitutional rights of newspaper owners. We turn first to the statutory, and then to the constitutional, issues.

A

(1)

Section 303(r) of the Communications Act, 47 U.S.C.A. § 303(r), provides that "the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act]." See also 47 U.S.C.A. § 154(i). As the Court of Appeals recognized, 181 U.S.App.D.C., at 14, 555 F.2d, at 951, it is now well established that this general rule-making authority supplies a statutory basis for the Commission to enact regulations codifying its view of the public interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable. If a license applicant does not qualify under standards set forth in such regulations, and does not proffer sufficient grounds for waiver or change of those standards, the Commission may deny the application without further inquiry. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943).

This Court has specifically upheld this rule-making authority in the context of regulations based on the Commission's policy of promoting diversification of ownership. In *United States v. Storer Broadcasting Co.*, *supra*, we sustained the portion of the Commission's multiple ownership rules placing limitations on the total number of stations in each broadcast service a person may own or control. . . .³⁰ And in *National Broadcasting Co. v. United States*, *supra*, we affirmed regulations that, *inter alia*, prohibited broadcast

30. [Ed.] See pp. 132-135 *infra*.

networks from owning more than one AM radio station in the same community, and from owning “‘any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability . . . that competition would be substantially restrained by such licensing.’” See 319 U.S., at 206–208, 63 S.Ct., at 1005; . . . ³¹.

Petitioner NAB attempts to distinguish these cases on the ground that they involved efforts to increase diversification within the boundaries of the broadcasting industry itself, whereas the instant regulations are concerned with diversification of ownership in the mass communications media as a whole. NAB contends that, since the Act confers jurisdiction on the Commission only to regulate “communication by wire or radio,” 47 U.S.C.A. § 152(a), it is impermissible for the Commission to use its licensing authority with respect to broadcasting to promote diversity in an overall communications market which includes, but is not limited to, the broadcasting industry.

This argument undersells the Commission’s power to regulate broadcasting in the “public interest.” In making initial licensing decisions between competing applicants, the Commission has long given “primary significance” to “diversification of control of the media of mass communications,” and has denied licenses to newspaper owners on the basis of this policy in appropriate cases. . . . As we have discussed on several occasions, see, e. g., *National Broadcasting Co. v. United States*, supra, 319 U.S., at 210–218, 63 S.Ct., at 1006–1010; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375–377, 387–388, 89 S.Ct. 1794, 1798–1799, 1805, 23 L.Ed.2d 371 (1969), the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, led Congress to delegate broad authority to the Commission to allocate broadcast licenses in the “public interest.” And “[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States.” *National Broadcasting Co. v. United States*, supra, 319 U.S., at 217, 63 S.Ct., at 1010. It was not inconsistent with the statutory scheme, therefore, for the Commission to conclude that the maximum benefit to the “public interest” would follow from allocation of broadcast licenses so as to promote diversification of the mass media as a whole.

Our past decisions have recognized, moreover, that the First Amendment and antitrust values underlying the Commission’s diversification policy may properly be considered by the Commission in determining where the public interest lies. “[T]he ‘public interest’ standard necessarily invites reference to First Amendment principles,” *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122, 93 S.Ct. 2080, 2096, 36 L.Ed.2d 772 (1973), and, in particular, to the First Amendment goal of achieving

31. [Ed.] See pp. 148–164 *infra*.

“the widest possible dissemination of information from diverse and antagonistic sources,” *Associated Press v. United States*, supra, 326 U.S., at 20, 65 S.Ct., at 1424. See *Red Lion Broadcasting Co. v. FCC*, supra, 395 U.S., at 385, 390, 89 S.Ct., at 1804, 1806. See also *United States v. Midwest Video Corp.*, 406 U.S. 649, 667–669, and n. 27, 92 S.Ct. 1860, 1870–1871, 32 L.Ed.2d 390 (1972) (plurality opinion). And, while the Commission does not have power to enforce the anti-trust laws as such, it is permitted to take antitrust policies into account in making licensing decisions pursuant to the public interest standard. See, e. g., *United States v. Radio Corp. of America*, 358 U.S. 334, 351, 79 S.Ct. 457, 467, 3 L.Ed.2d 354 (1959); *National Broadcasting Co. v. United States*, supra, 319 U.S., at 222–224, 63 S.Ct., at 1011–1013. Indeed we have noted, albeit in dictum:

“[I]n a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area’s major media of mass communication.” *United States v. Radio Corp. of America*, supra, 358 U.S., at 351–352, 79 S.Ct., at 467.

(2)

It is thus clear that the regulations at issue are based on permissible public interest goals and, so long as the regulations are not an unreasonable means for seeking to achieve these goals, they fall within the general rulemaking authority recognized in the *Storer Broadcasting* and *National Broadcasting* cases. Petitioner ANPA contends that the prospective rules are unreasonable in two respects: first, the rulemaking record did not conclusively establish that prohibiting common ownership of co-located newspapers and broadcast stations would in fact lead to increases in the diversity of viewpoints among local communications media; and second, the regulations were based on the diversification factor to the exclusion of other service factors considered in the past by the Commission in making initial licensing decisions regarding newspaper owners With respect to the first point, we agree with the Court of Appeals that, notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints. As the Court of Appeals observed, “[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.” 181 U.S.App.D.C., at 24, 555 F.2d, at 961. Moreover, evidence of specific abuses by common owners is difficult to compile; “the possible benefits of competition do not lend themselves to detailed forecast.” *FCC v. RCA Communications, Inc.*,

346 U.S. 86, 96, 73 S.Ct. 998, 1005, 97 L.Ed. 1470 (1953). In these circumstances, the Commission was entitled to rely on its judgment, based on experience, that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run." Order, at 1079-1080; see at 25, 555 F.2d, at 962.

As to the Commission's decision to give controlling weight to its diversification goal in shaping the prospective rules, the Order makes clear that this change in policy was a reasonable administrative response to changed circumstances in the broadcasting industry. Order, at 1074-1075; see *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138, 60 S.Ct. 437, 438-439, 84 L.Ed. 656 (1940). The Order explained that, although newspaper owners had previously been allowed, and even encouraged, to acquire licenses for co-located broadcast stations because of the shortage of qualified license applicants, a sufficient number of qualified and experienced applicants other than newspaper owners was now available. In addition, the number of channels open for new licensing had diminished substantially. It had thus become both feasible and more urgent for the Commission to take steps to increase diversification of ownership, and a change in the Commission's policy toward new licensing offered the possibility of increasing diversity without causing any disruption of existing service. In light of these considerations, the Commission clearly did not take an irrational view of the public interest when it decided to impose a prospective ban on new licensing of co-located newspaper-broadcast combinations.

B

Petitioners NAB and ANPA also argue that the regulations, though designed to further the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, supra, 326 U.S., at 20, 65 S.Ct., at 1424, nevertheless violated the First Amendment rights of newspaper owners. We cannot agree, for this argument ignores the fundamental proposition that there is no "unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co. v. FCC*, supra, 395 U.S., at 388, 89 S.Ct., at 1806.

The physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, government allocation and regulation of broadcast frequencies are essential, as we have often recognized. *Red Lion Broadcasting Co. v. FCC*, supra, at 375-377, 387-388, 89 S.Ct., at 1798-1799, 1805; *National Broadcasting*

Co. v. United States, *supra*, 319 U.S., at 210–218, 63 S.Ct., at 1006–1010; *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 282, 53 S.Ct. 627, 635, 77 L.Ed. 1166 (1933); . . . No one here questions the need for such allocation and regulation, and given that need, we see nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the “public interest” in diversification of the mass communications media.

. . . As we wrote in *National Broadcasting*, *supra*, “the issue before us would be wholly different” if “the Commission [were] to choose among applicants upon the basis of their political, economic or social views.” 319 U.S., at 226, 63 S.Ct., at 1014. Here the regulations are not content-related; moreover, their purpose and effect is to promote free speech, not to restrict it.

III

After upholding the prospective aspect of the Commission’s regulations, the Court of Appeals concluded that the Commission’s decision to limit divestiture to 16 “egregious cases” of “effective monopoly” was arbitrary and capricious within the meaning of the Administrative Procedure Act (APA), § 10(e), 5 U.S.C.A. § 706(2)(A).

A

(1)

The Commission was well aware that separating existing newspaper-broadcast combinations would promote diversification of ownership. It concluded, however, that ordering widespread divestiture would not result in “the best practicable service to the American public,” Order, at 1074, a goal that the Commission has always taken into account and that has been specifically approved by this Court, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 60 S.Ct. 693, 697, 84 L.Ed. 869 (1940); . . . In particular, the Commission expressed concern that divestiture would cause “disruption for the industry” and “hardship to individual owners,” both of which would result in harm to the public interest. Order, at 1078. Especially in light of the fact that the number of co-located newspaper-broadcast combinations was already on the decline as a result of natural market forces, and would decline further as a result of the prospective rules, the Commission decided that across-the-board divestiture was not warranted. See Order, at 1080 n. 29.

The Order identifies several specific respects in which the public interest would or might be harmed if a sweeping divestiture requirement were imposed: the stability and continuity of meritorious service provided by the newspaper owners as a group would be lost; owners who had provided meritorious service would unfairly be denied the opportunity to continue in operation; “economic dislocations”

might prevent new owners from obtaining sufficient working capital to maintain the quality of local programming;³² and local ownership of broadcast stations would probably decrease.³³ Order, at 1078. We cannot say that the Commission acted irrationally in concluding that these public interest harms outweighed the potential gains that would follow from increasing diversification of ownership.

In the past, the Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proven broadcast service to the public, and in its indirect consequence of rewarding—and avoiding losses to—licensees who have invested the money and effort necessary to produce quality performance.³⁴ Thus, although a broadcast license must be renewed every three years, and the licensee must satisfy the Commission that renewal will serve the public interest, both the Commission and the courts have recognized that a licensee who has given meritorious service has a “legitimate renewal expectanc[y]” that is “implicit in the structure of the Act” and should not be destroyed absent good cause. . . .³⁵ Accordingly, while diversification of ownership is a relevant factor in the context of li-

32. Although the Order is less than entirely clear in this regard, the Commission's theory with respect to “economic dislocations” and programming apparently was that, because of high interest rates, new owners would have to devote a substantial portion of revenues to debt service, and insufficient working capital would remain to finance local programming. See Order, at 1068 (describing comments to this effect).

33. In the Order the Commission expressed concern that a sweeping divestiture requirement “could reduce local ownership *as well as the involvement of owners in management.*” *Id.*, at 1078. (emphasis added). The Court of Appeals questioned the validity of any reliance on owner involvement in management, because “no evidence was presented that the local owners . . . are actively involved in daily management” and the Order itself had observed that “[m]ost of the parties state that their broadcast stations and newspapers have separate management, facilities, and staff” 181 U.S.App.D.C., at 27, 555 F.2d, at 964, quoting Order, at 1059. Of course, the fact that newspapers and broadcast stations are separately managed does not foreclose the possibility that the common owner participates in management of the broadcast station

and not the newspaper. But in any event, the Commission clearly did not place any significant weight on this factor, and we therefore need not consider it. . . .

34. We agree with the Court of Appeals that “[p]rivate losses are a relevant concern under the Communications Act only when shown to have an adverse effect on the provision of broadcasting service to the public.” 181 U.S.App.D.C., at 27, 555 F.2d, at 964-965, citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-476, 60 S.Ct. 693, 697-698, 84 L.Ed. 869 (1940), and *Carroll Broadcasting v. FCC*, 103 U.S.App.D.C. 346, 258 F.2d 440 (1958). Private losses that result in discouragement of investment in quality service have such an effect.

35. Section 301 of the Act provides that “no [broadcast] license shall be construed to create any right, beyond the terms, conditions, and periods of the license.” 47 U.S.C.A. § 301 (1970). The fact that a licensee does not have any legal or proprietary right to a renewal does not mean, however, that the Commission cannot take into account the incumbent's past performance in deciding whether renewal would serve the public interest. . . .

cense renewal as well as initial licensing, the Commission has long considered the past performance of the incumbent as the most important factor in deciding whether to grant license renewal and thereby to allow the existing owner to continue in operation. Even where an incumbent is challenged by a competing applicant who offers greater potential in terms of diversification, the Commission's general practice has been to go with the "proven product" and grant renewal if the incumbent has rendered meritorious service. . . .

In the instant proceeding, the Commission specifically noted that the existing newspaper-broadcast cross-owners as a group had a "long record of service" in the public interest; many were pioneers in the broadcasting industry and had established and continued "[t]raditions of service" from the outset. Order, at 1078. Notwithstanding the Commission's diversification policy, all were granted initial licenses upon findings that the public interest would be served thereby, and those that had been in existence for more than three years had also had their licenses renewed on the ground that the public interest would be furthered. The Commission noted, moreover, that its own study of existing co-located newspaper-television combinations showed that in terms of percentage of time devoted to several categories of local programming, these stations had displayed "an undramatic but nonetheless statistically significant superiority" over other television stations. Order, at 1078 n. 26. An across-the-board divestiture requirement would result in loss of the services of these superior licensees, and—whether divestiture caused actual losses to existing owners, or just denial of reasonably anticipated gains—the result would be that future licensees would be discouraged from investing the resources necessary to produce quality service.

At the same time, there was no guarantee that the licensees who replaced the existing cross-owners would be able to provide the same level of service or demonstrate the same long-term commitment to broadcasting. And even if the new owners were able in the long run to provide similar or better service, the Commission found that divestiture would cause serious disruption in the transition period. Thus, the Commission observed that new owners "would lack the long knowledge of the community and would have to begin raw," and—because of high interest rates—might not be able to obtain sufficient working capital to maintain the quality of local programming. Order, at 1078; . . .

The Commission's fear that local ownership would decline was grounded in a rational prediction, based on its knowledge of the broadcasting industry and supported by comments in the record, see Order, at 1068–1069, that many of the existing newspaper-broadcast combinations owned by local interests would respond to the divestiture requirement by trading stations with out-of-town owners. It is undisputed that roughly 75% of the existing co-located newspaper-tele-

vision combinations are locally owned, see 181 U.S.App.D.C., at 28, 555 F.2d, at 963-964, and these owners' knowledge of their local communities and concern for local affairs, built over a period of years, would be lost if they were replaced with outside interests. Local ownership in and of itself has been recognized to be a factor of some— if relatively slight—significance even in the context of initial licensing decisions. See Policy Statement on Comparative Broadcast Hearings, *supra*, 1 F.C.C.2d, at 396. It was not unreasonable, therefore, for the Commission to consider it as one of several factors militating against divestiture of combinations that have been in existence for many years.

In light of these countervailing considerations, we cannot agree with the Court of Appeals that it was arbitrary and capricious for the Commission to “grandfather” most existing combinations, and to leave opponents of these combinations to their remedies in individual renewal proceedings. In the latter connection we note that, while individual renewal proceedings are unlikely to accomplish any “overall restructuring” of the existing ownership patterns, the Order does make clear that existing combinations will be subject to challenge by competing applicants in renewal proceedings, to the same extent as they were prior to the instant rulemaking proceedings. Order, at 1087-1088 (emphasis omitted). . . . That is, diversification of ownership will be a relevant but somewhat secondary factor. And, even in the absence of a competing applicant, license renewal may be denied if, *inter alia*, a challenger can show that a common owner has engaged in specific economic or programming abuses. . . .

(2)

In concluding that the Commission acted unreasonably in not extending its divestiture requirement across-the-board, the Court of Appeals apparently placed heavy reliance on a “presumption” that existing newspaper-broadcast combinations “do not serve the public interest.” . . . The Court derived this presumption primarily from the Commission’s own diversification policy, as “reaffirmed” by adoption of the prospective rules in this proceeding, and secondarily from “[t]he policies of the First Amendment,” 181 U.S.App. D.C., at 26, 555 F.2d, at 963, and the Commission’s statutory duty to “encourage the larger and more effective use of radio in the public interest,” 47 U.S.C.A. § 303(g). As explained in Part II above, we agree that diversification of ownership furthers statutory and constitutional policies, and, as the Commission recognized, separating existing newspaper-broadcast combinations would promote diversification. But the weighing of policies under the “public interest” standard is a task that Congress has delegated to the Commission in the first instance, and we are unable to find anything in the Communications Act, the First Amendment, or the Commission’s past or present practices that would require the Commission to “presume” that its

diversification policy should be given controlling weight in all circumstances.

Such a "presumption" would seem to be inconsistent with the Commission's long-standing and judicially approved practice of giving controlling weight in some circumstances to its more general goal of achieving "the best practicable service to the public." Certainly, as discussed in Part III-A(1) above, the Commission through its license renewal policy has made clear that it considers diversification of ownership to be a factor of less significance when deciding whether to allow an existing licensee to continue in operation than when evaluating applicants seeking initial licensing. Nothing in the language or the legislative history of § 303(g) indicates that Congress intended to foreclose all differences in treatment between new and existing licensees, and indeed, in amending § 307(d) of the Act in 1952, Congress appears to have lent its approval to the Commission's policy of evaluating existing licensees on a somewhat different basis than new applicants.³⁶ Moreover, if enactment of the prospective rules in this proceeding itself were deemed to create a "presumption" in favor of divestiture, the Commission's ability to experiment with new policies would be severely hampered. One of the most significant advantages of the administrative process is its ability to adapt to new circumstances in a flexible manner, see *FCC v. Pottsville Broadcasting Co.*, supra, 309 U.S., at 137-138, 60 S.Ct., at 438-439, and we are unwilling to presume that the Commission acts unreasonably when it decides to try out a change in licensing policy primarily on a prospective basis.

The Court of Appeals also relied on its perception that the policies militating against divestiture were "lesser policies" to which the Commission had not given as much weight in the past as its divestiture policy. . . . This perception is subject to much the same criticism as the "presumption" that existing co-located newspaper-broadcasting combinations do not serve the public interest. The Commission's past concern with avoiding disruption of existing service is amply illustrated by its license renewal policies. In addi-

36. Prior to 1952, § 307(d) provided that decisions on renewal applications "shall be limited to and governed by the same considerations and practice which affect the granting of original applications." See Communications Act of 1934, § 307(d), 48 Stat. 1084. In 1952 the section was amended to provide simply that renewal "may be granted . . . if the Commission finds that public interest, convenience, and necessity would be served thereby." Communications Act Amendments, 1952, § 5, 66 Stat. 714. The House Report explained that the previous language "is neither realistic

nor does it reflect the way in which the Commission actually has handled renewal cases," H.R.Rep. No. 1750, 82d Cong., 2d Sess., 8 (1952), U.S.Code Cong. & Admin.News 1952, pp. 2234, 2241, and the Senate Report specifically stated that the Commission has the "right and duty to consider, in the case of a station which has been operating and is applying for renewal, the overall performance of that station against the broad standard of public interest, convenience, and necessity," S.Rep. No. 44, 82d Cong., 1st Sess., 7 (1951).

tion, it is worth noting that in the past when the Commission has changed its multiple ownership rules it has almost invariably tailored the changes so as to operate wholly or primarily on a prospective basis. . . .

The Court of Appeals apparently reasoned that the Commission's concerns with respect to disruption of existing service, economic dislocations, and decreases in local ownership necessarily could not be very weighty since the Commission has a practice of routinely approving voluntary transfers and assignments of licenses. See 181 U.S. App.D.C., at 28-30, 555 F.2d, at 963-965. But the question of whether the Commission should compel proven licensees to divest their stations is a different question from whether the public interest is served by allowing transfers by licensees who no longer wish to continue in the business. As the Commission's brief explains:

"[I]f the Commission were to force broadcasters to stay in business against their will, the service provided under such circumstances, albeit continuous, might well not be worth preserving. Thus, the fact that the Commission approves assignments and transfers in no way undermines its decision to place a premium on the continuation of proven past service by those licensees who wish to remain in business." Brief for Petitioner FCC, at 38 (footnote omitted).

The Court of Appeals' final basis for concluding that the Commission acted arbitrarily in not giving controlling weight to its divestiture policy was the Court's finding that the rulemaking record did not adequately "disclose the extent to which divestiture would actually threaten" the competing policies relied upon by the Commission. At 30, 555 F.2d, at 965. However, to the extent that factual determinations were involved in the Commission's decision to grandfather most existing combinations, they were primarily of a judgmental or predictive nature—e. g., whether a divestiture requirement would result in trading of stations with out-of-town owners; whether new owners would perform as well as existing cross-owners, either in the short run or in the long run; whether losses to existing owners would result from forced sales; whether such losses would discourage future investment in quality programming; and whether new owners would have sufficient working capital to finance local programming. In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency," . . .

B

We also must conclude that the Court of Appeals erred in holding that it was arbitrary to order divestiture in the 16 "egregious cases" while allowing other existing combinations to continue in op-

eration. The Commission's decision was based not—as the Court of Appeals may have believed, . . .—on a conclusion that divestiture would be more harmful in the grandfathered markets than in the 16 affected markets, but rather on a judgment that the need for diversification was especially great in cases of local monopoly. This policy judgment was certainly not irrational, see *United States v. Radio Corp. of America*, supra, 358 U.S., at 351–352, 79 S.Ct., at 467–468, and indeed was founded on the very same assumption that underpinned the diversification policy itself and the prospective rules upheld by the Court of Appeals and now by this Court—that the greater the number of owners in a market, the greater the possibility of achieving diversity of program and service viewpoints.

As to the Commission's criteria for determining which existing newspaper-broadcast combinations have an "effective monopoly" in the "local marketplace of ideas as well as economically," we think the standards settled upon by the Commission reflect a rational legislative-type judgment. Some line had to be drawn, and it was hardly unreasonable for the Commission to confine divestiture to communities in which there is common ownership of the only daily newspaper and either the only television station or the only broadcast station of any kind encompassing the entire community with a clear signal. Cf. *United States v. Radio Corp. of America*, It was not irrational, moreover, for the Commission to disregard media sources other than newspapers and broadcast stations in setting its divestiture standards. The studies cited by the Commission in its notice of rulemaking unanimously concluded that newspapers and television are the two most widely utilized media sources for local news and discussion of public affairs; and, as the Commission noted in its Order, at 1081, "aside from the fact that [magazines and other periodicals] often had only a tiny fraction in the market, they were not given real weight since they often dealt exclusively with regional or national issues and ignored local issues." Moreover, the differences in treatment between radio and television stations, see n. [26], supra, were certainly justified in light of the far greater influence of television than radio as a source for local news. See Order, at 1083.

The judgment of the Court of Appeals is affirmed in part and reversed in part.³⁷

37. [Ed.] Justice Brennan did not participate.

The FCC renewed television licenses, despite assumptions in each case that the licensee controlled a large share of local media, in *KSL, Inc.*, 62 F.C.C.2d 254, 39 R.R.2d 249 (1976); *Newhouse Broadcasting Corp.*, 62 F.C.C.2d 271, 280, 39 R.R.2d 259, 267 (1976);

WTMJ, Inc., 62 F.C.C.2d 345, 39 R.R.2d 293 (1976). Thus, an 81% market share was not considered in itself to constitute a Sherman Act violation in *KSL*; there was no misconduct and the co-located television and newspaper operations did not fall into the "egregious" category defined in the multiple ownership regulations.

CODE OF FEDERAL REGULATIONS

Title 47

§ 73.636 Multiple ownership.

(a)(1) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls: one or more television broadcast stations and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations, computed in accordance with § 73.684; or one or more standard broadcast stations and the grant of such license will result in the Grade A contour of the proposed station, computed in accordance with § 73.684, encompassing the entire community of license of one of the standard broadcast stations, or will result in the predicted or measured 2 mV/m ground wave contour(s) of the standard broadcast station(s), computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of the proposed station; or one or more FM broadcast stations and the grant of such license will result in the Grade A contour of the proposed station, computed in accordance with § 73.684, encompassing the entire community of license of one of the FM broadcast stations, or will result in the predicted 1 mV/m contour(s) of the FM broadcast station(s), computed in accordance with § 73.313, encompassing the entire community of license of the proposed station; or a daily newspaper and the grant of such license will result in the Grade A contour, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(b) Paragraphs (a) and (c) of this section are not applicable to noncommercial educational television stations.

(c) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial television station encompassing the entire community with a city-grade signal. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980.

Note 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2: In applying the provisions of paragraphs (a)(1) and (c) of this section, partial (as well as total) ownership interests in corporate broadcast licensees and corporate

daily newspapers represented by ownership of voting stock of such corporations will be considered.

. . .³⁸

Note 8: Paragraph (a)(1) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applications for assignment of license or transfer of control filed in accordance with § 1.540(b) or § 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled television broadcast stations and if no new encompassment of communities proscribed in paragraph (a)(1) of this section as to commonly owned, operated, or controlled television broadcast stations and standard or FM broadcast stations or daily newspapers would result. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of television broadcast stations with each other no greater than already existing. (The resulting areas of overlap of contours of television broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Paragraph (a)(1) of this section will not apply to major changes in UHF television broadcast stations authorized as of September 30, 1964, which will result in Grade B overlap with another television broadcast station that was commonly owned, operated, or controlled as of September 30, 1964; or to any application concerning a UHF television broadcast station which would result in the Grade A contour of the UHF sta-

38. [Ed.] Notes 3, 4, 5, 6 and 7 concern stock ownership of corporations having more than 50 stockholders. In general, such stockholdings need not be considered: (a) if held by an individual, not an officer or director of the corporation, in an amount not exceeding one percent; or (b) if held by

a mutual fund, insurance company or trust department of a bank, without officers or directors interlocking with those of the broadcast corporation and in the absence of control of the broadcast corporation, in an amount not exceeding five percent.

tion encompassing the entire community of license of a commonly owned, operated, or controlled standard or FM broadcast station, or which would result in the entire community of license of such UHF station being encompassed by the 2 mV/m or 1 mV/m contours of such standard or FM broadcast stations respectively. Such UHF overlap or community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by paragraph (a)(1) of this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated or controlled television broadcast station and daily newspaper fall within the encompassing proscription of subparagraph (a)(1) of this section, the station may not be assigned to a single person, group, or entity if the newspaper is being simultaneously sold to such single person, group or entity.

Note 9: Paragraph (a)(1) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station, the Grade B contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the Grade A contour of which completely encompasses the community of publication of a commonly owned, operated or controlled daily newspaper or the community of license of a commonly owned, operated or controlled standard or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such a standard broadcast station or the 1 mV/m contour of such an FM station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated,

or controlled "non-satellite" television stations with Grade B overlap or such commonly owned, operated or controlled non-satellite television stations and standard or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 8. Nor shall any application for assignment or transfer concerning such non-satellite stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated or controlled newspaper is proposed to be transferred, except as provided in Note 8.

Note 10: For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.³⁹

B. CONTROL OF MEDIA IN MULTIPLE MARKETS

Note on FCC Limitations on the Total Number of Stations That May be Commonly Owned. The FM rules of 1940 and the television rules of 1941 also imposed limits on the total number of such media that might be brought under common control. Each proscribed the

39. [Ed.] On concentration of media within a single market, see H. Levin, *Broadcast Regulation and Joint Ownership of Media* (1960); Toohey, *Newspaper Ownership of Broadcast Facilities*, 20 *Fed.Com.B.J.* 44 (1966); G. Litwin and W. Wroth, *The Effects of Common Ownership on Media Content and Influence* (1969); Anderson and Saunders, *Economic Issues Relating to the FCC's 'One-to-a-Customer' Rule*, 13 *J.Broad.* 241 (1969); Anderson, *The Alliance of Broadcast Stations and Newspapers: The Problem of Information Control*, 16 *J.Broad.* 51 (1971-72); Lago, *The Price Effects of Joint Mass Communication Media Ownership*, 16 *Antitrust Bull.* 789 (1971); Bennett, *Media Concentration and the FCC: Focussing With a Section 7 Lens*, 66 *Nw.U.L.Rev.* 159 (1971); Owen, *Newspaper and Television Joint Ownership*, 18 *Antitrust Bull.* 787 (1973); Comment, *Concentration of Ownership of the Media of Mass Communication: An Examination of New FCC Rules on Cross Ownership of*

Colocated Newspapers and Broadcast Stations, 24 *Emory L.J.* 1121 (1975); Mills, Moynahan, Perlini and McClure, *Constitutional Considerations of Multiple Media Ownership Regulation by the Federal Communications Commission*, 24 *Amer.U.L.Rev.* 1217 (1975); Comment, *Media Cross-Ownership—The FCC's Inadequate Response*, 54 *Tex.L.Rev.* 336 (1976); Note, *Power of the FCC to Regulate Newspaper-Broadcaster Cross-Ownership: The Need for Congressional Clarification*, 75 *Mich.L.Rev.* 1708 (1977); Comment, *Newspaper-Broadcast Combinations in the Same Community: How Much Diversity for the Sake of Diversity?* 1978 *Brig.Young L.Rev.* 675; Kiebowitz, *Discrimination or Discriminating Licensing? FCC Policy and Newspaper Ownership of TV Stations*, 30 *Admin. L.Rev.* 423 (1978); Sterling, *Newspaper Ownership of Broadcast Stations, 1920-1968*, 46 *Journ.Q.* 227 (1969). See also authorities cited supra note 1, p. 93.

issuance of a license which would "result in the concentration of control" of these new media in a manner inconsistent with the public interest. The FM rules specified that undue concentration would be found if more than six such stations were brought under common control.⁴⁰ The parallel television rules placed the outside limit on multiple ownership at three,⁴¹ later increased to five television stations.⁴² The multiple ownership rule promulgated for AM stations in 1943 contained no limit on the total number of such stations that might be brought under common ownership.⁴³

In 1953, the Commission amended its multiple ownership rules for all three services. The maximum limit for television was retained at five; the limit for FM was increased to seven; and a limit of seven was imposed on common ownership or control of AM stations. The television rule, illustrative of the three, provided:

"§ 3.636 *Multiple ownership.* (a) No license for a television broadcast station shall be granted to any party (including all parties under common control) if:

"(2) Such party, or any stockholder, officer, or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations."⁴⁴

Excerpts from the Commission's Report follow:

40. 5 Fed.Reg. 2382, 2384 (1940).

41. 6 Fed.Reg. 2282, 2284 (1941).

42. 9 Fed.Reg. 5442 (1944).

43. In *Sherwood B. Brunton*, 11 F.C.C. 407 (1946), the Commission refused to approve the acquisition of an eighth AM station by CBS because of concern about concentration of control. However, no general rule was announced.

44. "In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 per cent or more of the outstanding voting stock."

The text of the current 47 C.F.R. § 73.636 is reproduced *infra* at p. 138.

AMENDMENT OF MULTIPLE OWNERSHIP RULES

Federal Communications Commission, 1953.
18 Fed.Reg. 7796, 9 R.R. 1563.⁴⁵

One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis. See *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869. This Commission has consistently adhered to the principle of "diversification" in order to implement the Congressional policy against monopoly and in order to preserve competition. That principle requires a limitation on the number of broadcast stations which may be licensed to any person or to persons under common control. It is our view that the operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees. The vitality of our system of broadcasting depends in large part on the introduction into this field of licensees who are prepared and qualified to serve the varied and divergent needs of the public for radio service. Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. In this connection, we wish to emphasize that by such rules diversification of program services is furthered without any governmental encroachment on what we recognize to be the prime responsibility of the broadcast licensee (See Section 326 of the Communications Act). It is to effect this purpose that the foregoing specific limitation on the number of stations that may be owned, operated or controlled by any person, has been included in the multiple ownership rules.

In view of the arguments advanced by some parties that the proposed rules are arbitrary in that they give no effect to class and size of stations, geographical locations, populations served, and similar factors, we have considered alternatives to the outstanding proposal⁴⁶ But as a result of a study of the present holdings of multiple

45. [Ed.] Some footnotes have been omitted; others have been renumbered.

46. . . . It should also be noted that even if all the AM stations owned by the one party are small, there is a

tendency to concentrate in the same general area; under these circumstances, ownership of more than 7 stations would result in a concentration of control that would be contrary to the public interest.

owners, we have concluded that any proposal to limit multiple ownership on the basis of such factors as class of station or geographical location, is either unsatisfactory or unworkable.⁴⁷ For a formula, which we believe would reasonably limit ownership on such bases, would require extensive divestment of holdings by existing licensees: it is felt that this would be unduly disruptive. On the other hand, if existing licensees are to retain their present holdings, no formula can be devised which does not substantially extend the present maximum limitation on station ownership—a result felt to be completely unwarranted in view of the important policy considerations involved. As to devising a reasonable formula and “grandfathering” present holdings however greatly [in] excess of this new criterion, this is believed improper in view of the extensive multiple AM holdings and the nature of such holdings built up over that service’s long history and the consequent unfairly preferential treatment accorded such multiple owners. We conclude, therefore, that the method employed in our outstanding proposal is the only sound and workable one because of the history and present development of the broadcast industry.

. . . . It is our conclusion that the principle of diversification and the realities of the situation require that no distinction be made between a minority non-controlling interest and a full or controlling one. While the holder of a small interest in many instances may have slight influence on the operation of the station in question, it is also true such a person can exert a considerable influence—to an extent clearly within the objectives and purview of the described diversification policy. Several factors should be noted here: (1) there may not be a correlation between the size of the minority holding and the extent of the influence wielded; (2) it is impossible to determine on the face of the application what the influence of the multiple owner will be; indeed, it may be difficult or incapable of definite ascertainment even in a subsequent hearing; and (3) in the case of the holder who has interested himself in numerous stations, there is a good probability that because he is so actively engaged in the broadcast field, his influence will tend to be a positive or substantial one. For these reasons, we are of the opinion that to permit parties to acquire interests of any nature in more than the specified maximum numbers of stations set out within would tend to defeat the diversification policy. . . .

. . . . We turn now to what is the appropriate specific limitation in each service on the number of stations in which one person may hold an interest. The attached rules continue in effect the existing limitation on TV station ownership which, in our judgment based on ex-

47. It is important to note that the proposed rules do take these factors into consideration in situations not involv-

ing an application for facilities in excess of the maximum permissible number.

tensive experience with the problems of multiple ownership, have proven practicable and desirable. . . .⁴⁸

With respect to interests in FM broadcast stations, the attached rules, unlike the proposal which specified a 6 station FM limitation, raise the limitation to seven—the AM figure. It is considered desirable to have the same limitation applicable to both aural services because of their interrelationship and the present status of FM's growth.⁴⁹

The specific limitation on the holding of interests in excess of seven AM broadcast stations is a new provision of the Commission's Rules on multiple ownership. Aside from the factors set out in the prior paragraph, the greater potential of FM as compared to AM for the accommodation of broadcast stations might have justified a more severe limitation in AM than the limitation imposed in FM. It was determined, however, to limit the holdings in AM stations of any one person to seven in order that present holdings of such stations be not unduly disrupted. The specific limitation of 7 stations contained in the attached rule is consistent with the historical development of AM broadcasting and the tremendous expansion that has been achieved almost entirely within the framework of that limitation: only a very few parties have holdings in excess of 7. As to these latter few, orders to show cause why they should not divest themselves of so much of their holdings as is necessary to bring about conformity with the subject rule, will be issued. Decision as to whether or not divestment will be required will be made on the basis of the arguments adduced and the factors involved in each case.

UNITED STATES v. STORER BROADCASTING CO.

Supreme Court of the United States, 1956.
351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081.

MR. JUSTICE REED delivered the opinion of the Court.⁵⁰

The Federal Communications Commission [in 1948] proposed, so far as is pertinent to this case, to amend Rules 3.35, 3.240 and 3.636

48. The argument is . . . made that no cogent reasons exist for the disparity in TV and AM multiple ownership rules in view of the fact that the TV station potential is approximately equivalent to the AM station number. But there is a substantial disparity between the number of *existing* AM and TV stations. Further, . . . the AM figure of 7 was selected because of the tremendous expansion which has been achieved within the framework of that limitation; a lower figure would result in either severe disruption or, in the event of

"grandfathering," preferential treatment being accorded too many licenses. No such consideration pertains to the determination of the TV figure.

49. The most recent statistics available (January 1, 1953) show that of 600 FM broadcast stations, 538 are owned by AM licensees and for the most part, duplicate the AM programming.

50. [Ed.] Some footnotes have been omitted; others have been renumbered.

relating to Multiple Ownership of standard, FM and television broadcast stations. Those rules provide that licenses for broadcasting stations will not be granted if the applicant, directly or indirectly, has an interest in other stations beyond a limited number. The purpose of the limitations is to avoid overconcentration of broadcasting facilities.

In November 1953 the Commission entered an order amending the Rules in question without significant changes from the proposed forms. A review was sought in due course by respondent. Respondent alleged it owned or controlled, within the meaning of the Multiple Ownership Rules, seven standard radio, five FM radio and five television broadcast stations. It asserted that the Rules complained of were in conflict with the statutory mandates that applicants should be granted licenses if the public interest would be served and that applicants must have a hearing before denial of an application.

In its petition for review Storer prayed the court to vacate the provisions of the Multiple Ownership Rules insofar as they denied to an applicant already controlling the allowable number of stations a "full and fair hearing" to determine whether additional licenses to the applicant would be in the public interest.⁵¹ The Court of Appeals struck out, as contrary to § 309(a) and (b) of the Communications Act . . . , the [limitations specifying the maximum number of stations of each class].

The Commission asserts that its power to make regulations gives it the authority to limit concentration of stations under a single control. It argues that rules may go beyond the technical aspects of radio, that rules may validly give concreteness to a standard of public interest, and that the right to a hearing does not exist where an applicant admittedly does not meet those standards as there would be no facts to ascertain. The Commission shows that its regulations permit applicants to seek amendments and waivers of or exceptions to its Rules.⁵² It adds:

"This does not mean of course, that the mere filing of an application for a waiver . . . would necessarily re-

51. Storer also attacked the 1% ownership provision that appears as a note to Rule 3.636. . . . This was not passed upon by the Court of Appeals. 95 U.S.App.D.C. 97, 220 F.2d 204. Its judgment leaves that portion of the Rule unaffected. As there was no cross petition for certiorari, we leave open the question of its validity.

52. 47 CFR, Rev.1953, § 1.361(e):
"(e) Applications which because of the nature of the particular rule, regula-

tion, or requirement involved, are patently not in accordance with the Commission's rules, regulations, or other requirements will be considered defective and will be dismissed unless accompanied by a request of the applicant for waiver of, or exception to, any rule, regulation, or requirement with which the application is in conflict. Such requests shall show the nature of the waiver or exception desired and set forth the reasons in support thereof."

quire the holding of a hearing, for if that were the case a rule would no longer be a rule. It means only that it might be an abuse of discretion to fail to hear a request for a waiver which showed, on its face, the existence of circumstances making application of the rule inappropriate."

Respondent defends the position of the Court of Appeals. It urges that an application cannot be rejected under 47 U.S.C.A. § 309 without a "full hearing" to applicant. . . .

We do not read the hearing requirement, however, as withdrawing from the power of the Commission the rule-making authority necessary for the orderly conduct of its business. . . . The challenged Rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rule-making authority. 47 U.S.C.A. § 154(i) and § 303(2) grant general rule-making power not inconsistent with the Act or law.

This Commission, like other agencies, deals with the public interest. *Scripps-Howard Radio v. Federal Communications Commission*, 316 U.S. 4, 14, 62 S.Ct. 875, 882, 86 L.Ed. 1229 (1942). Its authority covers new and rapidly developing fields. Congress sought to create regulation for public protection with careful provision to assure fair opportunity for open competition in the use of broadcasting facilities. Accordingly, we cannot interpret § 309(b) as barring rules that declare a present intent to limit the number of stations consistent with a permissible "concentration of control." It is but a rule that announces the Commission's attitude on public protection against such concentration. The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions. We think the Multiple Ownership Rules, as adopted, are reconcilable with the Communications Act as a whole. An applicant files his application with knowledge of the Commission's attitude toward concentration of control.

. . . . We read the Act and Regulations as providing a "full hearing" for applicants who have reached the existing limit of stations, upon their presentation of applications conforming to Rules 1.361(c) and 1.702, that set out adequate reasons why the Rules should be waived or amended. The Act, considered as a whole, re-

Section 1.702:

"Petition for amendment or waiver of rules. Any interested person may petition for issuance, amendment, repeal or waiver of any rule or regulation. Such petition shall show the text of

the proposed rule, or its change, and set forth the reason in support of the petition."

See also 47 CFR, 1941 Supp. §§ 1.72, 1.81.

quires no more. We agree with the contention of the Commission that a full hearing, such as is required by § 309(b), . . . would not be necessary on all such applications. As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open.

We reverse the judgment of the Court of Appeals and remand the case to that court so that it may consider respondent's other objections to the Multiple Ownership Rules.

Reversed and remanded.⁵³

53. [Ed.] Justice Douglas concurred in the result; Justices Frankfurter and Harlan dissented on the ground that the Court lacked jurisdiction to review the FCC Rules.

In defending the multiple ownership rules before the Supreme Court, the Government argued (Brief, 31-35):

"The multiple ownership rules are a reasonable means of effectuating the policy of diversification. Concentration of station ownership in the hands of a relatively small number of licensees would . . . 'prevent the maximum utilization of radio facilities in the public interest.' . . . There are only a limited number of broadcasting channels available for licensing, and station owners may wield enormous influence in the guidance and formation of public opinion. Certainly it is not unreasonable for the Commission to conclude that the public interest requires that broadcasting stations be allocated so as to insure that a wide diversity of viewpoints will be heard. . . .

"Since public opinion on major issues is formed and exists on a nationwide basis, effective diversification of viewpoints cannot be achieved . . . merely in relation to local service areas. If, for example, one person were to acquire broadcasting facilities in a large number of cities, there would be grave cause to fear a tendency to uniformity in the presentation of viewpoint on the national level, even though in each particular city involved there would still be other communication facilities. In any realistic sense, the fullest public presentation of all shades of opinion can be ade-

quately protected only if the problem is dealt with on a national scale.

"The multiple ownership rules also serve the related purpose of effectuating the congressional policy against undue concentration of economic power in the hands of individual members of the broadcasting industry. The owner of numerous stations is in a position to utilize the enhanced bargaining power conferred by multiple ownership to gain substantial economic advantage over weaker competitors with respect to network affiliations, advertising, programming, service, etc.—an advantage which flows not from rendering a better service to the public but from the concentration of economic power. It was not unreasonable for the Commission to conclude that the "public interest" . . . of the listening public in "the larger and more effective use of radio" . . . required it to protect independent broadcasters from encroachment by large and powerful chains.

"Since the purposes of the multiple ownership rules are to promote diversification and to forestall undue concentration of economic power in the hands of individual members of the broadcasting industry, the Commission is not required to approach the problem . . . as if it were deciding in each case whether the acquisition of one additional station would constitute a provable violation of the antitrust laws. For, as the Commission's report makes clear . . . , the multiple ownership rules do not purport to enforce the antitrust laws as such. They seek to carry out the broader,

Note on Further FCC Actions Concerned With Concentration of Control. In 1965, the Commission proposed to amend its rules to impose additional limitations on multiple ownership of broadcast stations. Under the proposed rule, no person would be permitted to have interests in more than three television stations within the 50 largest television markets, and no more than two of these stations could be VHF. The Commission was concerned about increasing concentration of stations in the hands of multiple owners in markets encompassing large populations. Divestiture of existing facilities would not be required. Amendment of Television Multiple Ownership Rules, 5 R.R.2d 1609 (1965). Pending the outcome of the rule-making proceeding, the Commission stated that, "[a]bsent a compelling affirmative showing to the contrary," applications for new stations or for transfers of control would be designated for hearing if the grant of any such applications would result in violation of the proposed rule. Interim Policy Concerning Acquisition of Television Broadcast Stations, 5 R.R.2d 271 (1965), 6 R.R.2d 66 (1965), sustained sub nom. Meredith Broadcasting Co. v. FCC, 7 R.R.2d 2094 (D.C. Cir. 1966). See also 3 R.R.2d 909 (1964) (announcing an earlier interim rule).

In 1968, the Commission decided not to adopt the proposed rule. Multiple Ownership of Television Broadcast Stations, 12 R.R.2d 1501 (1968). The FCC reasoned that the development of UHF stations in the top 50 markets had reduced the previous degree of concentration in these markets and that, "an absence of the type of restriction proposed in the rule herein may well serve to make for a more rapid development of such stations and enhance the chances for development of a fourth commercial TV network. It would significantly contribute to the entry of persons who have the know-how and the financial resources to enter into and carry on UHF television broadcasting during this most crucial period." The Commission also stated, however, that "in light of the special problems concerning the top 50 markets . . . , we will expect a compelling public interest showing by those seeking to acquire more than three stations (or more than two VHF stations) in those markets."

Under both the Interim Policy and the ad hoc policy announced in 1968, the Commission has regularly found a "compelling public interest" in cases proposing levels of concentration in violation of the

and prophylactic, policy of preventing the emergence of a pattern of 'monopolistic domination in the broadcasting field'. . . . [T]he Commission, in the exercise of its rule-making power, may determine that a trend toward heavy concentration is antithetical to the maximum utilization of radio facilities and contrary to the public interest.

"If this be so, the Commission may set a limit or ceiling to ward off the dangers reasonably apprehended. . . ."

While the validity of the multiple ownership rules was being litigated, the FCC amended the television rules to permit licensees to own 2 UHF stations as well as 5 VHF. 19 Fed.Reg. 6102 (1954).

announced standard. See, e. g., Broadcast Plaza, Inc., 45 F.C.C.2d 101, 29 R.R.2d 539 (1974); Tribune Publishing Co., 45 F.C.C.2d 227, 29 R.R.2d 517 (1974).⁵⁴

In Amendment of Multiple Ownership Rules (Regional Concentration), 63 F.C.C.2d 824, 40 R.R.2d 23 (1977), on reconsideration 67 F.C.C.2d 54, 41 R.R.2d 1525 (1977), the FCC added a new prohibition against common ownership of "three broadcast stations in one or several services, where any two are within 100 miles of the third (measured city to city), if there is primary service contour overlap of any of the stations."

The "primary service contour" refers to "the predicted or measured 0.5 mv/m contour for AM stations, the predicted 1.0 mv/m contour for FM stations, and the predicted Grade B contour for TV stations."

The amendment was intended to address the problem of regional concentration on a more predictable basis than had occurred under the previous formulation which required consideration of "such factors as the size, extent and location of areas served, the number of people served, and the extent of other competitive service to the areas in question" (language deleted from the regulations by this amendment).

From an examination of previous filings, the Commission concluded that "the probability that a concentration of control will result where there is no overlap of the primary service contours of the commonly-owned stations is too unlikely to require extensive showings from applicants in such cases," although the Commission would retain the power to request such concentration showings "where specific allegations of fact coming to the Commission's attention, or other substantial and material questions of fact noticed by the Commission, raise the possibility that a grant of an application would create a concentration of control and be inconsistent with the public interest."

"For purposes of this rule making, AM-FM combinations licensed to the same market will be counted as one station. Satellite television stations, whether UHF or VHF, will not be considered. No concentration issue will be raised which would prevent a satellite from becoming a fully independent programmed television station. The amendment adopted herein is prospective only, and thus requires no divestiture of existing facilities or interests. Stations commonly controlled on the effective date of this amendment, the ownership of which is not in compliance therewith, are hereby 'grandfathered'. Transfer of control of an existing holding inconsistent with the new rule is, however, prohibited. (Transfers of stock by will or intestacy are excepted,

54. The FCC has proposed to abandon its special requirements applicable to the top 50 markets. Multiple Owner-

ship Rules, 68 F.C.C.2d 837, 43 Fed. Reg. 17982 (1978).

where such transfer will not aggravate, or create, an ownership pattern inconsistent with our multiple ownership rules.)”

While the amendment represented “a departure from precedent” in handling multiple ownership matters, the FCC described it as “based upon traditional diversification concepts. It is our view that the limited allocations available within an area should be distributed so as to prevent too many nearby allocations from coming under the control of a single person or entity. It is obviously undesirable and contrary to the Congressional purpose to have the limited spectrum concentrated in a relatively few hands. Our new regional concentration rule will, we believe, inhibit the emergence of oligopolistic patterns in the broadcast field, and thus will be in full accord with the underlying national philosophy of free and extensive competition.”⁵⁵

CODE OF FEDERAL REGULATIONS

Title 47

§ 73.636 Multiple ownership.

(a)(2) No license for a television broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with the public interest, convenience, or necessity. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band, or of three broadcast stations in one or several services, where any two are within 100 miles of the third (measured city to city), if there is primary service contour overlap of any of the stations.

Note 11: For the purposes of the three-station regional concentration provision of this section, (a) an application raising a regional concentration of control issue which involves overlap of or by one or more UHF television

55. On limiting common ownership of broadcast stations in different markets, see Levin, *Competition, Diversity and the Television Group Ownership Rule*, 70 *Colum.L.Rev.* 791 (1970); P. Cherington, L. Hirsch, and R. Brandwein, *Television Station Ownership: A Case Study of Federal Agency Regulation* (1971); United Research Inc., *The Implications of Limiting Multi-*

ple Ownership of Television Stations (1966); Trask, *The Palace of Humbug—A Study of FCC Policies Relating to Group Ownership of Television Stations*, 22 *Fed.Com.B.J.* 185 (1968). See also authorities cited *supra* note 1, p. 93.

56. Other notes to 47 C.F.R. § 73.636 are set forth *supra* at pp. 125-128.

stations will be treated on a case-by-case basis, consistent with the precedents of UHF determinations made under the one-to-a-market proscriptions of this section, and (b) standard and FM broadcast stations licensed to communities which are within 15 miles (city reference point to reference point) and/or within the same urbanized area (as mapped by the U. S. Bureau of the Census), will be considered as a combination and counted as one station.

UNITED STATES v. RADIO CORPORATION OF AMERICA

Supreme Court of the United States, 1959.
358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.⁵⁷

Appellees, Radio Corporation of America and National Broadcasting Company, are defendants in this civil antitrust action brought by the Government under § 4 of the Sherman Act, 15 U.S.C. § 4, 15 U.S.C.A. § 4. After holding a preliminary hearing on three of appellees' affirmative defenses to that action, the federal district judge dismissed the complaint. 158 F.Supp. 333. The Government appealed directly to this Court under the Expediting Act, 15 U.S.C. § 29, 15 U.S.C.A. § 29. The principal question presented is whether approval by the Federal Communications Commission of appellees' agreement to exchange their Cleveland television station for one in Philadelphia bars this independent action by the Government which attacks the exchange as being in furtherance of a conspiracy to violate the federal antitrust laws.

The Government's complaint generally alleged the following facts. In 1954, National Broadcasting Company (NBC), a wholly owned subsidiary of Radio Corporation of America (RCA), owned five very high frequency (VHF) television stations. The stations were located in the following market areas: New York, which is the country's largest market; Chicago, second; Los Angeles, third; Cleveland, tenth; and Washington, D. C., eleventh. According to the Government's allegations, in March 1954, NBC and RCA originated a continuing conspiracy to acquire stations in five of the eight largest market areas in the country. Since Philadelphia is the country's fourth largest market area, acquisition of a Philadelphia station in exchange for appellees' Cleveland or Washington station would achieve one goal of the conspiracy.⁵⁸

One Philadelphia station, WPTZ, was owned by Westinghouse Broadcasting Company. This station and a Westinghouse-owned

57. [Ed.] Some footnotes have been omitted; others have been renumbered.

58. Under present FCC regulations, NBC can own no more than five sta-

tions. 47 CFR 1958, § 3.636 so that acquisition of a new station would require that an existing one be relinquished.

station in Boston were affiliated with the NBC network. In addition, Westinghouse desired NBC affiliation for a station to be acquired in Pittsburgh. In order to force Westinghouse to exchange its Philadelphia station for NBC's Cleveland station, it is alleged that NBC threatened Westinghouse with loss of the network affiliation of its Boston and Philadelphia stations, and threatened to withhold affiliation from its Pittsburgh station to be acquired. NBC also threatened to withhold network affiliation from any new VHF or UHF (ultra high frequency) stations which Westinghouse might acquire. By thus using its leverage as a network, NBC is alleged to have forced Westinghouse to agree to the exchange contract under consideration. Under the terms of that contract NBC was to acquire the Philadelphia station, while Westinghouse was to acquire NBC's Cleveland station plus three million dollars.

The Government asked that the conspiracy be declared violative of § 1 of the Sherman Act, 15 U.S.C. § 1, 15 U.S.C.A. § 1, that the appellees be divested of such assets as the District Court deemed appropriate, that "such other and additional relief as may be proper" be awarded, and that the Government recover costs of the suit.

Appellees' affirmative defenses arose out of the fact that the exchange had been approved by the Federal Communications Commission. FCC approval was required under § 310(b) of the Communications Act of 1934 Under that Section, appellees filed applications setting forth the terms of the transaction and the reasons for requesting the exchange. The Commission instituted proceedings to determine whether the exchange met the statutory requirements of § 310, that the "public interest, convenience, and necessity" would be served. They were not adversary proceedings. After extensive investigation of the transaction, the Commission was still not satisfied that the exchange would meet the statutory standards, and, over three dissents, issued letters seeking additional information on various subjects, including antitrust problems, under § 309 (b) of the Act. After receiving answers to the letters, the Commission, without holding a hearing, on December 21, 1935, granted the application to exchange stations.

It was stipulated below that in passing upon the application, the Commission had all the information before it which has now been made the basis of the Government's complaint. It further appears that during the FCC proceedings the Justice Department was informed as to the evidence in the FCC's possession. It was further stipulated, and we assume, that the FCC decided all issues relative to the antitrust laws that were before it, and that the Justice Department had the right to request a hearing under § 309(b), to file a protest under § 309(c), to seek a rehearing under § 405, and to seek judicial review of the decision under § 402(b). . . . The Department of Justice took none of these actions. Accordingly, on January

22, 1956, after the period in which the Department could have sought review had expired, NBC and Westinghouse consummated the exchange transaction according to their contract. The Department did not file the present complaint until December 4, 1956, over ten months later.

Against this background, appellees assert that the FCC had authority to pass on the antitrust questions presented, and, in any case, that the regulatory scheme of the Communications Act has so displaced that of the Sherman Act that the FCC had primary jurisdiction to license the exchange transaction, with the result that any attack for antitrust reasons on the exchange transaction must have been by direct review of the license grant. Relying on this premise, they then contend that the only method available to the Government for redressing its antitrust grievances was to intervene in the FCC proceedings; that since it did not, the antitrust issues were determined adversely to it when the exchange was approved, so that it is barred by principles of collateral estoppel and *res judicata*; and that in any case the long delay between approval of the exchange and filing of this suit bars the suit because of laches.

I.

Whether these contentions are to prevail depends substantially upon the extent to which Congress authorized the FCC to pass on antitrust questions, and this in turn requires examination of the relevant legislative history. Two sections of the Communications Act of 1934 . . . deal specifically with antitrust considerations, Sections 311 and 313:

“Sec. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313. . . .

“Sec. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such

laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court."

[The Court reviewed the legislative history of sections 311 and 313. The predecessor of section 313 had been included in one of the early bills antedating the Radio Act of 1927 and had been embodied in that statute, and in the Communications Act of 1934, without amendment. It had remained unchanged since that time. By contrast, section 311, originating in the same bill, had undergone several changes over the years. As originally enacted, it provided (1) that the agency must refuse to license companies that had been adjudged by a court to have violated the antitrust laws in connection with radio communications or radio apparatus; and (2) that the granting of a license by the agency would not estop the United States or private persons from bringing antitrust suits against the licensee. In 1934, the first part of section 311 was amended to provide (a) that the FCC must refuse to license any person whose license had been revoked by a court under section 313, and (b) that the FCC, in its discretion, might deny a license to a person whom a court had found had violated the antitrust laws, even though license revocation had not been ordered by the court. Then, in 1952, Congress deleted the portion of the statute relating to discretionary denials by the FCC and also the language, of earlier origin, about licensing decisions not estopping antitrust plaintiffs. The latter language was described as "surplusage." Section 311 was stripped to its present dimensions: a provision concerned entirely with effectuating judgments of antitrust courts under section 313. Throughout these various stages, the Court found manifestations of Congressional intent that antitrust issues should be adjudicated by courts rather than by the FCC or its predecessor.]

Thus, the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts.

II.

We now reach the question whether, despite the legislative history, the over-all regulatory scheme of the Act requires invocation of a primary jurisdiction doctrine. . . .

. . . [W]hen questions arose as to the applicability of the doctrine to transactions allegedly violative of the antitrust laws, particularly involving fully regulated industries whose members were forced to charge only reasonable rates approved by the appropriate commission, this Court found the doctrine applicable. . . . At the same time, this Court carefully noted that the doctrine did not apply when the action was only for the purpose of dissolving the conspiracy through which the allegedly invalid rates were set, for in such a case there would be no interference with rate structures or a regulatory scheme. . . . The decisions sometimes emphasized the need for administrative uniformity and uniform rates, . . . while at other times they emphasized the need for administrative experience in distilling the relevant facts in a complex industry as a foundation for later court action. . . .

The cases all involved, however, common carriers by rail and water. These carriers could charge only the published tariff, and that tariff must have been found by the appropriate agency to have been reasonable. Free rate competition was modified by federal controls. The Court's concern was that the agency which was expert in, and responsible for, administering those controls should be given the opportunity to determine questions within its special competence as an aid to the courts in resolving federal antitrust policy and federal regulatory patterns into a cohesive whole. That some resolution is necessary when the antitrust policy of free competition is placed beside a regulatory scheme involving fixed rates is obvious. Cf. *McLean Trucking Co. v. United States*, 321 U.S. 67, 64 S.Ct. 370, 88 L.Ed. 544. Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance.

While the television industry is also a regulated industry, it is regulated in a very different way. That difference is controlling. Radio broadcasters, including television broadcasters, see *Allen B. Dumont Laboratories v. Carroll*, 3 Cir., 184 F.2d 153, are not included in the definition of common carriers in § 3(h) of the Communications Act, 47 U.S.C. § 153(h), 47 U.S.C.A. § 153(h), as are telephone and telegraph companies. Thus the extensive controls, including rate regulation, of Title II of the Communications Act, 47 U.S.C. §§ 201-222, 47 U.S.C.A. §§ 201-222, do not apply. Television broadcasters remain free to set their own advertising rates. . . . Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears.

The facts of this case illustrate that analysis. Appellees, like unregulated business concerns, made a business judgment as to the desirability of the exchange. Like unregulated concerns, they had to make this judgment with knowledge that the exchange might run afoul of the antitrust laws. Their decision varied from that of an unregulated concern only in that they also had to obtain the approval of a federal agency. But [the] scope of that approval in the case of the FCC was limited to the statutory standard, "public interest, convenience, and necessity." . . . The monetary terms of the exchange were set by the parties, and were of concern to the Commission only as they might have affected the ability of the parties to serve the public. Even after approval, the parties were free to complete or not to complete the exchange as their sound business judgment dictated. In every sense, the question faced by the parties was solely one of business judgment (as opposed to regulatory coercion), save only that the Commission must have found that the "public interest" would be served by their decision to make the exchange. No pervasive regulatory scheme was involved.

This is not to imply that federal antitrust policy may not be considered in determining whether the "public interest, convenience, and necessity" will be served by proposed action of a broadcaster, for this Court has held the contrary. *National Broadcasting Co. v. United States*, 319 U.S. 190, 222-224, 63 S.Ct. 997, 1011-1013, 87 L.Ed. 1344. Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication. See 98 Cong.Rec. 7399; *Mansfield Journal Co. v. Federal Communications Comm.*, 86 U.S.App.D.C. 102, 107, 109, 180 F.2d 28, 33, 34.

III.

The other contentions of appellees fall of their own weight if the FCC has no power to decide antitrust questions. Thus, before we can find the Government collaterally estopped by the FCC licensing, we must find "whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403, 60 S.Ct. 907, 917, 84 L.Ed. 1263. (Emphasis supplied.) But the issue in controversy before the Commission was whether the exchange would serve the public interest, not whether § 1 of the Sherman Act had been violated. Consequently, there could be no estoppel. *Res judicata* principles are even more inapposite.

Similarly, there could be no laches unless the Government was under some sort of a duty to go forward in the FCC proceedings. But

unless the FCC had power to decide the antitrust issues, and we have held that it did not, the Government had no duty either to enter the FCC proceedings or to seek review of the license grant.

Accordingly, the judgment of the District Court dismissing the action is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

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59. [Ed.] Justice Harlan concurred in a separate opinion and Justices Frankfurter and Douglas did not participate. For subsequent developments, see *NBC, Inc.*, 2 R.R.2d 921, 3 R.R.2d 611 (1964).

The *RCA* litigation is discussed in 71 *Harv.L.Rev.* 1556 (1958); 44 *Va.L.Rev.* 457 (1958). See also Bennett, *Media Concentration and the FCC: Focusing With a Section 7 Lens*, 66 *Nw.U.L.Rev.* 159 (1971); Johnson, *Freedom to Create: The Implications of Antitrust Policy for Television Programming Content*, 8 *Osgoode Hall L.J.* 11 (1970) and *1970 Law and the Social Order* 337; Barrow, *Antitrust and the Regulated Industry; Promoting Competition in Broadcasting*, 1964 *Duke L.J.* 282; Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 *Law & Contemp.Prob.* 549 (1957); Doerfer, *Federal Communications Commission and the Antitrust Law*, 1960 *Antitrust L. Symposium* 57; Hansen, *Broadcasting and the Antitrust Laws* 22 *Law & Contemp.Prob.* 572 (1957); B. Schwartz, *Antitrust and the FCC: The Problem of Network Dominance*, 107 *U.Pa.L.Rev.* 753 (1959); Comment, *Effect Upon a Subsequent Antitrust Suit of FCC Approval of an Exchange of Stations*, 57 *Mich.L.Rev.* 885 (1959); Note, *Antitrust Immunity in the Communications Industries*, 44 *Va.L.Rev.* 1131 (1958).

In most cases, antitrust actions against radio and television companies have been considered on the merits, without discussion of primary jurisdiction or the impact of FCC regulation. See, for example, *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *Melutire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), certiorari

denied 327 U.S. 779, 66 S.Ct. 530, 90 L.Ed. 1007 (1946); *United States v. Columbia Broadcasting System*, 215 F. Supp. 694 (S.D.N.Y.1963); *American Manufacturers Mut. Ins. Co. v. American Broadcasting-Paramount Theatres Inc.*, 221 F.Supp. 848 (S.D.N.Y. 1963). Where the issue has been considered, courts generally have declined to invoke the doctrine of primary jurisdiction. See *Packaged Programs v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958); *United States v. National Broadcasting Co.*, 29 R.R. 2d 597 (C.D.Cal. October 29, 1973); *First Delaware Valley Citizens, Inc. v. CBS*, 1975-2 *Trade Cases* par. 60,675 (E.D.Pa. July 1, 1975). Compare *Federal Broadcasting System v. American Broadcasting Co.*, 167 F.2d 349 (2d Cir. 1948), cert. denied 335 U.S. 821, 69 S.Ct. 43, 93 L.Ed. 375 (1948); *Chronicle Publishing Co. v. National Broadcasting Co.*, 294 F.2d 744 (9th Cir. 1961); *Standard Radio & Television Co. v. Chronicle Publishing Co.*, 182 Cal.App.2d 293, 6 Cal.Rptr. 246 (1st Dist. 1960), 74 *Harv.L.Rev.* 1229 (1961), 13 *Stan.L.Rev.* 629 (1961).

In *Philco Corp. v. FCC*, 293 F.2d 864 (D.C.Cir. 1961), *Philco* objected to the renewal of one of *NBC's* television licenses because *RCA*, *NBC's* parent corporation, allegedly had been engaged in various forms of anticompetitive behavior. The Court directed a hearing on *Philco's* charges, rejecting an FCC argument that the agency's decision should be postponed until after the resolution of certain antitrust actions pending against *RCA*. The Court reasoned: (1) anticompetitive behavior may disqualify an applicant even though the antitrust laws have not been violated; and (2) vindication of the public interest "cannot be postponed pending the outcome of lawsuits."

Chapter V

NETWORK PRACTICES¹

Introductory Note on the Nature of Network Operations. The broadcast network is essentially an intermediary serving three groups of clients: advertisers, program producers and affiliated stations. Networks produce some programming, principally news and public affairs, and they arrange with telecommunications common carriers for interconnection of affiliated stations. But the significance of the network can best be appreciated by considering the attitudes of each of its three client groups.

Advertisers, particularly those interested in a national market, generally prefer network exposure, because the network can deliver large audiences which are predictable to a significant degree and which in any case can be monitored on a continuing basis. There also are savings in transaction costs in dealing with a single network instead of individual affiliated stations (or the multiple national spot representatives of such stations).

Program producers prefer to sell their product to networks, at least in the first instance, because network exposure is essential to achieve the degree of program popularity needed to recoup production costs. Such costs are not normally recovered from the payments made

1. On network practices and network regulation, see FCC, Report on Chain Broadcasting (1941); FCC, Network Broadcasting: Report of the Network Study Staff to the Network Study Committee (1957), reprinted as House Rep.No.1297, 85th Cong., 2d Sess. (1958); FCC, Television Network Program Procurement, Second Interim Report, Part I (1962), reprinted in House Rep.No.281, 88th Cong., 1st Sess. (1963); FCC, Television Network Program Procurement, Second Interim Report, Part II (1965); Barrow, the Attainment of Balanced Program Service in Television, 52 Va.L.Rev. 633 (1968); A. D. Little, Inc., Television Program Production, Procurement, Distribution and Scheduling (1969); Bryant, Historical and Social Aspects of Concentration of Program Control in Television, 34 Law and Contemp. Prob. 610 (1969); Bryant, Regulation of Broadcast Networks, 15 St. Louis U.L.J. 3 (1970); Crandall, The Economic Effect of Television Network Program "Ownership," 14 J.L. and Econ. 385 (1971); Crandall, FCC Regulation, Monopsony, and Network Television Program Costs, 3 Bell J.Econ. and Mgt.Sci. 483 (1972); Besen and Soligo, The Economics of the Network-Affiliate Relationship in the Television Broadcasting Industry, 63 Amer. Econ.Rev. 259 (1973); R. Park, New Television Networks (Rand Corp. 1973), abridged version at 6 Bell J. Econ. and Mgt.Sci. 607 (1975); Crandall, The Economic Case for a Fourth Commercial Television Network, 22 Public Policy 513 (1974); Bowman, Demand and Supply of Network Television Advertising, 7 Bell J.Econ. and Mgt.Sci. 298 (1976); Dominick and Pearce, Trends in Network Prime Time Programming, 1953-1974, 26 J. Com. 70 (1976); Schuesler, FCC Regulation of the Network Television Procurement Process: An Attempt to Regulate the Laws of Economics, 73 Nw Univ.L.Rev. 227 (1978); Neubauer, The Networks' Policy Against Free-lance Documentaries: A Proposal for Commission Action, 30 Fed.Com.B.J. 117 (1978). See also authorities cited supra p. 26.

by the network for network exhibition; it is usually necessary for program producers to obtain substantial additional revenues from subsequent exhibitions on a non-network or syndication basis. Again, there also are savings in transaction costs in dealing with one or a few networks rather than with individual stations (or multiple syndicators serving such stations).

Affiliated stations prefer to deal with networks for at least part of their programming, and station "clearances" of network programs are generally on the order of 95%. In such transactions, the interests of the station are advanced in three ways. First, it receives direct compensation from the network equal to approximately 30% of the station's advertising rate (fixed by negotiation between the station and the network) after carrying approximately 20 to 25 hours of network programming each month without compensation. Second, the station can sell advertising time at the "station breaks" to non-network advertisers; the value of this time is enhanced by the popularity of the network's programming. Third, if the network's programs attract large audiences, there may be a tendency for such audiences to remain tuned to the station for non-network programming or to identify the station as one which generally carries popular programming; this enhances the audiences and advertising rates for the station's non-network programs.

The result is that, absent strong countervailing considerations, the network is in a good position to strike favorable bargains with advertisers (increasing network time charges), program producers (decreasing network payments), and affiliated stations (decreasing direct network compensation). With only three national networks and little room for shifts among affiliates, the rivalry among the three networks, while important in other respects, does not reduce their bargaining power in relation to any of the three client groups. Further, the advantages of dealing with the network are sufficiently great that, given a choice, each of the client groups normally prefers the network.

The alternative to the network offering, which is sometimes pursued, is for a station to obtain programming from a syndicator (or, less often, to produce it itself) and to obtain advertising through its national spot representative (or, for local advertisers, directly from the advertiser). Such arrangements may permit the station to retain a larger share of the advertiser's dollar; but if the audiences attracted are less than the network alternative, there will be fewer advertiser dollars to share. Sometimes the non-network alternative yields satisfactory results. But the relative attractiveness of the network and its programs is indicated by the higher profitability of network affiliates (and the preference of stations for affiliation whenever available) and the general practice of affiliates in "clearing" virtually all network offerings.

In general, this description applies to pre-television radio and earlier television operations as well as contemporary television operations. There are two important differences. First, the syndication of previously released network offerings is a television phenomenon and one that has grown in significance over the years. Second, in the earlier years advertisers tended to sponsor entire programs and had a larger voice in selecting programs and even the network line-up of stations (if less than all). Contemporary practice is for the network to arrange virtually all programming in the first instance, and then sell advertising minutes (or "participations") to interested advertisers. The shift is primarily the result of the high cost of television advertising and the desire of advertisers to spread their advertising budget as broadly as possible among a variety of programs and networks (not excluding some measure of non-network exposure).

NATIONAL BROADCASTING CO. v. UNITED STATES

Supreme Court of the United States, 1943.
319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.²

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

These suits were brought on October 30, 1941, to enjoin the enforcement of the Chain Broadcasting Regulations promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941. We held last Term in *Columbia System v. United States*, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563, and *National Broadcasting Co. v. United States*, 316 U.S. 447, 62 S.Ct. 1214, 86 L. Ed. 1586, that the suits could be maintained . . . and that the decrees of the District Court dismissing the suits for want of jurisdiction should therefore be reversed.³ On remand the District Court granted the Government's motions for summary judgment and dis-

2. [Ed.] Some footnotes have been omitted; others have been renumbered.

3. [Ed.] In these cases, it was observed that the regulations posed the threat of serious consequences to affiliated stations which did not conform to their terms, and that it was alleged without contradiction that "numerous affiliated stations have conformed to the regulations to avoid loss of their licenses." The networks were held to have standing to maintain the suits even though the regulations were not directed to them and

did not in terms compel action by them or impose penalties upon them because of their action on failure to act. "It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely [the networks'] contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked." 316 U.S. at 418, 422. 62 S.Ct. at 1200, 1202.

missed the suits on the merits. 47 F.Supp. 940. The cases are now here on appeal. 28 U.S.C.A. § 47. . . .

On March 18, 1938, the Commission undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain broadcasting⁴ were required in the "public interest, convenience, or necessity." . . .

On May 2, 1941, the Commission issued its Report on Chain Broadcasting setting forth its findings and conclusions upon the matters explored in the investigation, together with an order adopting the Regulations here assailed. Two of the seven members of the Commission dissented from this action. . . . And on October 11, 1941, the Commission (again with two members dissenting) issued a Supplemental Report, together with an order amending three Regulations. . . . Since October 30, 1941, when the present suits were filed, the enforcement of the Regulations has been stayed either voluntarily by the Commission or by order of court.

The Regulations, which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power," are addressed in terms to station licensees and applicants for station licenses. They provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks. Each Regulation is directed at a particular practice found by the Commission to be detrimental to the "public interest," and we shall consider them *seriatim*. In doing so, however, we do not overlook the admonition of the Commission that the Regulations as well as the network practices at which they are aimed are interrelated: "In considering above the network practices which necessitate the regulations we are adopting, we have taken each practice singly, and have shown that even in isolation each warrants the regulation addressed to it. But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly." (Report, p. 75.)

The Commission found that at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks. 135 stations were affiliated exclusively with the National Broadcasting Company, Inc., known in the industry as NBC, which operated two national networks, the "Red"

4. Chain broadcasting is defined in § 3 (p) of the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more connected stations." In actual prac-

tice, programs are transmitted by wire, usually leased telephone lines, from their point of origination to each station in the network for simultaneous broadcast over the air.

and the "Blue." NBC was also the licensee of 10 stations, including 7 which operated on so-called clear channels with the maximum power available, 50 kilowatts; in addition, NBC operated 5 other stations, 4 of which had power of 50 kilowatts, under management contracts with their licensees. 102 stations were affiliated exclusively with the Columbia Broadcasting System, Inc., which was also the licensee of 8 stations, 7 of which were clear-channel stations operating with power of 50 kilowatts. 74 stations were under exclusive affiliation with the Mutual Broadcasting System, Inc. In addition, 25 stations were affiliated with both NBC and Mutual, and 5 with both CBS and Mutual. These figures, the Commission noted, did not accurately reflect the relative prominence of the three companies, since the stations affiliated with Mutual were, generally speaking, less desirable in frequency, power, and coverage. It pointed out that the stations affiliated with the national networks utilized more than 97% of the total night-time broadcasting power of all the stations in the country. NBC and CBS together controlled more than 85% of the total night-time wattage, and the broadcast business of the three national network companies amounted to almost half of the total business of all stations in the United States.

The Commission recognized that network broadcasting had played and was continuing to play an important part in the development of radio. "The growth and development of chain broadcasting," it stated, "found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs. . . . But the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated." (Report, p. 4.)

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

Regulation 3.101—Exclusive affiliation of station. The Commission found that the network affiliation agreements of NBC and CBS

customarily contained a provision which prevented the station from broadcasting the programs of any other network. The effect of this provision was to hinder the growth of new networks, to deprive the listening public in many areas of service to which they were entitled, and to prevent station licensees from exercising their statutory duty of determining which programs would best serve the needs of their community. The Commission observed that in areas where all the stations were under exclusive contract to either NBC or CBS, the public was deprived of the opportunity to hear programs presented by Mutual. To take a case cited in the Report: In the fall of 1939 Mutual obtained the exclusive right to broadcast the World Series baseball games. It offered this program of outstanding national interest to stations throughout the country, including NBC and CBS affiliates in communities having no other stations. CBS and NBC immediately invoked the "exclusive affiliation" clauses of their agreements with these stations, and as a result thousands of persons in many sections of the country were unable to hear the broadcasts of the games.

"Restraints having this effect," the Commission observed, "are to be condemned as contrary to the public interest irrespective of whether it be assumed that Mutual programs are of equal, superior, or inferior quality. The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated. . . . Our conclusion is that the disadvantages resulting from these exclusive arrangements far outweigh any advantages. A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable, and which, by closing the door of opportunity in the network field, adversely affects the program structure of the entire industry." (Report, pp. 52, 57.) Accordingly, the Commission adopted Regulation 3.101, providing as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization."

Regulation 3.102—Territorial exclusivity. The Commission found another type of "exclusivity" provision in network affiliation agreements whereby the network bound itself not to sell programs to any other station in the same area. The effect of this provision, designed to protect the affiliate from the competition of other stations serving the same territory, was to deprive the listening public of many programs that might otherwise be available. If an affiliated station rejected a network program, the "territorial exclusivity" clause of its affiliation agreement prevented the network from offering the program to other stations in the area. For example, Mutual presented a popular program, known as "The American Forum of

the Air," in which prominent persons discussed topics of general interest. None of the Mutual stations in the Buffalo area decided to carry the program, and a Buffalo station not affiliated with Mutual attempted to obtain the program for its listeners. These efforts failed, however, on account of the "territorial exclusivity" provision in Mutual's agreements with its outlets. The result was that this program was not available to the people of Buffalo.

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

Recognizing that the "territorial exclusivity" clause was unobjectionable in so far as it sought to prevent duplication of programs in the same area, the Commission limited itself to the situations in which the clause impaired the ability of the licensee to broadcast available programs. Regulation 3.102, promulgated to remedy this particular evil, provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

Regulation 3.103—Term of affiliation. The standard NBC and CBS affiliation contracts bound the station for a period of five years, with the network having the exclusive right to terminate the contracts upon one year's notice. The Commission, relying upon § 307(d) of the Communications Act of 1934, under which no license to operate a broadcast station can be granted for a longer term than three years, found the five-year affiliation term to be contrary to the policy of the Act: "Regardless of any changes that may occur in the economic, political, or social life of the Nation or of the community in which the station is located, CBS and NBC affiliates are bound by contract to continue broadcasting the network programs of only one network for 5 years. The licensee is so bound even though the policy and caliber of programs of the network may deteriorate greatly. The future necessities of the station and of the community are not considered. The station licensee is unable to follow his conception of the public

interest until the end of the 5-year contract." (Report, p. 61.) The Commission concluded that under contracts binding the affiliates for five years, "stations become parties to arrangements which deprive the public of the improved service it might otherwise derive from competition in the network field; and that a station is not operating in the public interest when it so limits its freedom of action." (Report, p. 62.) Accordingly, the Commission adopted Regulation 3.103: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years; ⁵ *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period."

Regulation 3.104—Option time. The Commission found that network affiliation contracts usually contained so-called network optional time clauses. Under these provisions the network could upon 28 days' notice call upon its affiliates to carry a commercial program during any of the hours specified in the agreement as "network optional time." For CBS affiliates "network optional time" meant the entire broadcast day. For 29 outlets of NBC on the Pacific Coast, it also covered the entire broadcast day; for substantially all of the other NBC affiliates, it included 8½ hours on weekdays and 8 hours on Sundays. Mutual's contracts with about half of its affiliates contained such a provision, giving the network optional time for 3 or 4 hours on weekdays and 6 hours on Sundays.

In the Commission's judgment these optional time provisions, in addition to imposing serious obstacles in the path of new networks, hindered stations in developing a local program service. The exercise by the networks of their options over the station's time tended to prevent regular scheduling of local programs at desirable hours. The Commission found that "shifting a local commercial program may seriously interfere with the efforts of a [local] sponsor to build up a regular listening audience at a definite hour, and the long-term advertising contract becomes a highly dubious project. This hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service.

. . . A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of

5. Station licenses issued by the Commission normally last two years. Section 3.34 of the Commission's Rules

and Regulations governing Standard and High-Frequency Broadcast Stations, as amended October 14, 1941.

local consumer and social interest. We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national spot transcriptions. We believe that these considerations far outweigh any supposed advantages from 'stability' of network operations under time options. We find that the optioning of time by licensee stations has operated against the public interest." (Report, pp. 63, 65.)

The Commission undertook to preserve the advantages of option time, as a device for "stabilizing" the industry, without unduly impairing the ability of local stations to develop local program service. Regulation 3.104 called for the modification of the option-time provision in three respects: the minimum notice period for exercise of the option could not be less than 56 days; the number of hours which could be optioned was limited; and specific restrictions were placed upon exercise of the option to the disadvantage of other networks. The text of the Regulation follows: "No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

Regulation 3.105—Right to reject programs. The Commission found that most network affiliation contracts contained a clause defining the right of the station to reject network commercial programs. The NBC contracts provided simply that the station "may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity." NBC required a licensee who rejected a program to "be able to support his contention that what he has done has been more in the public interest than had he carried the network program." Similarly, the CBS contracts provided that if the station had "reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest, the station may, on 3 weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the station shall be satisfied."

While seeming in the abstract to be fair, these provisions, according to the Commission's finding, did not sufficiently protect the "public interest." As a practical matter, the licensee could not determine in advance whether the broadcasting of any particular network program would or would not be in the public interest. "It is obvious that from such skeletal information [as the networks submitted to the stations prior to the broadcasts] the station cannot determine in

advance whether the program is in the public interest, nor can it ascertain whether or not parts of the program are in one way or another offensive. In practice, if not in theory, stations affiliated with networks have delegated to the networks a large part of their programming functions. In many instances, moreover, the network further delegates the actual production of programs to advertising agencies. These agencies are far more than mere brokers or intermediaries between the network and the advertiser. To an ever-increasing extent, these agencies actually exercise the function of program production. Thus it is frequently neither the station nor the network, but rather the advertising agency, which determines what broadcast programs shall contain. Under such circumstances, it is especially important that individual stations, if they are to operate in the public interest, should have the practical opportunity as well as the contractual right to reject network programs. . . .

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

The Commission undertook in Regulation 3.105 to formulate the obligations of licensees with respect to supervision over programs: “No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.”

Regulation 3.106—Network ownership of stations. The Commission found that NBC, in addition to its network operations, was the licensee of 10 stations, 2 each in New York, Chicago, Washington, and San Francisco, 1 in Denver, and 1 in Cleveland. CBS was the licensee of 8 stations, 1 in each of these cities: New York, Chicago, Washington, Boston, Minneapolis, St. Louis, Charlotte, and Los Angeles.

These 18 stations owned by NBC and CBS, the Commission observed, were among the most powerful and desirable in the country, and were permanently inaccessible to competing networks. "Competition among networks for these facilities is nonexistent, as they are completely removed from the network-station market. It gives the network complete control over its policies. This 'bottling-up' of the best facilities has undoubtedly had a discouraging effect upon the creation and growth of new networks. Furthermore, common ownership of network and station places the network in a position where its interest as the owner of certain stations may conflict with its interest as a network organization serving affiliated stations. In dealings with advertisers, the network represents its own stations in a proprietary capacity and the affiliated stations in something akin to an agency capacity. The danger is present that the network organization will give preference to its own stations at the expense of its affiliates." (Report, p. 67.)

The Commission stated that if the question had arisen as an original matter, it might well have concluded that the public interest required severance of the business of station ownership from that of network operation. But since substantial business interests have been formed on the basis of the Commission's continued tolerance of the situation, it was found inadvisable to take such a drastic step. The Commission concluded, however, that "the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest," and that it was also against the "public interest" for network organizations to own stations in areas where the available facilities were so few or of such unequal coverage that competition would thereby be substantially restricted. Recognizing that these considerations called for flexibility in their application to particular situations, the Commission provided that "networks will be given full opportunity, on proper application for new facilities or renewal of existing licenses, to call to our attention any reasons why the principle should be modified or held inapplicable." (Report, p. 68.) Regulation 3.106 reads as follows: "No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

Regulation 3.107—Dual network operation. This regulation provides that: "No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be ap-

plicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network." In its Supplemental Report of October 11, 1941, the Commission announced the indefinite suspension of this regulation. There is no occasion here to consider the validity of Regulation 3.107, since there is no immediate threat of its enforcement by the Commission.

Regulation 3.108—Control by networks of station rates. The Commission found that NBC's affiliation contracts contained a provision empowering the network to reduce the station's network rate, and thereby to reduce the compensation received by the station, if the station set a lower rate for non-network national advertising than the rate established by the contract for the network programs. Under this provision the station could not sell time to a national advertiser for less than it would cost the advertiser if he bought the time from NBC. In the words of NBC's vice-president, "This means simply that a national advertiser should pay the same price for the station whether he buys it through one source or another source. It means that we do not believe that our stations should go into competition with ourselves." (Report, p. 73.)

The Commission concluded that "it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers." (Report, p. 75.) Accordingly, the Commission adopted Regulation 3.108, which provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs."

The appellants attack the validity of these Regulations along many fronts. They contend that the Commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934; that even if the Commission were authorized by the Act to deal with the matters comprehended by the Regulations, its action is nevertheless invalid because the Commission misconceived the scope of the Act, particularly § 313 which deals with the application of the anti-trust laws to the radio industry; that the Regulations are arbitrary and capricious; that if the Communications Act of 1934 were construed to authorize the promulgation of the Regulations, it would be an unconstitutional delegation of legislative power; and that, in any event, the Regulations abridge the appellants' right of free speech in violation of the First Amendment. We are thus called upon to determine whether Congress has authorized the Commission to exercise the power asserted by the Chain Broadcasting Regulations, and

if it has, whether the Constitution forbids the exercise of such authority.

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

We do not pause here to enumerate the scope of the Radio Act of 1927 and of the authority entrusted to the Radio Commission, for the basic provisions of that Act are incorporated in the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C.A. § 151 et seq., the legislation immediately before us.

[The Court then quoted portions of §§ 1, 301, 303, 307, 309, 310 and 312 of the Communications Act.]

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity," a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 60 S.Ct. 437, 439, 84 L.Ed. 656.⁶ "This criterion is not to be interpreted as setting up a stand-

6. [Ed.] In the *Pottsville* case an applicant for a construction permit under § 319 of the Communications Act obtained a reversal in the Court of Appeals of the FCC's denial of its application. Upon remand, the FCC consolidated the *Pottsville* application with two others subsequently filed for the same facilities in order to deter-

mine, on a comparative basis, which of the three "will best serve the public interest." The Court of Appeals then issued a writ of mandamus to the Commission, ordering it to sever the *Pottsville* application from the other two, and to hear and reconsider this application "on the basis of the record as originally made and in ac-

ard so indefinite as to confer an unlimited power. Compare *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24, 53 S.Ct. 45, 48, 77 L.Ed. 138. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services” *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285, 53 S.Ct. 627, 636, 77 L.Ed. 1166, 89 A.L.R. 406.⁷

The “public interest” to be served under the Communications Act is thus the interest of the listening public in “the larger and more effective use of radio.” § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. “An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts.” *Federal Communications Commission v. Sanders Radio Station*, 309 U.S. 470, 475, 60 S.Ct. 693, 697, 84 L.Ed. 869. The Commission’s licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of “public interest” were

cordance with the opinions” of the Court of Appeals. The Supreme Court reversed, holding that, upon remand to the FCC after the initial reversal by the Court of Appeals, “the Commission was again charged with the duty of judging the application in the light of ‘public convenience, interest, or necessity.’ The fact that in its first disposition the Commission had committed a legal error did not create rights of priority in [Pottsville], as against the later applicants, which it would not have otherwise possessed.” *Accord, Fly v. Heitmeyer*, 309 U.S. 146, 60 S.Ct. 443, 84 L.Ed. 664 (1940).

7. [Ed.] The *Nelson* case was decided at a time when the FCC was operating under a Congressionally mandated plan specifying quotas for radio stations in each state (as well as in broader geographical zones). The Commission modified the license of a broadcaster in Gary, Indiana, so as to extend the station’s coverage; Indiana was then among the states having less than its quota of stations. At the same time the Commission terminated the temporary licenses of two Chicago stations whose broadcasts would interfere with the Gary station; Illinois at that time had more than its quota of stations. In addition to more equitable apportionment of stations among the several states, the Commission ad-

vanced as reasons in support of its action: (1) the excellent public service rendered by the Gary station in meeting the particular needs of its region; (2) the absence of any loss to persons served by the Chicago stations, which were network affiliates whose broadcasts would be otherwise available; and (3) the reduction in the over-quota status of the statutory zone in which both Indiana and Illinois were situated. The Court of Appeals of the District of Columbia reversed the decision of the Commission as “unnecessarily injuring stations already established which are rendering valuable service to their natural service areas.”

The Supreme Court reversed, holding that the findings of the Commission supported its decision. The Commission had “the power to license operation by a station in an under-quota State on a frequency theretofore assigned to a station in an over-quota State, provided the Commission [did] not act arbitrarily or capriciously.” In making such an adjustment between different states, “the equities of existing stations undoubtedly demand consideration. They are not to be victims of official favoritism. But the weight of the evidence as to these equities and all other pertinent facts is for the determination of the Commission. . . .”

limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." See *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 n. 2, 60 S.Ct. 437, 439, 84 L.Ed. 656.

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."

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

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the

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

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137, 60 S.Ct. 437, 439, 84 L.Ed. 656. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest," if need be, by making "special regulations applicable to radio stations engaged in chain broadcasting." § 303(g)(i).

[The Court found that the legislative history of § 303(i) of the Act did not support the networks' contention that the provision was "intended to restrict the scope of the Commission's powers to the technical and engineering aspects of chain broadcasting."]

A totally different source of attack upon the Regulations is found in § 311 of the Act, which authorizes the Commission to withhold licenses from persons convicted of having violated the anti-trust laws. Two contentions are made—first, that this provision puts considerations relating to competition outside the Commission's concern before an applicant has been convicted of monopoly or other restraints of trade, and second, that, in any event, the Commission misconceived the scope of its powers under § 311 in issuing the Regulations. Both of these contentions are unfounded. . . .

That the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws certainly does not render irrelevant consideration by the Commission of the effect of such conduct upon the "public interest,

convenience, or necessity." A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted. . . .

Alternatively, it is urged that the Regulations constitute an *ultra vires* attempt by the Commission to enforce the anti-trust laws, and that the enforcement of the anti-trust laws is the province not of the Commission but of the Attorney General and the courts. This contention misconceives the basis of the Commission's action. The Commission's Report indicates plainly enough that the Commission was not attempting to administer the anti-trust laws:

"The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. . . . While many of the network practices raise serious questions under the anti-trust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest." (Report, pp. 46, 83, 83 n. 3.)

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

The Regulations are assailed as "arbitrary and capricious." If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade of Kansas City, Mo. v. United States*, 314 U.S. 534, 548, 62 S.Ct. 366, 372, 373, 86 L. Ed. 432 is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings sup-

ported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existence of practices which it regarded as contrary to the "public interest." The Commission knew that the wisdom of any action it took would have to be tested by experience: "We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. . . . The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial." (Report, p. 88.) The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Since there is no basis for any claim that the Commission failed to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. Here, as in *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24-25, 53 S.Ct. 45, 48, 77 L.Ed. 138 the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary." *Ibid.* . . .

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to

operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.*

8. [Ed.] Justices Black and Rutledge did not participate; Justices Murphy and Roberts dissented.

Section 3.107 which had been suspended indefinitely at the time of the *NBC* litigation, was reinstated April 12, 1944. See 8 Fed.Reg. 14166. Similar regulations applicable to FM broadcasting stations were adopted in 1945, 10 Fed.Reg. 12006, 12008 (1945).

With the decline in the role of networks in AM and FM broadcasting, the network regulations, as applied to those media, were largely rescinded in 1977. 63 F.C.C.2d 674. The only provision retained was an amended version of the prohibition against territorial exclusivity:

"Territorial exclusivity.—No licensee of an AM broadcast station shall have any arrangement with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or

hinders another station serving a substantially different area from broadcasting any program of the network organization: provided, however, that this section does not prohibit arrangements under which the station is granted first call within its primary service area upon the network's programs. The term 'network organization' means any organization originating program material, with or without commercial messages, and furnishing the same to stations interconnected so as to permit simultaneous broadcast by all or some of them. However, arrangements involving only stations under common ownership, or only the rebroadcast by one station of programming from another with no compensation other than a lump-sum payment by the station rebroadcasting, are not considered arrangements with a network organization. The term 'arrangement' means any contract, arrangement or understanding, express or implied." 49 C.F.R. § 73.132. To the same effect as regards FM stations, see 49 C.F.R. § 73.232.

CODE OF FEDERAL REGULATIONS

Title 47

§ 73.658 Affiliation agreements and network program practices.

(a) *Exclusive affiliation of station.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. (The term "network organization" as used in this section includes national and regional network organizations. See ch. VII, J, of Report on Chain Broadcasting.)

(b) *Territorial exclusivity.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another broadcast station located in the same community from broadcasting the network's programs not taken by the former station, or which prevents or hinders another broadcast station located in a different community from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its community upon the programs of the network organization. As employed in this paragraph, the term "community" is defined as the community specified in the instrument of authorization as the location of the station.

(c) *Term of affiliation.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original terms, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than 2 years: *Provided*, That a contract, arrangement, or understanding for a period up to 2 years may be entered into within 6 months prior to the commencement of such period.

(d) *Station commitment of broadcast time.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with any network organization, which provides for optioning of the station's time to the network organization, or which has the same restraining effect as time optioning. As used in this section, time optioning is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the

time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

(e) *Right to reject programs.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which, with respect to programs offered or already contracted for pursuant to an affiliation contract, prevents or hinders the station from (1) rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable, or contrary to the public interest, or (2) substituting a program which, in the station's opinion, is of greater local or national importance.

(f) *Network ownership of stations.* No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control of a network organization for a television broadcast station in any locality where the existing television broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. (The word "control" as used in this section, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.)

(g) *Dual network operation.* No license shall be issued to a television broadcast station affiliated with a network organization which maintains more than one network of television broadcast stations: *Provided,* That this section shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

(h) *Control by networks of station rates.* No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

(i) No license shall be granted to a television broadcast station which is represented for the sale of nonnetwork time by a network organization or by an organization directly or indirectly controlled by or under common control with a network organization, if the station has any contract, arrangement or understanding, express or implied, which provides for the affiliation of the station with such network organization: *Provided, however,* That this rule shall not be applicable to stations licensed to a network organization or to a subsidiary of a network organization.

(j) *Network syndication and program practices.* (1) Except as provided in subparagraph (3) of this paragraph, no television network shall:

(i) After June 1, 1973, sell, license, or distribute television programs to television station licensees within the United States for non-network television exhibition or otherwise engage in the business commonly known as "syndication" within the United States; or sell, license, or distribute television programs of which it is not the sole producer for exhibition outside the United States; or reserve any option or right to share in revenues or profits in connection with such domestic and/or foreign sale, license, or distribution; or

(ii) After August 1, 1972, acquire any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by a person other than such television network, except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network: *Provided*, That if such network does not timely avail itself of such license or other exclusive right to network exhibition within the United States, the grantor of such license or right to network exhibition may, upon making a timely offer reasonably to compensate the network, reacquire such license or other exclusive right to exhibition of the program.

(2) Nothing contained in subparagraphs (1) and (2) of this paragraph shall prevent any television network from selling or distributing programs of which it is the sole producer for television exhibition outside the United States, or from selling or otherwise disposing of any program rights not acquired from another person, including the right to distribute programs for nonnetwork exhibition (as in syndication) within the United States as long as it does not itself engage in such distribution within the United States or retain the right to share the revenues or profits therefrom.

(3) Nothing contained in this paragraph shall be construed to include any television network formed for the purpose of producing, distributing, or syndicating program materials for educational, non-commercial, or public broadcasting exhibition or uses.

(4) For the purposes of this paragraph and [paragraph (k)] of this section the term network means any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation.

(k) Effective September 8, 1975, commercial television stations owned by or affiliated with a national television network in the 50 largest television markets (see NOTE 1 to this paragraph) shall devote, during the four hours of prime time (7–11 p. m. E.T. and P.T., 6–10 p. m. C.T. and M.T.), no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) other than feature films, or, on Saturdays, feature films; provided, however, that the following categories of programs need not be counted toward the three-hour limitation:

(1) On nights other than Saturdays, network or off-network programs designed for children, public affairs programs or documentary programs (see NOTE 2 to this paragraph for definitions).

(2) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or other material related to such coverage, and political broadcasts by or on behalf of legally qualified candidates for public office.

(3) Regular network news broadcasts up to a half hour, when immediately adjacent to a full hour of continuous locally produced news or locally produced public affairs programming.

(4) Runovers of live network broadcasts of sporting events, where the event has been reasonably scheduled to conclude before prime time or occupy only a certain amount of prime time, but the event has gone beyond its expected duration due to circumstances not reasonably foreseeable by the networks or under their control. This exemption does not apply to post-game material.

(5) In the case of stations in the Mountain and Pacific time zones, on evenings when network prime time programming consists of a sports event or other program broadcast live and simultaneously throughout the contiguous 48 states, such stations may assume that the network's schedule that evening occupies no more of prime time in these time zones than it does in the Eastern and Central time zones.

(6) Network broadcasts of an international sports event (such as the Olympic Games), New Year's Day college football games, or any other network programming of a special nature other than motion pictures or other sports events, when the network devotes all of its time on the same evening to the same programming, except brief incidental fill material.

Note 1. The top 50 markets to which this paragraph applies are the 50 largest markets in terms of prime time audience

for all stations in the market [as determined by a specified procedure.]⁹

- Note 2. As used in this paragraph, the term “programs designed for children” means programs primarily designed for children aged 2 through 12. The term “documentary programs” means programs which are non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself. The term “public affairs programs” means talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, roundtables, and similar programs primarily concerning local, national, and international public affairs.

Note on the Evolution of the Television Network Regulations.
Network regulations applicable to television were adopted in 1946, 11

9. [Ed.] By Public Notice 2137, June 19, 1978, the Commission listed the following as the top 50 markets for the purpose of subsection (k) for September 1978 to September 1983.

Albany-Schenectady-Troy	Louisville
Atlanta	Memphis
Baltimore	Miami
Birmingham	Milwaukee
Boston	Minneapolis-St. Paul
Buffalo	Nashville
Charleston-Huntington, W.Va.	New Orleans
Charlotte, N.C.	New York
Chicago	Norfolk-Portsmouth-Newport News-Hampton, Va.
Cincinnati	Oklahoma City
Cleveland	Orlando-Daytona Beach
Columbus, Ohio	Philadelphia
Dallas-Ft. Worth	Phoenix
Dayton	Pittsburgh
Denver	Portland, Oregon
Detroit	Providence
Grand Rapids-Kalamazoo- Battle Creek	Sacramento-Stockton
Greensboro-Winston Salem- High Point, N.C.	Salt Lake City
Greenville-Spartanburg- Asheville	San Antonio
Hartford-New Haven	San Diego
Houston	San Francisco
Indianapolis	Seattle-Tacoma
Kansas City	St. Louis
Los Angeles	Tampa-St. Petersburg
	Washington, D.C.
	Wilkes-Barre-Scranton

Fed.Reg. 33, 37. Initially, they followed closely the regulations applicable to Standard (AM) Broadcasting sustained in the *National Broadcasting* case. Over the years, however, there have been a number of significant changes.

Subsection (b) was amended in 1955 to limit the affiliate's "right of first call" to the "community" designated in its license. Previously, the affiliate could contract with the network to exclude stations in other communities from duplicating its network programs where there was a substantial overlap in the service areas of the affiliate and the other stations. The FCC sought to provide "maximum opportunity . . . to all stations to compete for network programming." See Revision of Territorial Exclusivity Rule, 12 R.R. 1537 (1955).

Subsection (d) was amended in 1963 to prohibit option time entirely. The FCC found that the practice (a) impaired the competitive opportunities of independent program producers, non-network advertisers, independent stations (because of the shortage of high quality first-run independent producer product) and national "spot" representatives, and (b) restricted the licensee's freedom of choice in selecting programs on the basis of intrinsic merit. See Television Option Time, 34 F.C.C. 1103, 25 R.R. 1651, 1686 (1963). For earlier determinations on this much mooted issue, see Findings of Commission on Option Time, 18 R.R. 1809 (1959); Applicability of Antitrust Laws to Option Time Practice, 18 R.R. 1801 (1959); Option Time Rules, 20 R.R. 1568 (1960) (withdrawn at request of the Commission while pending on judicial review).

Subsection (i) was added in 1959. The FCC prohibited networks from representing their affiliates in the sale of non-network time because the FCC concluded that such representation (a) gave networks the power to restrain competition for positions as national spot representatives, since they could readily influence the decisions of their affiliates; and (b) tended to restrict competition between network and non-network programming and advertising, since the networks had an incentive to subordinate national spot placements and rates to their conflicting interests as networks. The same tendencies were felt to impinge on the independence of station licensees. Network Representation of Stations in National Spot Sales, 19 R.R. 1501, 27 F.C.C. 697 (1959), reconsideration denied, 28 F.C.C. 447 (1960), affirmed sub nom. Metropolitan Television Co. v. FCC, 289 F.2d 874 (D.C.Cir. 1961).

Subsections (j) and (k) were added in 1970 and subsection (k) was revised in 1974 and 1975. The nature of these additions, and the basis for their adoption, are set forth in the excerpts which follow.

Subsection (1), added in 1971, is not included in the regulations reproduced. It is concerned with the rather specialized situation of a market with two VHF network affiliates and one or more independ-

ent stations; it seeks to assure the independents a share of network programming from the unrepresented network. See VHF-TV Station Network Affiliations, 28 F.C.C.2d 169, 21 R.R.2d 1638, on reconsideration, 31 F.C.C.2d 87, 22 R.R.2d 1732 (1971).¹⁰

COMPETITION AND RESPONSIBILITY IN NETWORK TELEVISION BROADCASTING

Federal Communications Commission, 1970.
23 F.C.C.2d 382, 18 R.R.2d 1825, on reconsideration,
25 F.C.C.2d 318, 19 R.R.2d 1869.

[The bulk of this opinion is concerned with the initial promulgation of the "prime time access" rule, § 73.658(k). The considerations pertaining to the prime time access rule are considered in the following excerpts, setting forth the 1975 revision of § 73.658(k). The remaining portion of this 1970 opinion is concerned with § 73.658(j) limiting network participation in syndication and in acquiring certain financial interests in television programs.]

10. [Ed.] On a similar matter, see Availability of Network Programs to Non-Affiliates, 26 F.C.C.2d 772, 20 R.R.2d 1687 (1970), where the FCC declined to issue rules but indicated its intent to scrutinize network practices in making programs available to non-affiliates. The Commission was particularly interested in: (1) the vigor of network efforts to place "uncleared" programs on alternate stations, individual "specials" as well as series; (2) adequacy of notice to the alternate station that the program will not be cleared and thus will be available; (3) the adequacy of network compensation to the alternate station; and (4) the reasonableness of limits on the recapture of series programs by the network affiliate from the alternate station (a 13 week minimum was mentioned). The Commission was particularly concerned about the availability of programs to "small market" stations likely to be endangered by reason of inadequate program material.

In Territorial Exclusivity in Non-Network TV Programming, 42 F.C.C.2d 175, 28 R.R.2d 39 (1973), the FCC added sec. 73.658(m) to its regulations:

"No television station shall enter into any contract, arrangement or understanding, express or implied, with a non-network program producer, distributor, or supplier, or other person which prevents or hinders another television station located in a community

over 25 miles away, as determined by the reference points contained in Section 76.53 of this chapter, from broadcasting any program purchased by the former station from such non-network program producer, distributor, supplier or other person. As used in this sub-section, the term 'community' is defined as the community specified in the instrument of authorization as the location of the station."

The FCC recognized "the need for reasonable exclusivity to protect a station and give incentive to program suppliers to create and develop new programs." It observed that the 25-mile standard gave a protected area of approximately 1,900 square miles in any given contract. The FCC refused to afford protection throughout an entire television market because "overshadowed stations some distance from a large community (although located in the same television market) must be permitted to attempt to secure programs contracted to major market stations so that, based on competition, those overshadowed stations have a chance to develop."

In 1974, Rule 73.658(m) was revised to permit territorial exclusivity up to distances of 35 miles, and to allow exclusivity as against stations in the same hyphenated market (as identified in Rule 76.51). Territorial Exclusivity in Non-Network TV Programming, 46 F.C.C.2d 892, 29 R.R.2d 1748 (1974).

We . . . note that networks have increasingly engaged in the subsequent syndication of packager-licensed network programs. . . . Total hours of packager-licensed programs in which networks obtained domestic syndication distribution rights more than trebled (from 4½ hours in 1957 to 15 hours in 1967) [23.8%], and foreign distribution more than doubled (from 6½ hours in 1957 to 15½ hours in 1967) [24.4%]. (Supplemental ADL report, p. 52.) When profit shares are considered the results are even more indicative of the networks' acquisition of an increasingly strong position in syndication. . . . Domestic profit shares increased from 31.9 percent in 1957 to 65.4 percent in 1967 (from 9 hours in 1957 to 41½ hours in 1967); foreign from 33.6 percent in 1957 to 66.9 percent in 1967 (from 9 hours in 1957 to 42½ hours in 1967). (Supplemental ADL report, p. 54.)

While they do not constitute a principal part of overall revenues, revenues accruing to networks from syndication activities are substantial and are increasing. . . .

A direct relationship appears to exist between new programs chosen for network schedules and network acquisition of subsidiary rights and interests. As these and other data referred to earlier indicate, very few programs are produced for network exhibition where the network does not get some share in their subsequent earning power through syndication and other rights. The overall result is that, save for about 6 or 7 percent of their schedules which were the result of direct dealing between independent producers and sponsors, networks accepted virtually no entertainment program for network exhibition in a 5-year period in which they did not have financial interests in syndication and other subsequent use; in addition, they had similar interests in a large part of the surplus product available.

The networks between 1957 and 1967 have expanded their activities and interests in the sale of television programs in domestic syndication and foreign markets. Network commercial interests in domestic distribution and foreign sale took two forms: (1) Actual distribution of programs through their syndicated program divisions, and (2) profit sharing rights in domestic and foreign distribution carried on by others. Between 1957 and 1967 network sales of off-network television series in domestic and foreign syndication steadily increased from \$5.4 million to \$26.1 million—at the same time industry sales of off-network series increased from \$13 million to \$100 million. The three networks, with 23.6 percent of overall series sales (\$124 million in 1967), were among the leaders in sales in the industry. Profit sharing accounted for a much larger return to networks than did fees from domestic syndication distribution. . . .

Under present conditions independent producers who desire to exhibit their product first on a network and then offer it in domestic syndication and foreign markets must first bargain with the net-

works who are their principal competitors in syndication and foreign sales for the network exposure necessary to establish the subsequent value of their programs as valuable commercial assets in domestic syndication and foreign sales, and are usually required to grant to the networks either the distribution rights or large shares in the profits from domestic syndication and foreign distribution, or both, for the program. Similarly, a producer who seeks to distribute his programs in foreign countries must compete with networks who through the bargaining with the same and other independent producers control the source of supply of the programs which constitute the staples of this market and/or they share in the profits from such distribution by others. The record has convinced us that networks have a clear conflict of interest in choosing programs for their schedules. Indeed, as stated, we believe on the basis of the record before us that networks do not normally accept new, untried packager-licensed programs for network exhibition unless the producer/packager is willing to cede a large part of the valuable rights and interests in subsidiary rights to the program to the network.

If networks are prevented from operating as syndicators or from sharing in the profits from distribution by others in the domestic syndication market, there will no longer be any inducement to choose for network exhibition only those packager-licensed programs in which they have acquired other rights. Furthermore, producers and packagers will be enabled to fully benefit from their own initiative and presumably become more competitive and independent sources of programing since in many instances a packager cannot recoup his outlay from the first network run of a series or program and must look to the commercial uses of the program subsequent to the network run for commercial success. Relieved of the need to grant a network a large portion of his potential profit the producer's ability profitably to operate in network television will be greatly enhanced. With the expanded syndication market as a feasible alternate to network exhibition his bargaining position will be improved and he can be expected to develop into a stable and continuing alternate source of programs and ultimately to compete for network time.

We prohibit networks from acquiring subsidiary program rights and profit shares, as little would be accomplished in expanding competitive opportunity in television program production if we were to exclude networks from active participation in the syndication market and then permit them to act as brokers in acquiring syndication rights and interests and reselling them to those actively engaged in syndication. We also believe that the prohibition of network domestic syndication of their own programs will serve a salutary purpose in making for fairer competition. As pointed out above, the network has an advantage as a competitor in the syndication market because of its existing relations with affiliates. In addition, the prohibition will permit the networks to lend all their efforts to the sale of network

programs. We find that the rule will eliminate a potential for competitive restraint in these respects. Cf. *Metropolitan Television Co. v. Federal Communications Commission*, 110 U.S.App.D.C. 133, 289 F.2d 874 (1961).

Foreign distribution rights are an important part of the valuable assets which currently are on the bargaining table when the choice of a packager-licensed program or series is being determined. Networks engaged in foreign distribution of television programs in the same way they do in domestic syndication—the principal difference being that unlike domestic syndication where network series are not available until some time after the completion of their network run, network offerings are concurrently exhibited in foreign countries. Were we to permit networks to continue to bargain for foreign distribution rights and profit shares, such rights would continue to be important elements in the decisional process. Their concession to networks might well be a factor in program acceptance. Also an important source of revenue to enable independent programs to develop would be diminished. On the other hand we see no reason to exclude networks from entering into arrangements with broadcasters in foreign countries for the sale or exchange of programs wholly produced by the networks. The situation here differs from that in domestic distribution.

Finally, we do not believe that a network which has acquired the first-run network exhibition right or license to a program or series of which it is not the sole producer should be permitted to hold such right indefinitely against the wish of the producer. Thus, we have provided that if the network does not make timely use of the program the producer or other person from whom the right or license was acquired may reacquire it on his timely offer reasonably to compensate the network. In this way networks cannot keep a program in reserve for an unreasonably long time when, perhaps, such program or series might have a ready market as a nonnetwork offering or an offering to another network.

PRIME TIME ACCESS RULE

Federal Communications Commission, 1975.
50 F.C.C.2d 829, 40 Fed.Reg. 4001, 32 R.R.2d 697.

BY THE COMMISSION:

2. In substance, the provisions of the new rule, effective September 8, 1975, are as follows . . . :

(a) Network-owned or affiliated stations in the 50 largest markets (in terms of prime time audience for all stations in the market) may present no more than three hours of network or

off-network programs (including movies previously shown on a network) during the hours of prime time (7–11 p. m. E.T. and P.T., 6–10 p. m. C.T. and M.T.).

(b) Certain categories of network and off-network programming are not to be counted toward the three hour limitation; these are generally:

—Network or off-network programs designed for children, public affairs programs or documentary programs.

—Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or other material related to this coverage, and political broadcasts by or on behalf of legally qualified candidates for public office.

—Regular half-hour network news programs when immediately adjacent to a full hour of locally produced news or public affairs programming.

—Runovers of live network coverage of sports events, where the event has been reasonably scheduled to conclude before prime time.

—For stations in the Mountain and Pacific time zones, when network prime time programming consists of a sports or other live program broadcast simultaneously throughout the United States, these stations may schedule programming as though the live network broadcast occupies no more of their prime time than that of stations in the other time zones.

—Broadcasts of international sports events (such as the Olympics), New Year's Day college football games, or other network programming of a special nature (except other sports or motion pictures) when the network devotes all of its evening programming time, except for brief "fill" material, to the same programming.

(c) Another provision includes definitions of the terms "programs designed for children" and "documentary programs".

I. Background and Description of Comments.

3. The prime time access rule, § 73.658(k) of the Commission's Rules, was originally adopted in May 1970, and, with some modifications adopted later that year, went into effect October 1, 1971, as far as the basic restriction on prime-time network programming was concerned. The restriction on use of off-network and feature film material during the time cleared of network programs went into effect October 1, 1972.¹¹ This rule, "PTAR I", provides that stations

11. See *Report and Order* in Docket 12782 (May 1970), 23 FCC 2d 382, and decision on reconsideration (August

1970) generally affirming but making some minor changes, 25 FCC 2d 318. [Some footnotes have been omitted.]

(network-owned or network-affiliated) in the 50 largest U. S. television markets may not carry more than three hours of network programs each evening during the four prime time hours (7–11 p. m. E.T. and P.T., 6–10 p. m. C.T. and M.T.); and that the one hour thus cleared of network programs may not be filled with off-network material or feature films shown by a station in the market within the previous two years. The rule contains an exemption for network programs which are “special news programs dealing with fast-breaking news events, on-the-spot coverage of news events and political broadcasts by legally qualified candidates for public office.” The May 1970 decision also contemplated waivers of the rule generally in two other types of situations, which have been granted since: (1) where stations carry a full hour of local news or local public affairs material immediately before prime time, and wish to carry a half-hour of network news at the beginning of prime time without its counting toward the permissible three hours; and (2) sports run-overs, where a network telecast of a sports event normally would conclude within the allotted time but possibly may not. This matter arises chiefly with late-afternoon sports events scheduled to last until 7 p. m. E.T., but also sometimes occurs with respect to evening sports events. While not specifically mentioned in the decision adopting the rule, there has also been in effect since 1971 a waiver for one-time network news and public affairs programs, those not part of a regular series. Waivers have been granted since early 1972 for particular off-network programs (*Wild Kingdom*, *National Geographic*, etc.). There have also been waivers to take into account time zone differences. In a few cases, where requested by individual stations, waivers have been granted to permit use of 3½ hours of network or off-network material in one evening if accompanied by a reduction in such material on a later night soon after.

4. While not required by the terms of the rule, two other developments have occurred. First, as far as network origination of programs is concerned, the time cleared of network programs has been the first hour of prime time, or 7–8 p. m. E.T., Monday through Saturday. On Sunday, CBS and NBC have run from 7:30 to 10:30, leaving 7–7:30 and 10:30–11 as cleared time; ABC has alternated between that schedule and 8–11 p. m. Second, while the rule applies only to the top 50 markets, as a matter of business judgment, the networks decided not to present more prime time programming on affiliated stations below the top 50 markets. Therefore, the rule has led to an across-the-board reduction in network schedules, from 3½ hours on weekdays and 4 hours on Sunday before the rule (25 hours total) to 3 hours a night (21 hours total).

[The original prime time access rule (PTAR I) was sustained on judicial review in *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971). In 1974, the FCC adopted significant revisions in the prime time access rule, referred to as PTAR II, which had the

effect of substantially reducing the access period, 44 F.C.C.2d 1081. On judicial review, the Court of Appeals did not pass on the merits of the revision but remanded the matter for further consideration because the FCC had specified an effective date too early to afford interested parties sufficient time to make necessary adjustments. *National Association of Independent Television Producers and Distributors v. FCC*, 502 F.2d 249 (2d Cir. 1974). The Court of Appeals also suggested various areas of inquiry considered in this opinion on remand.]

II. Discussion and Conclusions.

. . . [T]he Commission has decided to return to PTAR I, the original rule adopted in 1970, except for the codification of certain waiver practices which have grown up under it (sports runovers, network news following an hour of local news, time-zone differences, etc.), and except for network or off-network programming which is designed for children, public affairs or documentary programs, and different provisions as to feature films. . . .

A. ARGUMENTS OF OPPONENTS OF THE RULE

14. In evaluating the arguments of the majors and other opponents of the rule, it is important to bear in mind the rule's primary objectives: to lessen network dominance and free a portion of valuable prime time in which licensees of individual stations present programs in light of their own judgments as to what would be most responsive to the needs, interests and tastes of their communities. At the same time, the rule seeks to encourage alternative sources of programs not passing through the three-network funnel so that licensees would have more than a nominal choice of material. These are still valid objectives. It was also noted that this increased supply would be a concomitant benefit to independent stations; and "it may also be hoped that diversity of program ideas may be encouraged by removing the network funnel for this half-hour . . .". Thus, diversity of programming was a hope, rather than one of the primary objectives. It was emphasized that the Commission's intention is not to smooth the path for existing syndicators or encourage the production of any particular type of program; the "types and cost levels of programs which will develop must be the result of competition which will develop."

15. As to the matter of network dominance, it is readily apparent that, as far as network control over station time is concerned, it is reduced by the requirement of cleared or access time, and that certain public advantages have resulted. These include, the local programming activities which have been stimulated, including those mentioned by the various minority and other citizens' groups filing herein . . . It may be that these programs in some cases would have been presented anyhow, and possibly at a reasonably desirable hour

in prime or fringe time; but their presentation in high-audience hours is certainly facilitated by the rule . . . These showings afford tangible evidence of the benefits flowing from the rule. The same applies to the presentation of syndicated programs which, in the licensees' judgment, have particular appeal to their stations' audiences, such as *Lawrence Welk* and *Hee Haw* after their cancellation on the networks. In sum, the rule in this respect has provided a significant public benefit, in freeing licensees to exercise their own programming judgments. Also of significance in this connection is the fact that affiliated stations are able to retain all of the revenues from access program time (less the amount they spend for programming, typically no more than 33% according to earlier material herein), compared to about 30% which they typically get from the networks for network time. Thus they have more money from which to support local programming efforts. We find it an important and valid consideration.

16. Also of considerable importance is the encouragement of a body of new syndicated programming, which independent stations may use as well as affiliated stations, by making prime time available for its presentation. Such a body of programming has developed. . . . While the [major film companies and others] urge that this is not of significance (being game shows, foreign imports or other network "retread"), it is premature to make any final judgment at this time as to the character of this programming (assuming that such a judgment is ever appropriate). There has, of course, been a reduction in network programs, and thus no doubt in programs which could become off-network material; however, the latter is rather speculative as to quantity, in view of the rather large number of current and recent network prime-time programs not lasting long enough to make a syndication package, and increased network use of movies, sports, etc. In any event, we conclude that it is definitely in the public interest to encourage the development of a body of new (not repeat) programs outside of the network process, and thus provide opportunity for the development of new program approaches and ideas.

17. On balance, we conclude that the rule also has other benefits. These include the increased opportunity for non-national advertisers as well as an optional outlet for national advertisers who may choose to use spot rather than network messages. There is increased programming of a public service character presented by ABC as a result of its greater profitability under the rule Finally, there is the emergence of successful distributors who are able to finance their own and others' production of network and non-network programs, e. g., Worldvision and Viacom As a result there is now an increased number of producers active in prime time. In light of the different views as to the present effect on independent

stations, we do not attach significance at this time to the benefit to independent stations formerly claimed and still asserted by some parties.

18. **Diversity and other programming considerations.** We do not regard the various points urged by Warner et al., and other opponents as warranting repeal of the rule, or modification beyond that adopted herein. Of the 9 points mentioned by Warner (other than First Amendment arguments discussed below), the most significant are those relating to the character of access-period programming, since we must always keep foremost in mind the interest of the viewing public rather than the interests of private parties. We reject the argument concerning lack of diversity and quality, as a basis for action at this time beyond that taken herein, for a combination of reasons. First, we are persuaded that the rule has not yet been fully tested. An evaluation of its long-term potential cannot be made at this point, with respect to the kind of programming which is likely to develop with time and a more favorable climate. The uncertainties [associated with the rule] have undoubtedly had a discouraging effect on investment in the development of programs other than those most easily produced and readily saleable. . . . Finally, we believe that the case for economic factors being an iron-clad, immutable obstacle to more elaborate programming efforts has not been made. . . . In sum, we do not think it is established that "nothing different is to be expected", given reasonable certainty as to the rule.

19. It is also to be noted that there is by no means a total lack of diversity, even though the emphasis is on game shows. There are a number of programs of other types, including animal shows and musical variety shows. Thus, the picture is not as monotonous as Warner's description might indicate, even looking at syndicated programming alone. . . .

20. Perhaps more fundamental is the question of to what extent repeal or really substantial abridgement of the rule would be justified on the basis of a Commission evaluation of such matters. Action on a basis like this has the danger of reflecting the Commission's personal predilections and prejudices. A related question is, assuming such an inquiry is appropriate, what standards should be used, and whether they should be applied, in a sense, retroactively and without any public input into their formulation. For example, assuming that 65.6% of access entertainment time devoted to game shows is undesirable, what about 41.2% of network prime time devoted to crime-drama shows of various types? If we look at the concentration of game shows in certain markets such as Cincinnati or Albany, must we not look also at three network crime-drama shows opposite each other on Wednesdays at 10 p. m.?

21. We do regard it as important to provide greater opportunity for the presentation in access time of certain kinds of material

which are to some extent inhibited by the rule. One of our objectives in so doing is to promote an increase in the range of fare available to the public at these times. Should the time come to review the rule again, it may well be that a continuing lack of diversity will be grounds for change; but we do not find it so now except as provided herein.

22. Warner et al. urge two other points concerning programming: the undesirability of use of foreign product, and the underrepresentation in access programming of minority groups and women. As to the first, Warner claims that the rule discriminates against American producers and favors foreign producers . . . In light of the reduced role which foreign product plays in access programming this year as compared to earlier years under the rule, action to repeal or substantially abridge the rule on this basis is not warranted.¹² While it is regrettable that American producers face off-foreign-network competition, which comes in with a cost advantage, this is a situation which obtains elsewhere in our economy. As to the other point—alleged irrelevance of access-period programs from the standpoint of minority groups and women, and American social problems generally—this is much too speculative a matter to afford basis for action at this time, particularly in view of the impetus to local programming. . . .

23. **Other arguments**—With respect to the argument concerning increased network dominance in the broad sense, the case for that proposition is not established in this proceeding. Network dominance is obviously reduced by the reduction in network prime time programming; and this reduction is only slightly lessened by the somewhat greater carriage of network programs during network prime time through decline in station preemptions and non-clearances. . . . [S]tation preemptions have generally been small in the past (nothing in the order of the amount of time involved in the rule), and they continue despite the clearance of time resulting from the rule; for ABC, the only data given, the decrease has been from 7.1 to 3.7% of U. S. TV homes for the average program. With respect to the role of network-owned stations in access program success . . . , while this is often quite important and sometimes vital, it is certainly not necessary for all programs. Some, including some of the most successful, have no owned-station exposure at all, and in other cases the sale to an O & O is on an individual basis, not representing any group purchase. The networks have a greater veto power over programs offered for network exhibition. As to the economic respects in which network control probably is increased, the relationships with national advertiser customers, and producer suppliers, the material set forth

12. According to the majors' joint appendix, off-foreign network programming (the only foreign-produced material which probably should be con-

sidered in this connection) occupied 7.2% of access entertainment time in 1974-75, compared to 14.3% last year and 17.6% in 1972-73.

. . . indicates that this increase in dominance is still an unresolved issue. As to relations with producers, the situation may well be an undesirable one . . . ; but it is not at all clear how much this results from the prime time access rule, or would be changed by repealing it. If the number of unsold pilots is as great as Warner et al. claim, nearly 300, it does not appear that the expansion of network prime time by four hours a week per network would necessarily alter substantially the "leverage" situation. In any event, this particular situation is one which could be approached in other ways, such as the current Justice Department anti-trust action (refiled December 10, 1974) or consideration of some restriction on network control and rental of production facilities. Moreover, as the proponents of the rule point out, both advertisers and producers have an alternative under the rule—access period programming—which they are free to use. For purposes of the prime time access rule, we conclude that network dominance is decreased, and that there is no warrant here for modifying it.

24. With respect to the impact on employment in the program production industry, on the basis of the facts presented herein . . . we find nothing presented to us which could be considered relevant to our decision. What is claimed to be involved are some 3,570 fulltime jobs, with at least some of this loss attributed to the rule made up by increased station employment (up more than 1,000 at top-50-market affiliated stations from 1971 to 1973 according to ABC, and some of this is attributable to the rule). Additionally, there are gains in production of non-network programs as well as sales and similar activity. Bearing in mind also the uncertainties involved (such as the lack of comment from AFTRA, which represents many actors in taped shows), we conclude that it is not a relevant factor on the basis of what is before us.

25. As to the more general subject of the well-being of Hollywood entities such as the major film companies and film producers . . . , we do not find in these arguments reason to repeal or substantially abridge the rule. As has been pointed out many times, the problems of Hollywood are of long standing, having many causes, and it is unclear as to the extent the problems are attributable to the rule, or how much help repeal of the rule would afford. We agree with the proponents of the rule that it is not the responsibility of the Commission to return Hollywood companies to their buoyant health of pre-1948 days; and, as ABC points out, most of the majors are doing rather well and they always have the choice of producing for access time. It may be that the majors would benefit from repeal of the off-network restriction; but in our judgment that would clearly be inconsistent with the public interest in stimulating the development of new material, as well as having a tendency to reduce employment in program production even more. In sum, we do not find in these considerations anything of decisional significance in this proceeding.

26. The last argument in this area is the effect on creative persons—actors and playwrights referred to by the Court, and others such as producers, musicians, etc. . . . In this connection, there is an impact on the creative opportunities for some persons as the rule has operated so far, since there is less network programming of a dramatic or comedy nature which uses them, and very little from U. S. sources of the same type of access-period use. But in this respect, it is simply too early to evaluate the rule's long-term effect. Other categories of persons, such as musicians, may well have gained by virtue of the musical variety shows which occupy a certain amount of access time but which are almost totally absent from current network prime time. Playwrights appear not to be significantly affected by the rule one way or the other, since original drama has greatly diminished on network television over the years, and, as the Authors League points out, the rule has not resulted in any such material on stations. We do not find reason here to repeal the rule.

B. THE EXEMPTION FOR CHILDREN'S, PUBLIC AFFAIRS AND DOCUMENTARY PROGRAMS; ARGUMENTS OF RULE PROPONENTS

28. As mentioned above, we have decided to permit an exemption for "programs designed for children" and "public affairs programs or documentaries." The definition of children's programming is "programs primarily designed for children aged 2 through 12". The term documentary program is defined as "programs which are non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself". . . .

29. We find that the prime time access rule has had the effect of inhibiting certain kinds of programming which we believe are entitled to special treatment so as to encourage their timely presentation in prime time. We believe that the importance of these kinds of programming outweighs any concern as to its source, whether locally produced, first-run syndicated, network or off-network, and that the public interest is better served by allowing children's programming, public affairs programs or documentaries to appear to some extent in cleared time regardless of their source, and that the stations should not be prohibited from also presenting three hours of other network or off-network prime time programming. The viewing public has a right to these types of programming, and the prime time access rule, by its operation, has had the effect of limiting this right.

30. With respect to children's programs, it appears that a very small amount of such material is locally produced and carried in access time (programs in Boston and San Francisco were mentioned in the comments). A small number of syndicated programs (current or in earlier years under the rule) might also fall into this category, although we would not necessarily regard all programs so considered by some as falling within the scope of this exemption. We have also recently granted waiver for a total of six off-network specials of this type. However, our concern here is with the numerous children's special programs presented by the networks, generally starting at 8 p. m. E.T. or later under the network schedules which have resulted from the rule, as well as with the potential for regular programming significant in this area. . . . [T]he Commission has received numerous complaints from parents, educators and others interested in children's matters, and sometimes from the children themselves, to the effect that this starting time is simply too late in relation to children's bedtime (except, perhaps, on Saturday). As emphasized in the recent policy statement concerning children's television (Docket 19142, FCC 74-1174, released November 6, 1974, pars. 26-27), the Commission wishes to encourage licensees to meet the needs of children with a variety of programming, especially at a time other than Saturday or Sunday morning. In order to foster such material, and avoid the problem mentioned with network broadcasts, we conclude that an exemption to permit access-period presentation of such material (in addition to the usual three hours of network material) should be granted, with respect to both network and off-network programs. As mentioned, we are extending this to regular as well as special programs, since they may be equally beneficial to the public.

32. With respect to public affairs programming, this is not available in significant amount in new syndicated material, although of course there is a substantial amount of such programming produced locally and presented in access time, one of the important benefits of the rule as already mentioned. . . . As to the networks, there is a substantial amount of public affairs programming (and similar news documentary material) in prime time on all three networks, but no regularly scheduled material, whereas before the rule both CBS and NBC had regular prime-time programs of this nature, and it is also noted that some such network programming occurs outside of prime time. We conclude, therefore, that the rule constitutes an inhibition on the networks' exercise of this highly important part of their activities, fulfillment of part of their journalistic function to advise and inform the public concerning matters of public importance, and that this added benefit outweighs the impingement on access time. This exemption is a codification and extension of the existing waiver for one-time network news and public affairs pro-

grams which has been in effect throughout the rule's history. That exemption has not been used to an inordinate extent by the networks, and, as discussed below, we assume that this exemption also will not be utilized to effectively undercut the basic rule.

33. Documentaries as defined herein also, of course, includes other programs, such as *National Geographic* and *Jacques Costeau* specials and the *America* series, both network and off-network programs. In our January 1974 decision we noted the value of these programs (usually produced independent of network control) to the public, as well as the difficulties involved in getting network prime time for programs such as *National Geographic* under the rule, or of producing them for distribution in syndication. . . . We are still of the same view. It is also recognized that, particularly as to use of off-network material, the exemption includes half-hour animal series, such as *Wild Kingdom* and *Animal World*, as well as a series of one-hour off-network outdoor specials for which a waiver request is pending (from the producer of the *World of Survival* series). We conclude that the exemption should be broad enough to include such material. When it comes to the off-network restriction, this is not related to network dominance directly, but is simply a restraint on licensee freedom of choice, designed to preserve the potential of cleared time availability for new non-network material. We conclude that preservation of this restraint is not warranted, when it comes to barring a station from using programs such as *Wild Kingdom* or *Animal World* (which were independently produced) in cleared time, instead of another program of the same or different type. In sum, in view of the obvious informational value of documentary programs, the benefit to the public from facilitating the presentation thereof outweighs in importance what might be termed an increase in network dominance (to the extent these are network programs) and an incursion into the full availability of 3 hours a night of cleared time for other new material. Here, as with public affairs and programs designed for children, the public interest is on the side of the programs, and not their place of origin. If licensees are better able to serve the needs and interests of their viewing public by presenting network or off-network public affairs and documentary programs, or are better able to serve the needs and interests of children, then we should remove the obstacles to this service which exist under the prime time access rule. Permitting this additional material into the access period will also serve to increase the diversity of fare available.

34. We expect the networks, and licensees in their acceptance of network programs and use of off-network material, to keep such programming to the minimum consistent with their programming judgments as to what will best serve the interests of the public gen-

erally.¹³ We continue to attach high importance to the rule as a limit on network dominance over station time, and as a means of opening up substantial amounts of prime time to sources of new non-network programming, be they producers and distributors for syndication, or local sources. We attach particular importance to the programming opportunities available on Saturday in the access time period. We do so because of the significance of existing local programming efforts in this time period, and the fact that this time offers the most significant opportunity for hour-long access programs. We caution networks to avoid any incursion into this period unless there are compelling public interest reasons for so doing. If there are extensive deviations from these precepts, the exemption may have to be re-visited.

35. In acting herein to permit an increase of network programming of certain types, we are only opening up an option for licensees to use such additional network material if, in light of their programming judgments as licensee-trustees meeting the needs, tastes, interests and problems of their coverage areas, they deem it appropriate to do so. Our purpose is to make available to licensees programming which, to some extent, was removed from prime time or caused to be run at a much later hour. There is intended no requirement, or even a suggestion, that such additional network programming should be carried in order for a licensee to carry out properly his programming obligations.

36. Arguments of proponents of the rule. In light of the foregoing, we turn to the arguments advanced by the proponents of PTAR I, including the numerous citizens groups . . . and NAITPD, Frank, Westinghouse, ABC and other private parties. . . . These arguments are addressed largely either to repeal of the rule or the more substantial modifications made in the PTAR II decision; but they apply *pro tanto* to the exemption discussed above. Some arguments, concerning the impropriety or illegality of preferred classes of programs, relate entirely to this exemption; these are discussed below as part of the First Amendment discussion. Others include: the importance of local programming efforts and the impact of any diminished access time on them; the objectives of the rule; the contentions that any additional network time works to increase network dominance and diminishes opportunities for alternative program sources and a healthy syndication industry; the success of the rule and advantages flowing from it . . . ; the potential harm done by the modifications in PTAR II, for example local programming and the chilling effect on the production of programs having to compete with the additional network or off-network material; the rule's short-

13. Thus, the stripping of off-network material on the theory that it is a program designed for children or a docu-

mentary program, would not be regarded as consistent with the spirit or objectives of the rule.

comings in practice are not chargeable to it but to stations or networks, and these shortcomings should be attacked by other ways consistent with the rule such as requiring the networks to advance their children's programming by giving up 10:30-11 instead of 7:30-8, making them carry adequate amounts of public affairs programming in their own time, questioning stations as to over-use of game shows or stripped programming, etc.; that weakening the rule affects the entire package adopted in 1970; and NAITPD's contention that under the Commission's approach and its waiver decisions, almost everything seems to be more important than preserving the rule.

37. The short answer to many of these objections is that it is not to be anticipated that these changes will have the untoward results claimed, so as to lessen significantly the advantages flowing from the rule. We do not expect that syndicated programming opportunities, for example the development of material such as dramatic or comedy programs, will be seriously affected by the minimal reduction in time. Similarly with local programming activities, there appears little reason to believe that they will be seriously affected, particularly taking into account the licensee's established obligation to present material of particular significance to his community. We find much too speculative NAITPD's argument that increased competitive pressure will force diminution of this kind of programming activity. It is apparent, in our judgment, that sufficient cleared time is left for local stations to garner the economic support necessary to present such local efforts. We appreciate the participation of the numerous public groups in this proceeding, and we respect their views; but we cannot accept the proposition (which is more or less explicit in the comments of some groups such as the Urban League, and implicit in others) that network programming has little to offer, so that we would not be justified in permitting its expansion if there is the slightest chance that the cause of localism in prime time television would be impeded. We have noted on many occasions over the years the value of national network programming, and the contribution it makes to American television.

39. We have kept the exemptions narrow so as to avoid any undue incursion into the access period. There will continue to be excluded from access time those programs which make up the bulk of present and former network programming—entertainment programs such as drama, comedy and variety—thus leaving the field for the development of such material to eligible access-period sources.

40. We have considered the argument that we should take other approaches to meet what we consider the shortcomings of broadcasting under the rule—require the networks to run children's programs earlier (giving up the 10:30 time slot instead of 7:30), requiring them to run a certain amount of public affairs in their own time, questioning stations about over-use of game shows or stripping, etc., rather

than by relaxing the rule and nullifying its benefits. The same kind of argument applied to off-network material—licensees should be required to run it at other times or, if early evening access time is so important, to run it then and preempt network programs later. We do not agree. We believe that these alternatives would involve the Commission too deeply in day-to-day programming and scheduling decisions.¹⁴

42. Warner Brothers and other opponents of the rule renew herein their arguments that the rule violates the First Amendment in a number of respects; Some of these were considered and rejected by the U. S. Court of Appeals in its 1971 affirmance of the rule (*Mount Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (C.A. 2, 1971))¹⁵ and need not be discussed here. There remain for consideration the contentions that experience shows the rule to be invalid because of the infringement on the public's right to diversity, and that the rule cannot be justified on the basis of its impetus to minority-group and other local programming activities because it is an over-broad restraint on the right to diversity. Finally, the contention is raised that it is illegal because the Commission is getting into the business of determining programming by setting up categories of preferred programs, as well as by earlier waiver policy. The latter contention is the same as that of proponents NAITPD et al., and is discussed below.

14. We are also not adopting rules, suggested by some parties in this connection and others, which would provide for some of cleared time to be later in the evenings. We have decided to [reject] the tie of cleared time to specific periods in the belief that any tighter limitation unduly reduces licensee freedom and flexibility, and gets the Commission too deeply into the details of station operation. As to the networks being required to give up the 10:30 time slot in order to run childrens' specials at 7:30, it is far from clear that an irregular schedule of this sort would serve the interest of access-period program producers, stations or the public. The Commission is concerned that such a trade off might have the effect of discouraging the early scheduling of children's programming.

15. [Ed.] In *Mt. Mansfield*, the court reasoned that, because technological factors make it impossible for all who wish to broadcast to do so, because ex-

isting broadcasters have achieved preferred positions as a result of government action and because the right to broadcast can only be exercised by a tiny percentage of the population, "the prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts, for it is the stated purpose of that rule to encourage the '[d]iversity of programs and development of diverse and antagonistic sources of program service' and to correct a situation where '[o]nly three organizations control access to the crucial prime time evening television schedule' [W]hile the rule may well impose a very real restraint on licensees in that they will not be able to choose, for the specified time period, the programs which *they* might wish, as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects—the general public."

43. As to the first of these, our conclusion is the same as that already given with respect to the majors' arguments as a matter of policy, that the rule has not had a full test so that it can be determined what will ultimately result, and the other considerations mentioned in pars. 18-20, above. The same thing applies with respect to the lack of diversity, and we call attention to our observations in par. 15, above.

44. The proponents' arguments are mostly those contained in NAITPD's Court brief included in its comments herein. The elaborate argument in substance runs along the following lines: (1) the rule was adopted to further the public's First Amendment right to as much diverse programming as possible from the maximum number of diverse sources—"the widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press v. U. S.*, 326 U.S. 1, 20 (1945)); (2) the PTAR II amendments (including those involved here) violate that concept by returning time to the networks (either directly or through use of former network material), when these were the very monopolies whose excessive dominance led to the impairment of the public's right which the rule was designed to remedy, thus infringing the right; and (3) the returning of time, to the extent it involves preferred program categories, gets the Commission into the business of judgments as to what kinds of programs the public should see, a role completely contrary both to the Constitution and to the § 326 and other provisions of the regulatory framework set up in the Communications Act.

45. We point out that the Commission does not violate the First Amendment in interesting itself in the general program formats and the kinds of programs broadcast by licensees (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)). It is also well recognized, of course, that the inherent limitations in broadcast spectrum space make necessary restraints—restricting the speech of some so that others may speak—not elsewhere appropriate (*Mt. Mansfield*, supra).

46. As we see it, our adoption of the prime time access rule, and its modification herein, may be roughly described from a First Amendment standpoint as follows: the rule was designed to lessen the tendency of licensees which led them to carry network or off-network programming, in order that the voices of other persons might be heard. The rule was a restraint on licensees designed to reduce the impact of another restraint, that of the networks, by preventing licensees from choosing present or former network programs so that new program sources might arise and be heard by the public. Such new persons or sources have come forward, but by and large, as far as syndicated programming is concerned, they present mostly game shows. At the same time, other sorts of programming important to the public—those included in the exemptions herein—have been somewhat reduced in amount, or, in the case of children's programming,

have not been available at the most appropriate time. Therefore, since it was the Commission's rule which has had this effect, we have an affirmative duty to relax our restraint to permit such programming to be made more readily available. We point out that the kinds of programs involved here are to a large extent those whose importance has been recognized in the Communications Act (§ 315) or by us recently in the children's programming proceeding.

47. We also regard as without merit NAITPD's attack on the legality of the exemptions. The exemptions have been drawn as narrowly as possible consistent with the interest of the public discussed above, to avoid any unwarranted incursion into cleared time. Thus, we have drawn the exemption so as to exclude the possibility of its being used for network game shows (since game shows are plentiful in access time), and to exclude the whole range of entertainment such as drama, comedy and variety, where there appears a potential for impact on the development and success of material which might otherwise develop for access use.

48. We do not believe that permitting the carriage of programs in the categories exempted raises any questions of a Constitutional nature. We state again that the purpose of these exemptions is to facilitate the carriage of programs which the rule has had the effect of limiting. If we did not believe that we had the authority to make these modifications, we would then give further consideration to the advisability of continuing the rule.

D. OFF-NETWORK AND FEATURE FILM RESTRICTIONS

49. . . . [S]ome of the opponents of the rule urge that we should repeal the off-network and feature film restrictions of PTAR I, even if we leave the rule in effect otherwise. As to the off-network restriction, we find that repeal or relaxation is not warranted, except to the limited extent adopted herein and discussed above. It is readily apparent that elimination of this restriction would lead to a large-scale incursion into cleared time by use of off-network material, sharply reducing the availability of time to sources of new non-network material. While the off-network aspects of the rule do constitute a restraint which is not directly related to present network dominance, the drastic impact on our objective of encouraging the development of new material would obviously be completely diserved. . . .

50. We have decided to modify prior provisions regarding the use of feature films in access time. Under the changes made here, we eliminate the restriction on movies which have been shown by a station in the same market within a two-year period. At the same time, however, the new rule bars any feature film which has ever appeared on a network from the access period. If a movie has never appeared on a network, it may now be presented during the access

hour, regardless of when or whether it has ever appeared on a station in the same market. If it appeared on a network—whether or not made for television—it is barred. We believe that this will ease the administration of this portion of the rule for licensees, motion picture distributors, and the Commission. . . . [T]his provision is consistent with the goals of limiting network dominance, and encouraging new sources of programming. Feature films are thus treated exactly like any other programming. . . .

51. **Sports runovers.** In subparagraph (4) of new § 73.658(k), we are codifying the existing practice under the rule, of waiving sports runover time, where a football game, golf match, or other sports event is scheduled so that it normally would conclude before prime time, but lasts unexpectedly long and the telecast runs until after 7 p. m. E.T. In a much smaller number of cases, the problem is an evening event scheduled to occupy some but not all of the three permissible network hours. While the present situation is by no means entirely satisfactory, and some of the citizens' groups and other proponents of the rule urge us to preserve access time by requiring either a give-back or a roll-back by the networks in these cases, we are not persuaded that this is a serious enough problem to warrant a basically different approach. Certainly, there is not enough incidence of runovers to affect the potential market for syndicated programming. . . .

52. However, as far as professional football is concerned, there appears to have been a high incidence of runovers this fall, with some abuses—one network when the second game of a doubleheader concluded about 6:45, picking up a third game which lasted until nearly 7:15—and some use of time after 7 p. m. for post-game scoreboard or interview shows. We expect that in the future the networks will exercise a greater degree of care in their scheduling of sports events. Such events should be scheduled so that it would be expected that they would conclude prior to the access period in the absence of unusual occurrences such as overtime or delays due to weather.

53. **Network news following a full hour of local news.** The new rule (§ 73.658(k)(3)) codifies the existing waiver for a half-hour of regular network news if it is preceded by a full hour of local news or local public affairs programming. This waiver was envisaged in the decision adopting the rule, has been granted since the rule went into effect, and there is no substantial objection to its continuation.

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16. [Ed.] The basis for the exemption in subsection (3) is that, if a station is carrying a full hour of local news or public affairs programming immediately prior to prime time (from 6:00 to 7:00 p. m. E.T.), the failure to exempt the half hour network news broadcast

at the beginning of prime time (from 7:00 to 7:30 p. m. E.T.) would result in a rearrangement in programs without substantive significance. In the absence of the exemption, a station could achieve compliance with the prime time access rule by rearranging its

54. **Time zone differences.** The new rule (§ 73.658(k)(5)) also deals with time zone difference situations, codifying waivers granted in the past for situations such as NBC's *Academy Awards* and *Miss America* telecasts, where live simultaneous programming is involved. It provides that a network evening schedule which meets the requirements of the rule in the Eastern and Central time zones will also be held to comply with it in the Mountain and Central time zones. This concept, to deal with the problems presented by such broadcasts in the four time zones of the U. S., has not been the subject of substantial objection.

55. **Exemption for special network programming.** In new § 73.658(k)(6), we are adopting [an exemption] for what might be called the "Summer Olympic" situation, so called because of the 1972 denial of waiver to ABC to carry material concerning the Olympic games in access time in addition to its own network prime time, an action which aroused considerable protest from the public. This provides that where a network uses all of its prime time on an evening (or all except for brief incidental "fill" material for truly special programming), cleared time may be used for the same material. The exemption reads in terms of an international sports event such as the Olympic games, New Year's Day college football games (NBC's long-standing Rose Bowl-Orange Bowl telecasts), and any other special programming except other sports or movies. In comments early in 1973, NAITPD as well as all other commenting parties who discussed the subject expressed the view that some such accommodation should be made. While a few parties in the present stage of the proceeding oppose this kind of exemption, it appears that relaxation of the rule's provisions is warranted to include such unusual programming.

56. **Special network news coverage and similar material.** New § 73.658(k)(2) retains the exemption for special network news coverage and political broadcasts as adopted in PTAR I, with the slight expansions adopted in PTAR II to include material related to on-the-spot news coverage (e. g., previously filmed material) and political broadcasts on behalf of as well as by qualified candidates. . . . NAITPD expresses objection to the expansion to include related material, but in our judgment this is clearly warranted to lessen any impediment to the networks' proper exercise of their journalistic function.

schedule as follows: local news 6:00-6:30; network news 6:30-7:00; local news 7:00-7:30. The FCC concluded

that no public policy would be served by requiring such a rearrangement.

**F. OTHER MATTERS CONCERNING THE SUBSTANCE
OF THE RULE**

57. **Views of the Department of Justice and the Office of Telecommunications Policy (OTP).** . . . It may be that the Department [which supports continuation of PTAR I] would disagree with our conclusion that PTAR I should be modified to permit additional opportunity for programming of certain types from network and off-network sources; if so, we must respectfully disagree, for reasons stated at length above concerning the importance of increased opportunity for the presentation of such material. As to OTP, we are, of course, reaching a decision largely contrary to its position urging repeal of the rule. As mentioned herein, we believe that it is premature to reach a conclusion at this point as to the programming which may ultimately develop under the rule for cleared time. For reasons discussed above, we must also disagree with OTP's suggestion that it is beyond our proper role to act to increase the opportunity for certain kinds of programs. . . .

58. **The Rule and Competition.** One of the questions raised by the Court in its June 1974 opinion was the rule in relation to the national policy favoring competition in broadcasting, as to which it particularly sought the views of the Department of Justice. We agree with the Department that it is probably too early to give a definitive answer to this question. The rule opens up substantial amounts of cleared time to additional, largely different, producers, and, while much of this time is occupied by the programs of a handful of producers (chiefly game-show entrepreneurs), the situation in this respect is not much different from that of network prime time, where the majors occupy about 55% of it with their material (about the same percentage as the access-period producers mentioned). While some producers who claim that they cannot use the access route may be foreclosed from reaching prime-time television, it is too early to say that this will be a permanent matter. The access period option remains open to them, as well as affording increased opportunity for non-national advertisers as well as an option for national advertisers wishing to use spot rather than network messages. We do not consider the exclusion of off-network material from access time a significant anti-competitive consideration (even though to some extent it may work to the disadvantage of the majors and others), in view of the importance of affording full opportunity for the development of new material.

. . .

**G. OTHER MATTERS: THE LICENSEE'S DUTY WITH RESPECT TO
LOCALLY SIGNIFICANT MATERIAL; THE FUTURE OF THE
RULE; EFFECTIVE DATE**

60. As mentioned above, one of the really significant benefits from the rule is its impetus to the development of local programming efforts, and this is one of the principal reasons for retaining it in a form close to PTAR I. We expect that stations subject to the rule will devote an appropriate portion of "cleared time," or at least of total prime time to material particularly directed to the needs or problems of the station's community and area as disclosed in its regular efforts to ascertain community needs, including programming addressed to the special needs of minority groups. Such programming efforts are necessary if the benefit of the rule in stimulating locally meaningful programming is to be significantly achieved, as well as to carry out the licensee's obligation to serve the public interest. We point out, however, that programming of the significant character mentioned need not necessarily be all locally produced. Syndicated or network programming, where it deals with needs or problems common in substantial degree to many communities, may also make an important contribution.

61. **The future of the rule.** As noted above, the Department of Justice, as well as many of the private proponents of the rule, assert that a period of assured stability for the rule is highly important for realization of its potential for the development of new and varied programming. A five-year guarantee is urged by NAITPD, Frank, Westinghouse, et al.

62. The Commission, however, does not believe it appropriate to give the kind of absolute assurance sought, for a period such as five years, in view of the various uncertainties involved as to what will develop in the fairly near future. While we recognize the need for stability, we do not feel it appropriate for this Commission to bind itself or its successors in this manner.

[The revisions were made effective September, 1975.] ¹⁷

17. [Ed.] Concurring and dissenting opinions have been omitted.

In *National Association of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975), the FCC's decision was largely affirmed, although a remand was ordered on certain matters.

The exemption of public affairs, documentary and children's programs from the prime time access limitation was sustained, but the FCC was directed to formulate a definition of "public affairs" programming. The court also

stated that the "Commission should not make the waiver procedure available to determine whether particular programs fall within the exempt category."

With respect to the FCC's admonition that the exemptions were not to be used on Saturday evenings except for "compelling public interest reasons," the court found that no meaningful guideline had been provided for licensees and that "the Commission must either withdraw its admonition concerning Saturday programs or make

ABC-ITT MERGER CASE, 7 F.C.C.2d 245, 9 R.R.2d 12, 7 F.C.C. 2d 336, 9 R.R.2d 87, 9 F.C.C.2d 546, 10 R.R.2d 289 (1967). In a 4-3 decision, the FCC approved ITT's acquisition of the ABC television network (or, more precisely, the licenses of ABC's AM, FM, and TV stations). The Commission concluded that ABC would benefit by access to the greater financial resources of ITT; that the combined company would bring network affiliations to presently unaffiliated UHF stations; and that, as a result of the merger, ITT would have an incentive to contribute to the development of broadcast technology. The FCC rejected Department of Justice contentions that the merger should be disallowed because:

(1) ITT was a probable independent entrant into television network operations, CATV operations and networking, and pay television, and potentially could contribute technological developments relating to broadcast and CATV networking. In each instance, the FCC found the factual premises of the Department's contentions to be unsound; the FCC also observed that other entities were more probable entrants than ITT.

(2) The merger would eliminate the independence of ABC in regulatory proceedings and commercial situations where the interests of broadcasters and common carriers were adverse. The FCC found some merit to this contention, but held that the probable adverse impact was minimal.

(3) The merger would create adverse effects in the television advertising markets because ITT would be able to engage in reciprocity vis-à-vis its suppliers. The FCC found that ITT did not practice reciprocity, and that the opportunities for reciprocity were not significant in the case of ITT.

(4) ITT's influence over ABC would impair the independence and integrity of ABC's news operations. While there was some adverse evidence on this point, the FCC concluded that sufficient protections and assurances had been provided to safeguard ABC news.

the exempted categories wholly unavailable to licensees in access time on Saturdays." The FCC also was directed to consider whether a ceiling should be imposed on total hours for exempted network material.

The court held that the FCC's treatment of feature films was arbitrary and found no basis for distinguishing between films which previously had been shown on a network and those which had not.

On remand, the FCC added a definition for public affairs programming; de-

clined to impose a ceiling on total hours of exempted network material; refused to permit any network or off-network material (including exempt material) or any feature films to be shown in the Saturday access period; and otherwise permitted feature films to be shown in access time without limitation (partly because the incidence of such use was expected to be small). Prime Time Access Rule, 53 F.C.C.2d 335, 33 R.R.2d 1089 (1975). The changes are included in the text of the regulation, reproduced supra at pp. 168-169.

When the Department of Justice appealed the FCC determination, ITT exercised a contractual option to terminate the transaction and the merger was not consummated.¹⁸

Note on Antitrust Suits Against the Networks. The Department of Justice in 1972 filed antitrust complaints against the three national networks. These suits were dismissed without prejudice in 1974 and refiled the same year. The 1974 complaints alleged that each network used its control over access to evening broadcasting hours to restrain and monopolize prime time television entertainment programming, in violation of sections 1 and 2 of the Sherman Act, by:

- (1) Excluding from network broadcast those entertainment programs in which the network had no ownership interest;
- (2) Compelling outside program suppliers to grant the network financial interests in television programs which it accepted for broadcast;
- (3) Refusing to offer air time to advertisers and other outside program suppliers seeking to have their own programs shown on the network;
- (4) Controlling the prices paid by the network for television exhibition rights to motion picture feature films; and
- (5) Obtaining competitive advantages over other producers and distributors of television entertainment programs and of motion picture feature films.

It was alleged that these practices resulted in concentration in the networks of ownership and control of network prime time television entertainment programs; unreasonable restraint of competition in the production, distribution and sale of television entertainment programs; and, for the viewing public, deprivation of the benefits of free and open competition in the broadcast of television entertainment programs.

Injunctive relief was sought to prevent the networks from:

- (a) obtaining any interest in television entertainment programs produced by others, except for the first-run right of exhibition;
- (b) engaging in syndication of any television entertainment programs;
- (c) transmitting any television entertainment programs produced by any one of the networks; and
- (d) using their control of access to broadcasting time to foreclose competition in any other field.

18. See Levin, *Broadcast Structure, Technology, and the ABC-ITT Merger Decision*, 34 *Law and Contemp.Prob.* 452 (1969); Bradbury and Champy,

Corporate Acquisitions of Broadcast Facilities, 8 *B.C.Ind. and Com.L.Rev.* 903 (1967).

The suits did not challenge affiliation agreements between the networks and their local affiliated stations. News, public affairs, documentary, and sports programs of the networks were not encompassed by the actions.

In *United States v. NBC, 1978-1 CCH Trade Cases par. 61,842 and 61,855* (Nov. 29, 1977 and Jan. 26, 1978), the Department of Justice obtained a consent decree against NBC. The decree is concerned exclusively with entertainment programs, defined to include "any program, including a feature film, exhibited or intended to be exhibited on television other than the following programs: news, public affairs, agriculture, religious, instructional and sports." The decree divides the broadcast day into three segments: (1) "Prime Time Hours," defined as 6:00 to 11:00 p. m. in the Eastern and Pacific Time Zones, and 5:00 to 10:00 p. m. in the Central and Mountain Time Zones; (2) "Daytime Hours," defined as 9:00 a. m. to 6:00 p. m. in the Eastern and Pacific Time Zones and 9:00 a. m. to 5:00 p. m. in the Central and Mountain Time Zones; and (3) "Fringe Hours," defined as 11:00 p. m. to 2:00 a. m. and 6:00 a. m. to 9:00 a. m. in the Eastern and Pacific Time Zones and 10:00 p. m. to 1:00 a. m. and 6:00 a. m. to 9:00 a. m. in the Central and Mountain Time Zones.

Section IV(A) of the decree enjoins NBC from "[a]cquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by an independent program supplier, other than the right to Network Exhibition of the program." There are exceptions of limited significance.

Section IV(B) of the decree enjoins NBC from "[s]elling, licensing, or distributing entertainment programs to [domestic] television broadcast stations for non-network television exhibition (or otherwise engaging the business commonly known as 'syndication') or to foreign television stations or networks," except, in the latter instance, where the program either was produced by NBC or was produced in a foreign country and was not included in NBC's network schedule.

Section V of the decree enjoins NBC for a period of ten years "from offering for NBC network broadcast during Prime Time Hours, Daytime Hours or Fringe Hours, more than [2½] hours per week in Prime Time Hours, more than [8] hours per week in Daytime Hours, and more than [11] hours per week in Fringe Hours, . . . of entertainment programs obtained from sources other than independent program suppliers." This restriction is subject to two provisos. During each successive 6-month period, NBC may add two additional hours of "non-regularly scheduled special programs." Further, NBC may add to the hours permitted in Fringe Hours, hours not used in Prime Time Hours and Daytime Hours. This restriction is intended to limit NBC production of its own network entertainment programming.

Section VI(A) of the decree enjoins NBC from “purchasing or offering to purchase from an independent program supplier the right to Network Exhibition of one or more entertainment programs upon condition, express or implied, that NBC . . . will obtain any other right or interest from said supplier,” except as permitted in the decree.

Section VI(B) of the decree enjoins NBC for a period of 15 years “from agreeing with an independent program supplier that said supplier use NBC production facilities to produce a program, other than a live program, as an NBC television network entertainment program for a period in excess of the time required to produce episodes for [1] broadcast year.”

Section VI(D) of the decree enjoins NBC for a period of 10 years from purchasing or offering to purchase from [CBS or ABC] any right to Network Exhibition of any entertainment program upon the condition, express or implied, that CBS or ABC agrees to purchase or offers to purchase a right to network exhibition of any entertainment program produced or controlled by NBC.”

Section VI(E)(i) of the decree enjoins NBC for a period of 15 years from “[a]cquiring from an independent program supplier options to Network Exhibition of a prime time network entertainment program exercisable for a period in excess of [4] years from the date of first broadcast of such program as part of an NBC prime time network entertainment program series, and the balance of any broadcast year [September-to-September] in which such [4] year period ends.” There are qualifications affording NBC larger rights in some instances, including a right of first refusal for annual periods subsequent to the allowable initial period.

Section VI(E)(ii) of the decree enjoins NBC for a period of 15 years from “[a]cquiring from an independent program supplier . . . exclusive exhibition rights for prime time network entertainment program series episodes for which NBC has exercised a contractual right to Network Exhibition in excess of the following: (a) for prime time use, the duration of any contract term or terms by which NBC acquires the right to Network Exhibition; (b) for non-prime time stripping on television broadcast stations [i. e., the broadcast of more than one episode per week], four (4) years from the first prime time episode broadcast; and (c) for other broadcast uses, three (3) years from the first prime time episode broadcast.” NBC may obtain more extensive rights “so long as negotiation for and acquisition of such rights takes place after NBC has agreed to order episodes of such program for the first year of broadcast as an NBC prime time television network entertainment program series.”

Section VI(E)(iii) of the decree enjoins NBC for a period of 15 years from “[a]cquiring from an independent program supplier . . . exclusive exhibition rights for theatrical feature films for

which NBC has a contractual right to Network Exhibition, against: (a) theatrical and non-theatrical direct projection; (b) closed circuit TV in non-residential hotels, motels, bars, restaurants, hospitals and similar non-residential institutions; (c) passenger-carrying vehicles; (d) video discs, cartridges or cassettes or other such equipment."

Section VI(F) of the decree enjoins NBC for a period of 10 years from "acquiring from an independent program supplier a first year pick-up option for exhibition of a prime time network entertainment program series based on a program designated by NBC and said supplier as a 'pilot program' ('pilot') which is exercisable after the following times: (i) where NBC has not advanced said supplier any part of the costs of pilot development, subsequent to the earliest date that the agreement contemplates that broadcast of the series may commence; and (ii) where NBC has advanced said supplier any part of the costs of pilot development, more than [1] year after delivery to NBC of the completed pilot." There are a number of complex qualifications to the second limitation, the purport of which is to require NBC to release 65% of pilots not promptly utilized upon payment of NBC's unrecouped costs for the development of the pilot.

Section VI(G) of the decree provides that NBC is enjoined for a period of 10 years from "acquiring from an independent program supplier rights in excess of first negotiation and first refusal rights for a spinoff involving a non-continuing character" (i. e., one appearing in no more than 25% of the original episodes of the program upon which the spinoff is based).

Section VI(H) of the decree enjoins NBC for a period of 10 years from "purchasing from an independent program supplier a right to first run Network Exhibition of any television entertainment program series which includes the right to exhibit repeats of episodes in years subsequent to the broadcast year of initial exhibition of such episodes, *provided that* repeat rights to [3] initial episodes per broadcast year of each such program series may be purchased for exhibition in subsequent broadcast years as part of the right to Network Exhibition, and *provided further that* additional rights to repeats may be purchased for exhibition in subsequent broadcast years, so long as negotiation for and acquisition of such additional repeat rights takes place after NBC has agreed to order episodes for such program series for the first year of broadcast as an NBC television network entertainment program series, and *provided further that* the limitation as to repeats . . . shall not apply to (i) made-for-television and theatrical feature films, (ii) specials, and (iii) cartoons or other children's programs."

The consent decree further provides that, until similar injunctive relief is obtained against CBS and ABC, Sections V, VI(C), VI (E)(i), and VI(F) through (H) shall not take effect. Further, if the antitrust actions against CBS and ABC shall be dismissed, or re-

sult in different relief, NBC "shall be granted a modification of or relief from any terms set forth herein as may be necessary to prevent NBC from being placed at a competitive disadvantage with respect to CBS or ABC." The parties further stipulated that upon a showing that NBC had used "contractual rights to the exclusive use of talent or of literary properties for television exhibition" to impede competition in television entertainment programming or to circumvent any provision of the decree, the Government may apply for relief against such conduct, provided that such relief would not place NBC at a competitive disadvantage with respect to CBS or ABC."

In entering the decree, the Court observed:

1. That the provisions of section IV parallel the restrictions imposed on all three networks by FCC regulations relating to financial interests and syndication, and that section VI(A) reinforces these restrictions.

2. That the provisions of section V, limiting internal program production by NBC, permit more programs than currently produced by NBC.

3. That the provisions of sections VI(E)(i) and (ii), VI(G) and VI(H), limiting initial contractual provisions obtainable by NBC, are intended to protect the program producer at a time when the popularity and values of the program are not known.

4. That section VI(F), pertaining to pilot programs, is intended to release a portion of such pilots from one-year exclusive contracts in instances where NBC has decided not to use the pilot.¹⁹

19. See Note, *The Antitrust Implications of Network Television Programming*, 27 *Hast.L.J.* 1207 (1976); *Fastow, Competition, Competitors and the Government's Suit Against the Television Networks*, 22 *Antitrust Bull.* 517 (1977). On the antitrust laws generally, see pp. 139-145 *supra*. In approving the consent decree, the court rejected arguments that the suit should be dismissed or stayed because of FCC regulation. To the same effect, see prior rulings in *U. S. v. ABC*, 41 *R.R.2d* 551 (1977), and *U. S. v. CBS*, 39 *R.R.2d* 1504 (1977).

In *Commercial Television Network Practices*, 44 *R.R.2d* 1674 (1979), the FCC declined to issue a declaratory ruling condemning as violations of its "financial interest" regulations, 47 *C.F.R.* § 73.658(j)(1)(ii), practices relating to options, repeats and spinoffs, prohibited by the NBC consent decree. The FCC preferred to have these issues considered in a pending network study. See *Commercial TV Network Practices*, 62

F.C.C.2d 548 (1977), 69 *F.C.C.2d* 1524 (1978).

A recent proposal by RCA may significantly affect the attractiveness of syndicated programming relative to network programming. RCA, through its satellite affiliate, proposes to provide satellite interconnection of broadcast stations for use by syndicators. RCA will provide receive-only earth stations at the facilities of most broadcasters in order to encourage use of the service. See *Television Digest*, Mar. 12, 1979, p. 1.

Other technological innovations may also have some influence. Video discs and cassettes are available, but their economic viability is questionable; in any case, their impact is expected to be limited. The impact of direct satellite-to-home broadcasts would be very great, but the likelihood of such service in the near future is believed to be small. See *Television Digest*, May 14, 1979, pp. 4, 6.

Chapter VI

REGULATION OF PROGRAMMING: POLITICS AND PUBLIC CONTROVERSY¹

Note on the regulation of political broadcasts. Section 315 of the Communications Act, based on a section of the Radio Act of 1927, requires every broadcaster to "afford equal opportunities" to all "legally qualified candidates" for a public office, once one such candidate for the same public office has been permitted "to use" the broadcaster's station. The section has been applied to primary as well as to general elections. In no case may the charge to political candidates exceed the station's standard charges, and within 45 days prior to a primary election and 60 days prior to a general election, the charge to political candidates may not exceed "the lowest unit charge of the station for the same class and amount of time for the same period." There is an explicit ban on censorship of the candidate's presentation on the station. 47 U.S.C.A. § 315.

Legally qualified candidate. The FCC has defined a legally qualified candidate for public office, 47 C.F.R. § 73.1940(a)(1), as one who:

"(i) has publicly announced his or her intention to run for nomination or office;

"(ii) is qualified under the applicable local, state or federal law to hold the office for which he or she is a candidate; and,

"(iii) has met the qualifications set forth in either subparagraphs (2), (3), or (4) below," which in general require that the purported candidate either (a) qualify for a place on the ballot, or (b) commit himself to seeking election by the write-in method (where such is allowed under applicable law) and make a "substantial showing" that he is a bona fide candidate by engaging in such activities as making campaign speeches, distributing campaign literature, and the like.²

1. On FCC regulation of programming generally, see Freedom and Responsibility in Broadcasting (Coons ed. 1961); Note, Regulation of Program Content by the FCC, 77 Harv.L.Rev. 701 (1964); Kalven, Broadcasting, Public Policy and the First Amendment, 10 J.Law & Econ. 15 (1967); Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn.L.Rev. 67 (1967); D. W. Toohy et al., Legal Problems in Broadcasting: Identification and Analysis of Selected Issues (1974); Canby, Programming in Response to the Community: The Broadcast Consumer and the First

Amendment, 55 Texas L.Rev. 67 (1976); Goldberg & Couzens, "Peculiar Characteristics": An Analysis of First Amendment Implications of Broadcast Regulation, 31 Fed.Com.L.J. 1 (1978).

2. More specifically, 47 C.F.R. § 73.1940 provides:

"(2) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the cri-

Use of broadcast facilities. The FCC has treated any appearance by a candidate, in which his voice or picture is identified or identifiable, as a "use." This includes appearances by candidates as entertainers or broadcast station personnel. *Paulsen v. FCC*, 491 F.2d 887 (9th Cir. 1974). It also includes appearances by candidates in non-partisan capacities—as for example, a Presidential appearance initiating a United Fund drive. *United Way of America*, FCC 75-1091.

teria set forth in subparagraph (1) above, that person:

"(i) has qualified for a place on the ballot, or

"(ii) has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.

Persons seeking election to the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered legally qualified candidates only in those states or territories (or the District of Columbia) in which they have met the requirements set forth in paragraph (a)(1) and (2) of this rule: Except, that any such person who has met the requirements set forth in paragraph (a)(1) and (2) in at least 10 states (or nine and the District of Columbia) shall be considered a legally qualified candidate for election in all states, territories and the District of Columbia for purposes of this Act.

"(3) A person seeking nomination to any public office, except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (a)(1) above, that person makes a substantial showing that he or she is a bona fide candidate for such nomination: Except, that no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.

"(4) A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those states or territories (or the District of Columbia) in which, in addition to meeting the requirements set forth in paragraph (a)(1) above,

"(i) he or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in that state, territory or the District of Columbia, or

"(ii) he or she has made a substantial showing of bona fide candidacy for such nomination in that state, territory or the District of Columbia: Except, that any such person meeting the requirements set forth in paragraph (a)(1) and (4) in at least ten states (or nine and the District of Columbia) shall be considered a legally qualified candidate for nomination in all states, territories and the District of Columbia for purposes of this Act.

"(5) The term "substantial showing" of bona fide candidacy as used in paragraphs (a)(2), (3) and (4) above means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing."

By contrast, if there is no appearance by the candidate there is no "use," and § 315 is not applicable. Appearances by supporters of the candidate do not trigger the statutory requirement of "equal opportunities." *Felix v. Westinghouse Radio Station, Inc.*, 186 F.2d 1 (3d Cir. 1950), cert. den., 341 U.S. 909, 71 S.Ct. 622, 95 L.Ed. 1347 (1951). Adversaries must rely on the Commission's "fairness doctrine" (considered *infra*) in such cases.

Exemptions for news coverage. The FCC's broad construction of "use" resulted in the requirement of "equal opportunities" being made applicable to the appearances of political candidates on newscasts. Thus, the televising of a mayor at a civic function, at a time when a mayoralty election campaign was in progress, led to a requirement that the station provide equal time for other candidates for the same office. See the discussion of the *Lar Daly* case in Sen.Rep.No. 562, 86th Cong., 1st Sess. (1959). In 1959, Congress amended § 315 to exempt from its coverage the appearance of a candidate on a (1) "bona fide newscast;" (2) "bona fide news interview;" (3) "bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary);" or (4) "on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)." However, the exemption was coupled with a proviso stating that broadcasters were not to be relieved from the obligation imposed by the Act "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 73 Stat. 557 (1959), 47 U.S.C.A. § 315.

The "bona fide newscast" exemption has been broadly construed. In one case, a recorded 30-minute interview with a candidate had been broken down into five segments and had been carried as portions of five regularly scheduled newscasts. The FCC upheld the licensee upon a showing that similar interviews previously had been carried on its newscasts. *Letter to Citizens for Reagan (WCKT-TV)*, 56 F.C.C.2d 925 (1976).

The "bona fide news interview" exemption has been interpreted somewhat more restrictively. The FCC has looked to whether the news interview program has been regularly scheduled, how long it has been broadcast, whether the broadcaster produces and controls the program, whether the selection of persons to be interviewed and topics to be discussed are based on their newsworthiness, and whether the broadcaster's actions are based on good faith journalistic judgments. See examples cited in *Law of Political Broadcasting and Cablecasting*, 43 R.R.2d 1354, 1376-1378 (1978).

The "news documentary" exemption has produced no unusual difficulties, but the FCC has given an expansive interpretation to "on the spot coverage of bona fide news events." In *Aspen Institute*,

55 F.C.C.2d 697, 35 R.R.2d 49 (1975), sustained sub nom. *Chisholm v. FCC*, 538 F.2d 349 (D.C.Cir. 1976), cert. den. 429 U.S. 890, 97 S.Ct. 247, 50 L.Ed.2d 173 (1977), the FCC reversed prior restrictive rulings and construed this exemption to encompass:

(a) Debates between candidates for public office, not encompassing all candidates for the office, where such debates were arranged by organizations other than the broadcaster and were considered newsworthy by the broadcaster; and

(b) Press conferences by candidates, including incumbent office holders, when considered by broadcasters to be newsworthy.

The Commission ruled, with respect to news events generally, that "a program which might otherwise be exempt does not lose its exempt status because the appearance of a candidate is a central aspect of the presentation, and not incidental to another news event."

At the same time, the Commission adhered to its prior rulings that the exemption for a "bona fide news interview" was limited to appearances of candidates on regularly scheduled interview programs under the control of the broadcaster, and did not encompass ad hoc interviews arranged by the broadcaster and candidate.³

The ruling in *Aspen Institute* was employed to exempt debates between the 1976 Presidential candidates, Carter and Ford, from the equal time requirements of § 315, by having the debates arranged under the auspices of the League of Women Voters. *American Independent Party*, 62 F.C.C.2d 4, 38 R.R.2d 923 (1976), sustained sub nom. *McCarthy v. FCC*, 390 F.2d 471 (D.C.Cir. 1976), cert. den. 430 U.S. 955, 97 S.Ct. 1599, 51 L.Ed.2d 804 (1977). The chief criterion for exemption under *Aspen* is exclusion of the broadcaster from selection of the event's content, format and participants, and limiting it to the role of observer and reporter. See *Lorence L. Kessler*, 58 F.C.C.2d 922, 36 R.R.2d 891 (1976).

The FCC has excluded from the exemption delayed broadcasts of debates or press conferences (when the delay is in excess of one day), *Delaware Broadcasting Co.*, 60 F.C.C.2d 1030 (1976),⁴ and "town meeting" formats in which a candidate gives a talk and answers questions from the audience, *Chicago Educational Television Association*, 58 F.C.C.2d 922 (1976); *Station WCLV (FM)*, 59 F.C.C.2d 1376 (1976).

3. Presidential reports on important international developments, as well as the President's state of the union message, have been held to be exempt from § 315. See *Republican National Committee*, 40 F.C.C. 408 (1964), affirmed by an equally divided court sub nom. *Goldwater v. FCC*, Case No. 18963, D.C.Cir. 1964, cert. den., 379 U.S. 893, 85 S.Ct. 169 (1964); *Lar*

Daly, 59 F.C.C.2d 97 (1976). See also *Telegram to ABC, CBS and NBC*, 40 F.C.C. 276 (1956) (same result prior to 1959 amendment).

4. The FCC's approach to delayed broadcasts of political debates was sustained in *Office of Communication v. FCC*, 590 F.2d 1062 (D.C.Cir. 1978).

Time of request. The FCC requires that a request for equal opportunities "be submitted to the licensee within one week of the day on which the first prior use, giving rise to the right of equal opportunities, occurred: provided, however, that where the person was not a candidate at the time of such first prior use, he shall submit his request within one week of the first subsequent use after he has become a legally qualified candidate for the office in question." 47 C.F.R. § 1940(e).

Reasonable access by federal candidates. As a result of an amendment in 1972, broadcasters must permit a candidate for federal elective office to purchase "reasonable amounts" of time or "allow reasonable access" to such candidates. 47 U.S.C.A. § 312(a)(7). The FCC issued guidelines on this requirement in Enforcing Section 312(a)(7) of the Communications Act, 68 F.C.C.2d 1079, 43 Fed.Reg. 33765, 43 R.R.2d 1029, 1048 (1978):

"(a) Reasonable access must be provided through the gift or sale of 'uses' of a station by legally qualified candidates for federal elective office.

"(b) Licensees must provide prime time program time absent unusual circumstances and prime time spot announcements as part of the fulfillment of their 'reasonable access' obligations.

"(c) Licensees may not have a policy of flatly banning federal candidates from access to the types, lengths and classes of times which they sell to commercial advertisers.

"(d) Reasonable access must be provided at least during the 45 days before a primary and 60 days before a general or special election. The question of whether access should be afforded *before* these periods and when access should apply before a convention or caucus will be determined on a case-by-case basis.

"(e) Noncommercial educational stations generally need not provide federal candidates with lengths of program time which are not a normal component of the station's broadcast day.

"(f) In view of the no-censorship provision of Section 315(a) noncommercial broadcasters may not censor the content of a 'use' by a candidate and, therefore, may not reject broadcast matter submitted by candidates merely on the basis that it was originally prepared for broadcast on a commercial station.

"(g) Although educational and commercial licensees may suggest the format for appearances of candidates under Section 312(a)(7), a candidate need not accept these suggestions and may not be penalized by loss of 'equal opportunities' if he or she declines to appear on a program designed by the broadcasters." ⁵

5. In Senator Wendell Anderson, 69 F.C.C.2d 1250, 44 R.R.2d 831 (1978), the FCC ruled that a radio licensee must sell five-minute segments to fed-

eral candidates seeking access under § 312(a)(7), even though the station's normal format did not involve sales of segments of more than one minute,

In *Summa Corp.*, 43 F.C.C.2d 602, 28 R.R.2d 768 (1973), a television station refused to sell time to a candidate for federal office exceeding sixty seconds except between the hours of 1:30 a. m. and 6:00 a. m. In the absence of countervailing circumstances, the station's policy was held to violate the statute. Congress intended "to ensure candidates for Federal office adequate opportunity to fully present and discuss their candidacies and hence provide voters with information necessary for the responsible exercise of their franchise." By contrast, in *Paul A. Talmey*, 49 F.C.C.2d 678, 31 R.R.2d 1309 (1974), the FCC declined to interfere where a candidate had been offered 30 minutes in Sunday prime time, 5 minute segments in other prime time, and spot announcements in prime and other time. The Commission ruled that the statute did not assure a candidate of time of any particular length or time scheduled at any particular hour.

Candidates for state office do not have a comparable right of access. "It is the duty of each licensee to determine which campaigns and/or elections are of the most importance and interest in its service area and to devote a reasonable amount of coverage to those campaigns and/or elections." "In covering a particular campaign or election a licensee may provide free spot or program time, or sell spot or program time, or may make some combination of free and purchasable time available to candidates in that election." The licensee also has discretion as to "the date on which its campaign/election coverage will commence." On this ground, among others, a broadcaster's failure to sell time to an incumbent governor five months before a state primary election was held to be within the licensee's discretion. *Honorable Dan Walker*, 57 F.C.C.2d 799, 35 R.R.2d 527 (1975). See also *Rosenbush Advertising Agency*, 31 F.C.C.2d 782, 22 R.R.2d 889 (1971).

Prohibition against censorship. In *Farmers Educational & Co-operative Union v. WDAY, Inc.*, 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed. 2d 1407 (1959), Sec. 315 of the Federal Communications Act was read (1) as barring station review of a political candidate's material, used on broadcasts allowed pursuant to the section's provision for equal time, in order to delete defamatory statements; and (2) as barring actions for defamation under state law, against the station, based on the broadcast of any such political candidate. In reaching its conclusion on the second point, the Court pointed out that the opposite view would impose unreasonable burdens on broadcasting licensees or lead such licensees to curtail the use of their facilities for political debate. Justices Frankfurter, Harlan, Whittaker and Stewart dissented on the second point.⁶

and the longer segments would be disruptive of the station's format of music and news.

6. On political broadcasting, see Friedenthal and Medalle, *The Impact of Federal Regulation of Political Broadcasting: Section 315 of the Communi-*

cations Act, 72 Harv.L.Rev. 445 (1959); Singer, *The FCC and Equal Time: Never-Neverland Revisited*, 27 Md.L. Rev. 221 (1967); K. Lang and G. Lang, *Politics and Television* (1969); Note, *Televised Presidential Addresses and the FCC's Fairness Doctrine*, 7 Colum.

*Introductory note on the "fairness doctrine."*⁷ The FCC early took the position that, since radio facilities were not sufficiently numerous to provide a separate outlet for every point of view, broadcast licensees should not use their facilities to promote a particular ideology; instead, they should endeavor to present a balanced picture of matters of public concern. Thus, in *Young People's Ass'n*,⁸ the applicant, a religious group, proposed to broadcast programs that were compatible with its own religious views but not programs of other religious persuasions. The application was denied.

A major controversy was precipitated when the FCC's general approach was applied in *Mayflower Broadcasting Co.*⁹ In this renewal proceeding, the Commission condemned the broadcasting of "editorials" by a licensee "urging the election of various candidates for

J.Law and Soc.Prob. 75 (1971); Freeman and Edelstein, Political Campaigning and the Airways, 1 Pepper.L. Rev. 178 (1974); N. Minow, J. Martin, and L. Mitchell, Presidential Television (1974); Whitehead, Media Chic, 83 Yale L.J. 1751 (1975); Comment, Quadrennial Problem: Application of the Equal Opportunity and Fairness Doctrines to Political Campaigns, 1976 Det.Coll.L.Rev. 83 (1976); Comment, Equal Opportunity in Political Broadcasting: A Dying Ideal, 8 Sw U.L.Rev. 991 (1976); L. Mitchell, Televised Presidential Debates (Twentieth Century Fund 1976); N. Bowie, A Study of the FCC's Equal Opportunity Regulation: An Agency in Search of a Standard (1976); Barrow, Presidential Debates of 1976: Toward a Two-Party Political System, 46 U.Cinn.L.Rev. 123 (1977); Gottlieb, Role of Law in the Broadcast of Political Debate, 37 Fed. B.J. 1 (1978); Note, The Right of "Reasonable Access" for Federal Political Candidates Under Section 312(a)(7) of the Communications Act, 78 Colum.L. Rev. 1287 (1978).

7 On the fairness doctrine generally, see Barrow, The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy, 37 U.Cinn.L.Rev. 447 (1968); Loevinger, Free Speech, Fairness and Fiduciary Duty in Broadcasting, 34 Law & Contemp.Prob. 278 (1969); Marks, Broadcasting and Censorship: First Amendment Theory After Red Lion, 38 Geo.Wash.L.Rev. 974 (1970); Note, The Fairness Doctrine and Broadcast License Renewals, 71 Colum.L.Rev. 452 (1971); H. Geller, The Fairness Doctrine in Broadcasting (Rand Corp. 1973); Note, Fairness Doctrine and Entertainment Programming: All in the Family, 7 Ga.L.Rev.

554 (1973); Mallamud, The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion, 1973 Duke L.J. 89; Swartz, Fairness for Whom? Administration of the Fairness Doctrine, 1969-70, 14 B.C.Ind. & Com.L. Rev. 457 (1973); Comment, Fairness Doctrine: Time for the Graveyard? 2 Fordham Urban L.J. 563 (1974); Bazelon, Regulation of the Telecommunications Press, 1975 Duke L.J. 213 (1975); Barrow, Fairness Doctrine: A Double Standard for Electronic and Print Media, 26 Hastings L.J. 659 (1975); Karst, Equality as a Central Principle in the First Amendment, 43 U.Chi.L.Rev. 20, 43-52 (1975); Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich.L.Rev. 1 (1976); F. Friendly, The Good Guys, the Bad Guys and the First Amendment (1976); Rosenfeld, The Jurisprudence of Fairness: Freedom Through Regulation in the Marketplace of Ideas, 44 Ford.L.Rev. 877 (1976); Note, Constitutional Ramifications of a Repeal of the Fairness Doctrine, 64 Geo.L.J. 1293 (1976); Powe, "Or of the [Broadcast] Press," 55 Texas L.Rev. 39 (1976); Comment, Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation, 28 Stan.L.Rev. 563 (1976); Simmons, FCC's Personal Attack and Political Editorial Rules Reconsidered, 125 U.Pa.L.Rev. 990 (1977); Van Alstyne, Möbius Strip of the First Amendment, 29 S.C.L.Rev. 539 (1978); S. Simmons, The Fairness Doctrine and the Media (1978).

See also note 1 *supra* and note 41 *infra*.

8. 6 F.C.C. 178 (1938).

9. 8 F.C.C. 333 (1940).

political office or supporting one side or another of various questions in public controversy," with a view to winning "public support for some person or view favored by those in control of the station." In addition to statements concerning the obligation of the licensee to present "all sides of public issues," the Commission observed that a "truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate." The Commission granted renewal here, however, relying on prior cessation of the condemned practice by the licensee and its promise not to renew the practice in the future.

The dissatisfaction with *Mayflower* eventually led to a restatement of the Commission's views on editorializing.

EDITORIALIZING BY BROADCAST LICENSEES

Federal Communications Commission, 1949.
13 F.C.C. 1246.

It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that portions of the radio spectrum are allocated to that form of radio communications known as radiobroadcasting. Unquestionably, then, the standard of public interest, convenience and necessity as applied to radiobroadcasting must be interpreted in the light of this basic purpose. The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

. . . Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be af-

forded radio time can radio be maintained as a medium of freedom of speech for the people as a whole. These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public.

It has been suggested in the course of the hearings that licensees have an affirmative obligation to insure fair presentation of all sides of any controversial issue before any time may be allocated to the discussion or consideration of the matter. On the other hand, arguments have been advanced in support of the proposition that the licensee's sole obligation to the public is to refrain from suppressing or excluding any responsible point of view from access to the radio. We are of the opinion, however, that any rigid requirement that licensees adhere to either of these extreme prescriptions for proper station programming techniques would seriously limit the ability of licensees to serve the public interest. Forums and roundtable discussions, while often excellent techniques of presenting a fair cross section of differing viewpoints on a given issue, are not the only appropriate devices for radio discussion, and in some circumstances may not be particularly appropriate or advantageous. Moreover, in many instances the primary "controversy" will be whether or not the particular problem should be discussed at all; in such circumstances, where the licensee has determined that the subject is of sufficient import to receive broadcast attention, it would obviously not be in the public interest for spokesmen for one of the opposing points of view to be able to exercise a veto power over the entire presentation by refusing to broadcast its position. Fairness in such circumstances might require no more than that the licensee make a reasonable effort to secure responsible representation of the particular position and, if it fails in this effort, to continue to make available its facilities to the spokesmen for such position in the event that, after the original programs are broadcast, they then decide to avail themselves of a right to reply to present their contrary opinion. It should be remembered, moreover, that discussion of public issues will not necessarily be confined to questions which are obviously controversial in nature, and, in many cases, programs initiated with no thought on the part of the licensee of their possibly controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views. In such cases, however, fairness can be preserved without undue difficulty since the facilities of the station can be made available to the spokesmen for the groups wishing to state views in opposition to those expressed in the original presentation when such opposition becomes manifest.

We do not believe, however, that the licensee's obligations to serve the public interest can be met merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time. If, as we believe to

be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficulty [sic] if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist. Undoubtedly, over a period of time some licensees may make honest errors of judgment. But there can be no doubt that any licensee honestly desiring to live up to its obligation to serve the public interest and making a reasonable effort to do so, will be able to achieve a fair and satisfactory resolution of these problems in the light of the specific facts.

It is against this background that we must approach the question of "editorialization"—the use of radio facilities by the licensees thereof for the expression of the opinions and ideas of the licensee on the various controversial and significant issues of interest to the members of the general public afforded radio (or television) service by the particular station. In considering this problem it must be kept in mind that such editorial expression may take many forms ranging from the overt statement of position by the licensee in person or by his acknowledged spokesmen to the selection and presentation of news editors and commentators sharing the licensee's general opinions or the

making available of the licensee's facilities, either free of charge or for a fee to persons or organizations reflecting the licensee's viewpoint either generally or with respect to specific issues. It should also be clearly indicated that the question of the relationship of broadcast editorialization, as defined above, to operation in the public interest, is not identical with the broader problem of assuring "fairness" in the presentation of news, comment or opinion, but is rather one specific facet of this larger problem.

It is clear that the licensee's authority to determine the specific programs to be broadcast over his station gives him an opportunity, not available to other persons, to insure that his personal viewpoint on any particular issue is presented in his station's broadcasts, whether or not these views are expressly identified with the licensee. And, in the absence of governmental restraint, he would, if he so choose, be able to utilize his position as a broadcast licensee to weight the scales in line with his personal views, or even directly or indirectly to propagandize in behalf of his particular philosophy or views on the various public issues to the exclusion of any contrary opinions. Such action can be effective and persuasive whether or not it is accompanied by any editorialization in the narrow sense of overt statement of particular opinions and views identified as those of licensee.

The narrower question of whether any overt editorialization or advocacy by broadcast licensees, identified as such, is consonant with the operation of their stations in the public interest, resolves itself primarily into the issue of whether such identification of comment or opinion broadcast over a radio or television station with the licensee, as such, would inevitably or even probably result in such overemphasis on the side of any particular controversy which the licensee chooses to espouse as to make impossible any reasonably balanced presentation of all sides of such issues or to render ineffective the available safeguards of that overall fairness which is the essential element of operation in the public interest. We do not believe that any such consequence is either inevitable or probable, and we have therefore come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness detailed above, is not contrary to the public interest.

It must be recognized, however, that the licensee's opportunity to express his own views as part of a general presentation of varying opinions on particular controversial issues, does not justify or empower any licensee to exercise his authority over the selection of program material to distort or suppress the basic factual information upon which any truly fair and free discussion of public issues must necessarily depend. The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible. A li-

censee would be abusing his position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news. No discussion of the issues involved in any controversy can be fair or in the public interest where such discussion must take place in a climate of false or misleading information concerning the basic facts of the controversy.

During the course of the hearing, fears have been expressed that any effort on the part of the Commission to enforce a reasonable standard of fairness and impartiality would inevitably require the Commission to take a stand on the merits of the particular issues considered in the programs broadcast by the several licensees, as well as exposing the licensees to the risk of loss of license because of "honest mistakes" which they may make in the exercise of their judgment with respect to the broadcasts of programs of a controversial nature. We believe that these fears are wholly without justification, and are based on either an assumption of abuse of power by the Commission or a lack of proper understanding of the role of the Commission, under the Communications Act, in considering the program service of broadcast licensees in passing upon applications for renewal of license. . . . The question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved. It does not require any appraisal of the merits of the particular issue to determine whether reasonable efforts have been made to present both sides of the question. Thus, in appraising the record of a station in presenting programs concerning a controversial bill pending before the Congress of the United States, if the record disclosed that the licensee had permitted only advocates of the bill's enactment to utilize its facilities to the exclusion of its opponents, it is clear that no independent appraisal of the bill's merits by the Commission would be required to reach a determination that the licensee has misconstrued its duties and obligations as a person licensed to serve the public interest. . . .

There remains for consideration the allegation made by a few of the witnesses in the hearing that any action by the Commission in this field enforcing a basic standard of fairness upon broadcast licensees necessarily constitutes an "abridgment of the right of free speech" in violation of the first amendment of the United States Constitution. We can see no sound basis for any such conclusion. The freedom of speech protected against governmental abridgment by the first amendment does not extend any privilege to government licensees of means of public communications to exclude the expression of opinions and ideas with which they are in disagreement. We believe, on the contrary, that a requirement that broadcast licensees utilize their franchises in a manner in which the listening public may be assured of hearing varying opinions on the paramount issues facing the

American people is within both the spirit and letter of the first amendment.

We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgment by the first amendment. *United States v. Paramount Pictures, Inc., et al.*, 334 U.S. 131, 166, 68 S.Ct. 915, 933, 92 L.Ed. 1260. But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest. Indeed, it seems indisputable that full effect can only be given to the concept of freedom of speech on the radio by giving precedence to the right of the American public to be informed on all sides of public questions over any such individual exploitation for private purposes. Any regulation of radio, especially a system of limited licensees, is in a real sense an abridgment of the inherent freedom of persons to express themselves by means of radio communications. It is however, a necessary and constitutional abridgment in order to prevent chaotic interference from destroying the great potential of this medium for public enlightenment and entertainment. . . . Nothing in the Communications Act or its history supports any conclusion that the people of the Nation, acting through Congress, have intended to surrender or diminish their paramount rights in the air waves, including access to radio broadcasting facilities to a limited number of private licensees to be used as such licensees see fit, without regard to the paramount interests of the people. The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees.¹⁰

OFFICE OF COMMUNICATION OF UNITED CHURCH OF CHRIST v. FCC, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966), second review, 425 F.2d 543 (D.C.Cir. 1969). Renewal of the television license of WLBT in Jackson, Mississippi, was opposed by units of the United Church of Christ and by individuals who were leaders in Mississippi civic and civil rights groups. On behalf of themselves, and as representatives of other television viewers in Mississippi, these organizations and individuals (the appellants), argued that WLBT had failed to operate in the public interest because its programming (1) had violated the "fairness doctrine" by denying equal time to individuals and organizations to answer their critics; (2) had violated the "fairness doctrine" by not providing for the dissemination of opposing views on racial

10. [Ed.] Two Commissioners added separate statements, and one Commissioner dissented.

issues; (3) had discriminated against Negroes by failing to give adequate exposure to Negro individuals and institutions and by being generally disrespectful toward Negroes; (4) had discriminated against local activities of the Catholic Church; and (5) had devoted a disproportionate amount of time to entertainment and commercial announcements. Some of the complaints had antecedents dating back to 1955. Negroes comprised almost 45% of the total population in the primary service area of WLBT.

The Commission accepted the allegations of the appellants as true, but found a need for WLBT's continued broadcast service; it renewed WLBT's license for a probationary period of one year, coupled with stern warnings to the station to change its ways. The Court of Appeals reversed, holding that, in the circumstances shown by the record, "an evidentiary hearing was required in order to resolve the public interest issue." The Court observed that "a history of programming misconduct of the kind alleged would preclude, as a matter of law, the required finding that renewal of the license would serve the public interest," and that "in a renewal proceeding, past performance is [the] best criterion. When past performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest." The Commission had found an urgent need for a properly run station in Jackson. The Court held that there was not sufficient evidence to support the conclusion "that the need for a properly run station in Jackson was so pressing as to justify the risk that WLBT might well continue with an inadequate performance." Nor had WLBT, either by past performance or by present affirmation, provided assurance that its station would be properly run. Moreover, the "need which the Commission thought urgent might well be satisfied by refusing to renew the license of WLBT and opening the channel to new applicants under the special temporary authorization procedures available to the Commission on the theory that another, and better suited, operator could be found to broadcast on the channel with brief, if any, interruption of service."

On remand, the FCC granted WLBT a three-year renewal of its license, concluding that "the intervenors have failed to prove their charges and that the preponderance of the evidence before us established that WLBT has afforded reasonable opportunity for the use of its facilities by the significant community groups comprising its service area." *Lamar Life Broadcasting Co.*, 14 F.C.C.2d 431 (1968). The Court of Appeals reversed, holding that the Commission's conclusion was not supported by substantial evidence. The Court ruled that the FCC had erred:

(a) By improperly placing the burden of proof on the intervenors rather than on the renewal applicant. The Court noted that the FCC's initial grant of a one-year probationary renewal (set aside in the prior Court determination) was premised on the

fact that the renewal applicant at the very outset had been unable to persuade the FCC that renewal was in the public interest.

(b) By failing to credit uncontradicted evidence of the intervenors with respect to monitoring of WLBT's programming, WLBT's cutting off of network programs referring to local racial problems, and the use of disparaging terms by WLBT announcers in referring to Negroes. The Court noted that it was not determining "how the factors . . . should have been weighed by the Commission but only that they had some probative value and should have been considered."

(c) By treating the intervenors with impatience and hostility in the remanded proceeding; "an ally was regarded as an opponent" and the examiner's treatment of the intervenors "made fair and impartial consideration impossible."

The Court further concluded that the "administrative conduct reflected in the record is beyond repair" and that it would "serve no useful purpose to ask the Commission to reconsider." Accordingly the Court ordered that WLBT's license be vacated forthwith and that the Commission invite applications to be filed for the license. The Court refrained, however, "from holding that the licensee be declared disqualified from filing a new application; the conduct of the hearing was not primarily the licensee's responsibility, although as the applicant it had the burden of proof." The Commission was further directed to consider a plan for interim operation pending completion of these hearings; "if it finds it in the public interest to permit the present licensee to carry on interim operations that alternative is available. The Commission is free to consider whether net earnings of the licensee should be impounded by the Commission, pending final disposition of this license application." ¹¹

RED LION BROADCASTING CO. v. FCC

United States Supreme Court, 1969.
395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371.

MR. JUSTICE WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that

11. In *Alabama Educational Television Commission*, 50 F.C.C.2d 461, 32 R.R. 2d 539 (1974), the Commission refused to renew the noncommercial television licenses of the Alabama agency because it had discriminated against Black-oriented programming and had failed adequately to ascertain the needs of the Blacks in its audience, who comprised 30% of the total. In

view of improvements made since the licensing period in issue, the FCC permitted the Alabama agency to continue to operate the stations on an interim basis and held that it was not ineligible for a new grant. But in the new licensing proceeding, the Alabama agency would not have standing as an incumbent.

each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. *Red Lion* involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

I.

A.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater—Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater." When Cook heard of the broadcast he concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia Circuit, the FCC's position was upheld as constitutional and otherwise proper. 127 U.S.App.D.C. 129, 381 F.2d 908 (1967).

B.

Not long after the *Red Lion* litigation was begun, the FCC issued a Notice of Proposed Rule Making, 31 Fed.Reg. 5710, with an eye to

making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and to specifying its rules relating to political editorials. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed, 32 Fed.Reg. 10303. Twice amended, 32 Fed.Reg. 11531, 33 Fed.Reg. 5362, the rules were held unconstitutional in the *RTNDA* litigation by the Court of Appeals for the Seventh Circuit, on review of the rule-making proceeding, as abridging the freedoms of speech and press. 400 F.2d 1002 (1968).

As they now stand amended, the regulations read as follows:

“Personal attacks; political editorials.

“(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee’s facilities.

“(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

“Note: The fairness doctrine is applicable to situations coming within [(3)], above, and, in a specific factual situation, may be applicable in the [(2)], above. See, section 315(a) of the Act, 47 U.S.C.A. § 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 F.R. 10415. The categories listed in [(3)] are the same as those specified in section 315(a) of the Act.

“(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification

of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).¹²

C.

Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion*.

II.

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own.

A.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The broadcaster must give adequate coverage to public issues, *United Broadcasting Co.*, 10 F.C.C. 515 (1945), and coverage must be fair in that it accurately reflects the opposing views.

12. [Ed.] In 1978, these regulations were replaced by 47 C.F.R. §§ 73.1920 (personal attacks) and 73.1930 (political editorials). The personal attack rule was revised to remove the parentheses around "commentary" and "analysis" and to move the reference to editorials to a new subsection (c): "The provisions of paragraph (a) of this section shall be applicable to editorials of the licensee, except in the case of noncommercial educational stations since they are precluded from editorializing (Section 399(a), Communications Act)." The Note referring to the fairness doctrine was deleted. The political editorial regulation was revised to add a new subsection: "(b)

Inasmuch as noncommercial educational stations may not engage in editorializing nor may support nor oppose any candidate for political office (Section 399(a), Communications Act), the provisions of paragraph (a) of this section [the original provision] do not apply to such stations." See *Re-regulation of Radio and Television Broadcasting*, 44 R.R.2d 481 (1978).

In *Better Business Bureau of South Florida*, 68 F.C.C.2d 928, 42 R.R.2d 1645 (1978), the personal attack doctrine was held not to apply to comments within newscasts supervised entirely by the news department and not directed by higher management.

New Broadcasting Co., 6 P & F Radio Reg. 258 (1950). This must be done at the broadcaster's own expense if sponsorship is unavailable. Cullman Broadcasting Co., 25 P & F Radio Reg. 895 (1963). Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. John J. Dempsey, 6 P & F Radio Reg. 615 (1950); see Metropolitan Broadcasting Corp., 19 P & F Radio Reg. 602 (1960); The Evening News Assn., 6 P & F Radio Reg. 283 (1950). The Federal Radio Commission had imposed these two basic duties on broadcasters since the outset, Great Lakes Broadcasting Co., 3 F.R.C. Ann.Rep. 32 (1929), rev'd on other grounds, 59 App.D.C. 197, 37 F.2d 993, cert. dismissed, 281 U.S. 706, 50 S.Ct. 467, 74 L.Ed. 1129 (1930); Chicago Federation of Labor v. FRC, 3 F.R.C. Ann.Rep. 36 (1929), aff'd 59 App.D.C. 333, 41 F.2d 422 (1930); KFKB Broadcasting Assn. v. FRC, 60 App.D.C. 79, 47 F.2d 670 (1931), and in particular respects the personal attack rules and regulations at issue here have spelled them out in greater detail.

When a personal attack has been made on a figure involved in a public issue both the doctrine of cases such as *Red Lion* and *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from the preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

B.

The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions * * * as may be necessary to carry out the provisions of

this chapter * * *." 47 U.S.C.A. § 303 and § 303(r). The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses. 47 U.S.C.A. §§ 307(a), 309(a); renewing them, 47 U.S.C.A. § 307; and modifying them. *Ibid.* Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest, 47 U.S.C.A. § 309(h). This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," It is broad enough to encompass these regulations.

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception "*from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*" Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U.S.C.A. § 315(a) (emphasis added). This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. . . . Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act.

The objectives of § 315 themselves could readily be circumvented but for the complementary fairness doctrine ratified by § 315. The section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other supporters. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air and proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself. It is

the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step.

The legislative history reinforces this view of the effect of the 1959 amendment. . . .

. . . . When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future. The statutory authority does not go so far. But we cannot say that when a station publishes personal attacks or endorses political candidates, it is a misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense. When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station.

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. The Communications Act is not notable for the precision of its substantive standards and in this respect the explicit provisions of § 315, and the doctrine and rules at issue here which are closely modeled upon that section, are far more explicit than the generalized "public interest" standard in which the Commission ordinarily finds its sole guidance, and which we have held a broad but adequate standard before. . . . We cannot say that the FCC's declaratory ruling in *Red Lion*, or the regulations at issue in *RTNDA*, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

III.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules

abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

A.

Although broadcasting is clearly a medium affected by a First Amendment interest, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166, 68 S.Ct. 915, 933, 92 L.Ed. 1260 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952). For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination. *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949).

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945).

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934 It was this reality which at the very least necessitated first the division of the radio spectrum into

portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations. *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166 (1933). No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co. v. United States*, 319 U.S. 190, 227, 63 S.Ct. 997, 1014, 87 L.Ed. 1344 (1943).

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole re-

tain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

B.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, § 18, 44 Stat. 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned. *Farmers Educ. & Coop. Union v. WDAY*, 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959).

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners

and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1425, 89 L.Ed. 2013 (1945).

C.

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard. It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of

fundamental questions. The statute, long administrative practice, and cases are to this effect.

D.

The litigants embellish their First Amendment arguments with the contention that the regulations are so vague that their duties are impossible to discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply. The regulations at issue in *RTNDA* could be employed in precisely the same way as the fairness doctrine was in *Red Lion*. Moreover, the FCC itself has recognized that the applicability of its regulations to situations beyond the scope of past cases may be questionable, 32 Fed.Reg. 10303, 10304 and n. 6, and will not impose sanctions in such cases without warning. We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States v. Sullivan*, 332 U.S. 689, 694, 68 S.Ct. 331, 334, 92 L.Ed. 297 (1948), but will deal with those problems if and when they arise.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.

E.

It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. To this there are several answers.

Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace. . . .

Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has been necessary to suspend new applications. The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, makes it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential. This does not mean, of course, that every possible wavelength must be occupied at every hour by some vital use in order to sustain the congressional judgment. The substantial capital investment required for many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasible. The allocation need not be made at such a breakneck pace that the objectives of the allocation are themselves imperiled.

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and rul-

ing at issue here are both authorized by statute and constitutional. The judgment of the Court of Appeals in *Red Lion* is affirmed and that in *RTNDA* reversed and the causes remanded for proceedings consistent with this opinion.¹³

STATION KTYM, 4 F.C.C.2d 190, 7 R.R.2d 565 (1966), affirmed sub nom. *Anti-Defamation League v. FCC*, 403 F.2d 169 (D.C.Cir. 1968) cert. denied, 394 U.S. 930 (1969). The Anti-Defamation League complained that the station had broadcast three programs of a defamatory and anti-semitic character and objected to renewal of the station's license. The Commission observed that the station had offered the League equal time to answer the broadcasts, and that nothing more was required of it under the Commission's "fairness doctrine." The FCC refused to set the station's renewal application for hearing (one Commissioner dissenting):

"The issue presented here is not whether the broadcasts in question were proper, or were false and defamatory, or were anti-semitic, or were in the public interest. . . . The Com-

13. [Ed.] Justice Douglas did not participate.

Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed. 730 (1974). A Florida "right of reply" statute provided that, if a candidate for public office was assailed regarding his personal character or official record by any newspaper, the candidate had the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate might make to the newspaper's charges. The reply was required to be comparable in placement and type-size to the original charge and to take up no more space than the original charge. The Florida Supreme Court further limited the statute by requiring that the reply be "wholly responsive" to the original charge and not libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane. Even as thus limited, the statute was held to be a violation of the First Amendment. Without citing or discussing *Red Lion*, the Court reasoned:

". . . The Florida statute exacts a penalty on the basis of the content of a newspaper . . . in terms of the cost in printing and composing time and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct . . . that a newspaper is not subject to the finite tech-

nological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a state commands the readers should have available.

"Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy and that, under the operation of the Florida statute, political or electoral coverage would be blunted or reduced. . . .

"Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper and content, and treatment of public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment"

mission cannot put such matters in issue without becoming the censor of broadcasting which it is forbidden to do. . . .

“. . . To require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantial group. More often than not this would deprive the public of the opportunity to hear unpopular or unorthodox views.”

BRANDYWINE—MAIN LINE RADIO, INC., 4 R.R.2d 697 (1965). Application was made to transfer a station to a religious organization headed by a Reverend McIntire. The application was opposed on the ground that Reverend McIntire “has made false and misleading statements and deliberate distortions of the facts relating to various public issues . . . ; that he has made intemperate attacks on other religious denominations and leaders, various organizations, governmental agencies, political figures and international organizations; and that such expressions are irresponsible and a divisive force in the community and help create a climate of fear, prejudice and distrust of democratic institutions.” Reverend McIntire maintained that the station would make time available to all faiths on an equal basis; that an effort would be made to obtain diverse religious views; and that the station would abide by the Commission’s “fairness doctrine” in the treatment of controversial issues. With one Commissioner dissenting, the FCC approved the application without a hearing. The Commission relied on the affirmations of the proposed transferee; stressed its obligation to avoid censorship; and pointed out that the good faith of the proposed transferee could not properly be tested without a trial. The Commission also adverted to the obligations of a licensee (1) not to serve merely “private” interests, such as those of a particular religious sect, (2) to present the news fairly, and (3) to provide opportunities for reply, under the Commission’s “fairness doctrine,” to persons or organizations attacked in broadcasts over the station.

In Brandywine—Main Line Radio, Inc., 24 F.C.C.2d 18 (1970), reconsideration denied, 27 F.C.C.2d 565 (1971), the FCC refused to renew the Brandywine license because of (a) violations of the fairness doctrine generally, (b) violations of the personal attack regulations, and (c) misrepresentations in the transfer application as to programs intended to be carried. On judicial review, a divided Court of Appeals affirmed the FCC decision. 473 F.2d 16 (D.C.Cir. 1972). One judge agreed with the FCC on all three grounds. One judge concurred on the misrepresentation issue alone. The third judge dissented, arguing that refusal to renew the license in this case violated the

First Amendment. While the dissent rested in part on the facts of this particular case, it also challenged the constitutionality of the fairness doctrine generally.¹⁴

NICHOLAS ZAPPLE, 23 F.C.C.2d 707, 19 R.R.2d 421 (1970). In response to an inquiry, the FCC ruled: "Where a spokesman for, or supporter of candidate A, buys time and broadcasts a discussion of the candidates or the campaign issues, there has clearly been the presentation of one side of a controversial issue of public importance. It is equally clear that spokesmen for or supporters of opposing candidate B are not only appropriate, but the logical spokesmen for presenting contrasting views. Therefore, barring unusual circumstances, it would not be reasonable for a licensee to refuse to sell time to spokesmen for or supporters of candidate B comparable to that previously bought on behalf of candidate A." However, the FCC also stated that, in this circumstance, the licensee would not be obliged to provide free time to the opposing candidate's spokesmen or supporters. "When spokesmen or supporters of candidate A have purchased time, it is our view that it would be inappropriate to require licensees to in effect subsidize the campaign of an opposing candidate by providing candidate B's spokesmen or supporters with free time."¹⁵

COMMITTEE FOR THE FAIR BROADCASTING OF CONTROVERSIAL ISSUES, 25 F.C.C.2d 283, reconsideration denied, 25 F.C.C.2d 739 (1970). This opinion was concerned principally with complaints that the networks had not provided adequate opportunities to respond to President Nixon's speeches on the Vietnam War. There were five speeches between November 3, 1969 and June 3, 1970—all in prime time, unedited and uninterrupted. The FCC rejected claims that op-

14. The FCC has ruled that a proper opportunity to reply to a personal attack is not afforded if the reply is preceded or followed by a repetition of the original attack: "If the attacked party knew that if he accepted a station's offer to reply time he would subject himself to attack again at the time of such reply, it would discourage the attacked party from defending himself and thereby help to frustrate our goal of encouraging robust debate." Stations WGCB and WXUR, 46 F.C.C.2d 385, 29 R.R.2d 1438 (1974). Accord, WIYN Radio, Inc., 53 F.C.C.2d 428, 33 R.R.2d 849 (1975).

However, a right to respond may be afforded on an interview program on which the personal attack was made, despite a fear that the complainant may be treated unfairly. The com-

plainant must first submit to the interview and thereafter present evidence that he was not afforded a reasonable opportunity to reply. Donald J. Gillard, 39 R.R.2d 1093 (1977).

15. In *Handling of Public Issues Under the Fairness Doctrine*, 30 R.R.2d 1261 (1974) (discussed further infra at pp. 240-243), the FCC held that announcements pertaining to ballot propositions triggered the fairness doctrine, including the *Cullman* requirement of free response time. Stations were warned to make advance preparations to preclude a one-sided last-minute "blitz" by one group. The "subsidy" to a responding party obtaining free time under *Cullman* was said to be mitigated by the fact that the responding party was not entitled to equal time, only the fair exposure of its views.

ponents of the President's policies should be given an "equal opportunity" to respond; it rejected the claim that a substantial group of Senators should be recognized as appropriate opposition spokesmen; and it rejected the claim that equal time should be made available for contrasting views immediately following a Presidential address. All were considered to be inconsistent with the discretion of the licensee in determining how best to achieve fairness in the discussion of public issues.

Turning to the five speeches, the FCC concluded that the networks' other coverage of the Vietnam War had been both extensive and roughly balanced. In terms of responses to these speeches, however, ABC and CBS had provided only brief opportunity for uninterrupted, prime time responses, while NBC had provided a single such response of 30 minutes duration. The Commission raised the issue: "Are reasonable opportunities afforded when there has been an extensive but roughly balanced presentation on each side and *five* opportunities in prime time for the leading spokesman on one side to address the nation on this issue? We believe that in such circumstances there must also be a reasonable opportunity for the other side geared specifically to the five addresses (i. e., the selection of some suitable spokesman or spokesmen by the networks to broadcast an address giving the contrasting viewpoint)." After reviewing the networks' actions, the FCC concluded that they were insufficient and required "that at the least, time be afforded for one more uninterrupted opportunity by an appropriate spokesman to discuss the issue, with the length of time to be determined by the nature of the prior efforts in this area of uninterrupted presentations (and with thus the least requirement in this respect on NBC). We of course leave entirely to the judgment of the networks the selection of the appropriate spokesmen."

The FCC also considered a complaint by the Republican National Committee (RNC) seeking time to respond to a half-hour made available by CBS to the Democratic National Committee (DNC). DNC used this time to attack the administration's positions on a number of issues, but devoted relatively little time to the Vietnam War. The FCC sustained the RNC complaint, reasoning that CBS had given DNC the time without any constraint; that the time was used for partisan purposes in the nature of "electioneering"; that the time was not used to respond to the President's Vietnam speeches except in small part; and that the *Zapple* case required that CBS afford RNC a similar opportunity under the "political party" doctrine. On this issue, the FCC was reversed by the Court of Appeals. The Court held that the DNC broadcast was responsive to prior Presidential speeches; that there was no reason why the broadcast should have been confined to the Vietnam War; and that the FCC had not articulated an adequate basis for extending the *Zapple* case to cover this situation. As applied, the FCC approach would provide "the Presi-

dent's party with 'two bites of the apple'—with twice the opportunity to influence public opinion as its critics." *CBS v. FCC*, 454 F.2d 1018 (D.C.Cir. 1971).

DEMOCRATIC NATIONAL COMMITTEE v. FCC, 460 F.2d 891 (D.C. Cir. 1972). This proceeding involved complaints under the fairness doctrine by both the Democratic National Committee (DNC) and the Republican National Committee (RNC). The sequence of events was as follows:

On March 15, 1971, NBC devoted 48 minutes of the "Today" show to an interview with President Nixon. The interview centered on the President's family life, the effect of his public career on his wife and family, and the role of his wife in his decisions as a public official. The President also discussed a variety of public issues.

On March 22, 1971, ABC broadcast a one-hour interview of President Nixon by Howard K. Smith. The matters discussed included the Vietnam War, election reform legislation, and proposals for revenue sharing with the states.

On April 7, 1971, all three networks carried a Presidential address concerned with Vietnam, defending the President's policies.

DNC sought an opportunity to respond to these programs. The networks refused, except that ABC granted DNC one-half hour to respond to the President's address on Vietnam. Thereupon, RNC sought time from ABC to respond to DNC. ABC refused.

On complaints filed with the FCC by both DNC and RNC, the FCC held that the actions of the networks were not unreasonable. 22 R.R.2d 727 (1971). The Court of Appeals affirmed.

On the DNC complaints, the Court observed that DNC sought "a ruling whereby each time a President addressed the nation the opposition party would be entitled to an 'equal opportunity' under § 315(a) of the Communications Act" This position was rejected: "The President is obliged to keep the American people informed and as this obligation exists for the good of the nation this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond reposed in the opposition party." While the President's utterances on public issues were considered subject to the fairness doctrine, DNC was not invariably the most appropriate party to respond. Station licensees were held to have discretion as to the manner in which they presented opposing views, and the Court sustained the FCC's finding that the networks had afforded reasonable opportunity for expression of views contrary to those of the President.

On the RNC complaint, the Court concluded: "Reason and logic teach us that an unjust result would be reached by giving one political party an opportunity to respond to a second party which had

been given the opportunity to respond to the President who is a member of the first party . . . We refuse to sanction the commencement of such an unending circle." The Court rejected RNC's contention that it had a point of view different from that of the President which should be aired, and sustained ABC's position that it had presented pro-Administration as well as anti-Administration views in its programming. The FCC rested its decision in part on the fact that ABC had retained control in assuring that the time would be devoted to responding to the President's speech and would not be for the use of a political party *qua* party.

On procedural matters, the Court ruled that DNC had not raised issues requiring a formal hearing, and that RNC had not made out a *prima facie* case in support of its demand that ABC produce logs and tapes of its programming on Vietnam.¹⁶

GREEN v. FCC, 447 F.2d 323 (D.C. Cir. 1971). Stations in Washington, D. C. and San Francisco carried spot announcements appealing for voluntary enlistments in various branches of the armed services. The announcements in themselves did not dwell on the Vietnam War, or on warfare in general, and the draft was not expressly mentioned. Petitioners requested free time to air responses to these announcements, generally emphasizing the Vietnam War, the draft and the availability of draft deferments. The stations refused to provide the time and the FCC upheld the stations. The Court of Appeals affirmed.

The Court observed that there was some uncertainty as to the issue or issues of a controversial public nature which might invoke the fairness doctrine in this case. Five possibilities were identified: (1) military recruitment by voluntary means, (2) the draft, (3) the Vietnam War, (4) the morality of participating in any war, and (5) the "desirability" of military service. As to the first and fourth possibilities, petitioners did not claim that either of these were the issues to which they wished to respond. As to the second and third possibilities, it was uncontroverted that all the stations involved had

16. See also Democratic National Committee v. FCC, 156 U.S.App.D.C. 368, 481 F.2d 543 (D.C.Cir.1973). The DNC sought a right to respond in prime time to four Presidential addresses on his economic control program initiated Aug. 15, 1971, two of which were in prime time. The FCC rejected the demand and the Court affirmed. The Court reaffirmed its previous position that Presidential speeches do not automatically give the opposition party a right to reply. The FCC and the Court distinguished Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C. 2d 283, 19 R.R.2d 1103 (1970). Here

there were only two prime time speeches and significant presentation of opposing views had been carried by the networks. The FCC and the Court also rejected the view that the DNC was necessarily the appropriate opposition spokesman. Accord, John H. Bickel, 45 R.R.2d 797 (1979) (prime time program may be balanced by non-prime time program if audiences are comparable).

See, Cohn, Access to Television to Rebut the President of the United States: An Analysis and Proposal, 45 Temp.L. Q. 141 (1972).

devoted extensive time to coverage of these issues. Finally, as to the fifth possibility—the “desirability” of military service—the Court concluded that this raised essentially the same issues as the second and third—the draft and Vietnam—and that prior coverage was sufficient:

“Unless casual viewing over the past seven years has been totally unrepresentative, it is our opinion that the *undesirable* features of military life have been displayed in virtually every living room in the country, frequently in full living (or dying) color, in the American television networks’ endeavor to bring the Vietnam war and all of its miseries home to the American people.”¹⁷

HEALEY v. FCC, 460 F.2d 917 (D.C. Cir. 1972). On Sunday, February 16, 1969, the *Los Angeles Times* featured a profile of Dorothy Healey, a leading Communist in the Los Angeles area, generally favorable and sympathetic in its approach. The next day a newscaster on television station KTTV devoted six minutes of the station’s 4:30 and 10:00 p. m. “News Reports” to a discussion of the article, criticizing both Mrs. Healey and the *Times* article. In particular, the newscaster wondered about Mrs. Healey’s attitude toward Krushchev’s extermination of millions of Ukrainians, referred to “bugging” as a commonplace Communist tactic, and rejected Mrs. Healey’s view that those associating with her were threatened with loss of employment. Mrs. Healey sought an opportunity to respond under the fairness doctrine, but was rebuffed by the station. The FCC upheld the station, 24 F.C.C.2d 487 (1970), and the Court of Appeals affirmed.

The Court observed that Mrs. Healey did not rely on the “personal attack” rule and did not challenge the FCC’s conclusion that the rule had not been violated because the discussion had occurred during a bona fide newscast. The Court then noted that there was some uncertainty as to the controversial issue of public importance here involved. To the claims that the issue was “the role played by individual Communists in our society” or “guilt by association,” the Court said that it might be plausibly maintained that these were controversial issues of public importance. As to these, however, the Court ruled that there was no evidence as to the extent of the licensee’s coverage. Referring to the complainant’s burden “to allege and point specifically to an unfairness or imbalance in the programming of the licensee” concerning a public issue, the Court observed that “there is neither allegation nor proof that this licensee failed to

17 Accord, *Neckritz v. FCC*, 446 F.2d 501 (9th Cir. 1971).

See also *Mrs. Madalyn Murray*, 5 R.R.2d 263 (1965). The Commission held that the fairness doctrine does not require that a station, which makes its facilities available for religious programming such as services, devotionals

and prayers, must also make time available for a spokesman of “free thought” opposition to organized religion. The result would be otherwise if the stations were to broadcast programs attacking the “free thought” movement, its organizations or its spokesmen.

devote sufficient program time to these issues to present a fair and balanced view for the listening public.”

As to the only issue remaining—the role of Mrs. Healey as a Communist—the FCC and the Court held that this was not a controversial issue of public importance.

“ . . . Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance. Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues.

“ . . . In effect, the *Los Angeles Times* wrote a long article to prove that even an American Communist could be a nice, normal, ordinary, housewife. The TV licensee’s commentator disagreed; he questioned whether she really is a nice, normal, ordinary person. We fail to see the ‘controversial issue of public importance’ here . . .

“ . . . To characterize every dispute of this character as calling for rejoinder under the fairness doctrine would so inhibit television and radio as to destroy a good part of their public usefulness. It would make what has already been criticized as a bland product disseminated by an uncourageous media even more innocuous . . .”

NBC v. FCC, 170 U.S.App.D.C. 173, 516 F.2d 1101 (1974 and 1975), cert. denied, 424 U.S. 910, 96 S.Ct. 1105, 47 L.Ed.2d 313 (1976). In 1972, NBC broadcast an award-winning documentary entitled “Pensions: The Broken Promise.” In 1973, the FCC ruled that the program violated the fairness doctrine in that it presented only one side of an issue of public controversy. In 1974, the Court of Appeals reversed the Commission, holding that the Commission’s finding of a fairness doctrine violation was not justified. In 1975, the Court vacated its judgment, essentially on the ground that the case had become moot.

The program consisted primarily of case histories of workers who had failed to receive pensions under private pension plans after expectations of comfortable retirement. The causes varied: discontinuance of all or part of the firm’s operations; discharge of the employee prior to vesting of pension rights; insolvency of the employing firm; ineligibility of the employee because of changes in work assignment and union coverage. “Much of the program was a recount of human suffering, interviews in which aging workers described their plight without comment on cause or remedy.” Interspersed with the case histories were comments by persons active in the pension field, by public officials, and by the narrator, Edwin Newman. Some of these commented on possible remedies, including action on pending legislation. In his concluding remarks, Mr. Newman in-

licated that there were "many good [private pension plans], and there are many people for whom the promise has become reality." After discussion of the various problems associated with private pension plans, Mr. Newman stated that "it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven protection for those involved. The situation, as we've seen it, is deplorable."

In response to a complaint that the program had presented one side of the controversial issue of the performance and regulation of private pension plans, NBC replied that the program was not concerned with a controversial issue of public importance and did not attempt to discuss all private pension plans or urge the adoption of any specific legislative or other remedies; instead, the program "was designed to inform the public about some problems which have come to light in some pension plans and which deserve a closer look." NBC also claimed that, if it had inadvertently raised the issue of the overall performance of private pension plans, the side generally supportive of the system also had been heard. The FCC rejected NBC's claims, ruling that the program had in fact presented views on the overall performance and proposed regulation of private pension systems, a controversial public issue, and that, although the documentary contained some "pro-pensions" views, the "overwhelming weight" of the "anti-pensions" statements required further presentation of opposing views.

The Court of Appeals reversed. Its specific rulings addressed three different aspects of the program:

(a) As to case histories revealing pension plan abuses and individual hardships, the Court held that these did not present a controversial issue because it was conceded that such abuses and hardships did in fact exist.

(b) As to comments critical of private pension plans generally, the Court held that these were balanced by general comments in the program favorable to private pension plan performance.

(c) As to suggestions concerning the need for remedial legislation, the Court ruled that, while specific proposals were controversial, these were not discussed on the program in any detail and the more general theme of a need for remedial legislation was not controversial.

More generally, the Court ruled that the FCC had erred because "it failed adequately to apply the message of applicable decisions that the editorial judgments of the licensee must not be disturbed if reasonable and in good faith. The licensee has both initial responsibility and primary responsibility There may be mistakes in the licensee's determinations. But the review power of the agency is limited to licensee determinations that are not only different

from those the agency would have reached in the first instance but are unreasonable.”

As to the dispute on the subject matter of the program and the issue it raised, the Court ruled that, “if the broadcast licensee was reasonable in his premise, and his projection of the subject-matter of the program, he cannot be said by the supervising agency to have abused or exceeded his sound discretion.” In this case, “the Commission undertook to determine for itself as a fact whether ‘the program did in fact present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system.’ This is not a sufficient basis for overturning the licensee. [The Commission must find] abuse of discretion by the licensee in concluding that no controversial issue had been presented.” There was no finding of abuse of discretion, nor a basis for such a finding, in this case. “In the absence of extrinsic evidence that the licensee’s characterization to the Commission was not made in good faith, the burden of demonstrating that the licensee’s judgment was unreasonable to the point of abuse of discretion requires a determination that reasonable men viewing the program would not have concluded that its subject was as described by the licensee.” The Court continued:

“Investigative reporting has a distinctive role of uncovering and exposing abuses. It would be undermined if a government agency were free to review the editorial judgments involved in selection of theme and materials, to overrule the licensee’s editorial ‘judgment as to what was presented,’ though not unreasonable, to conclude that in the agency’s view the exposé had a broader message in fact than that discerned by the licensee and therefore, under the balancing obligation, required an additional and offsetting program.

. . . .
“ . . . In a case where NBC has made a reasonable judgment that a program relates to, and the public has an interest in knowing about, the ‘broken promise’ abuses that its reporters have identified in various private pension plans, and there is no controversy concerning the existence in fact of such abuses, then the balancing of the fairness doctrine cannot permit the intrusion of a government agency to make its own determination of the subject and thrust of the program as a report that such abuses feature private pensions generally, and with such enlargement to a controversial status to burden the reporting with the obligation of providing an opposing view of the escalated controversy.”

There were concurring and dissenting opinions. The case was set for rehearing *en banc*, but before the rehearing could be completed there was a suggestion of mootness by the FCC and the case was referred back to the original panel. The original panel, by a

divided vote, vacated its judgment and directed the FCC to vacate its order. One opinion concluded that the matter had become moot in light of subsequent events, including the passage of pension legislation; others suggested that the disposition rested on the FCC's desire not to pursue the matter further, largely on the basis of the same changed circumstances.¹⁸

STRAUS COMMUNICATIONS, INC. v. FCC, 174 U.S.App.D.C. 149, 530 F.2d 1001 (D.C.Cir. Jan. 16, 1976). The Bob Grant Show, a radio call-in talk show, was discussing a nationwide meat boycott then in progress. Mr. Grant indicated that he would try to reach Congressman Rosenthal, a leader of the boycott, to obtain his views. Mr. Rosenthal declined to participate and, at 10:45 a. m., Mr. Grant expressed his disappointment at Mr. Rosenthal's refusal but emphasized that he agreed with Mr. Rosenthal on the boycott question. After two hours of programming concerned with neither the meat boycott nor Mr. Rosenthal, Mr. Grant at 12:45 a. m. was conversing with a caller about some mothballed government ships at Haverstraw, New York, during which the caller praised Mr. Grant. Mr. Grant replied: "Well, when I hear about guys like Ben Rosenthal, I have to say I wish there were a thousand Bob Grants 'cause then you wouldn't have . . . a coward like him in the United States Congress."

On complaint of Congressman Rosenthal, the FCC ruled that the reference to Mr. Rosenthal as a coward constituted a personal attack and that the station had failed to comply with the procedures specified in the Personal Attack Rule. Despite the two-hour time lapse, the FCC held that Mr. Grant's remark "was part of a continuing discussion of the nationwide meat boycott and the Congressman's role therein, and therefore was within the context of a controversial issue of public importance." The Commission did not impose a forfeiture for violation of the rule because of the "novel aspects" of the case, such as the time lapse between the discussion of the issue and the personal attack. The Court of Appeals reversed the Commission.

First, the Court held that the finding of a violation, even though not accompanied by any monetary sanction, provided a basis for review because the finding very likely "means that future violations by this station would stand to suffer harsher treatment than similar violations by other stations."

Second, the Court ruled that the proper standard to be employed by the Commission in personal attack cases was whether "the licensee's actions and decisions have been unreasonable or in bad faith," the same standard as in Fairness Doctrine cases generally: "it is the licensee, in the first instance, who decides, for example, ex-

18. On the *Pensions* litigation, see Case-notes, 52 Texas L.Rev. 797 (1974): 27 U.Fla.L.Rev. 607 (1975): 21 N.Y.L. Forum 455 (1976). See also *Stumons*,

Problem of "Issue" in the Administration of the Fairness Doctrine, 65 Calif. L.Rev. 546 (1977).

actly what issue is involved and whether that issue is controversial and of public importance.”

Third, the Court observed that the station in this case had made a substantial argument that the challenged remark was not made “during the presentation of views on a controversial issue of public importance,” as required by the Personal Attack Rule. “The 12:45 reference to Rosenthal was indeed fleeting, appearing abruptly in the midst of a discussion of ships to which Rosenthal had no ostensible relationship. The meat boycott . . . had not been mentioned for a full two hours, and even at 10:45 there were only limited remarks tying Rosenthal to the boycott. Finally, in an important sense the ‘coward’ remark did not relate to the boycott at all. Grant had made it clear that he agreed with the congressman on that issue, and his unfortunate comment related primarily to his private pique over Rosenthal’s refusal to appear on his show.”

Fourth, the Court held that the Commission had applied the wrong standard in determining whether a violation existed. “To find a violation, despite the strong arguments the station mustered, would . . . require from the Commission a careful statement of why those arguments do not reasonably support the station’s conclusions Instead we have only the Commission’s own *de novo* judgment on the matter It made its own judgment, instead of judging the objective reasonableness of the licensee’s determination.” The case was remanded to the Commission for further consideration, but the Court observed that the FCC’s concession that this case involved “novel aspects” “comes very close to saying that the station’s action could not have been unreasonable or in bad faith. In this light the Commission would carry a heavy burden to find, on remand, a violation of the Personal Attack Rule.”

The Court made clear that it was not precluding the Commission from interpreting the Personal Attack Rule as it did, but holding only that “the Commission is on shaky ground if it finds the station’s action unreasonable *before* it has announced the new interpretation for prospective application.” Because of its disposition of the case, the Court did not pass on other questions posed, including, among other things, whether the charge of cowardice in this context constituted a personal attack and whether the Personal Attack Rule, as applied to this case, was unconstitutional.¹⁹

19. With the FCC ruling in *Straus*, compare:

WCMP Broadcasting Co., 27 R.R.2d 1000 (May 23, 1973). A fairness complaint was rejected where a station owner had criticized public officials on his own program despite facts that: (a) the station owner had improperly concluded that issues of public controversy were not involved, (b) presentation

of opposing views might have been limited to programs over which the partisan broadcaster presided, and (c) the broadcaster was himself seeking public office, a matter not disclosed in the broadcasts. A personal attack complaint also was rejected although the charges against the public officials involved misuse of government property, “hoodwinking” another gov-

REPRESENTATIVE PATSY MINK, 59 F.C.C.2d 987, 37 R.R.2d 744 (1976). Complainants contended that radio station WHAR, Clarksburg, West Virginia, for at least a four-month period of intense legislative activity, had failed to carry any programming on strip mining legislation, a controversial matter of extreme importance to the locality served by the station. Station WHAR conceded that it had carried no local programming on the issue, but argued that programming of the network with which it was affiliated had included material on strip mining; however, the station could not establish that it had carried any or all of the network programs. The FCC ruled for the complainants.

The Commission concluded that strip mining was of enormous importance to the area served by the station, which had the highest percentage of strip mined land in the country, and that there was ample evidence of the controversial character of the subject. "We believe it would be unreasonable for WHAR to deny that the issue of strip mining is a critical controversial issue of public importance in Clarksburg. It would therefore appear that a total failure to cover an issue of such extreme importance to the particular community would raise serious questions concerning whether the licensee has acted reasonably in fulfilling its obligations under the fairness doctrine." Here WHAR had not "shown what programming, if any, it broadcast which was devoted to a discussion of the local ramifications of strip mining and/or the proposed legislation. It neither originated such programming nor provided syndicated material aimed at informing its listeners in any depth of the nature of the issue . . . —that issue being the effects of strip mining in and around Clarksburg."

As for WHAR's reliance on network programs, the FCC observed that the licensee could not specify which programs had been broadcast and, in this context, WHAR had delegated its programming responsibility and had "not made a sufficiently diligent effort to inform its listeners. Under these circumstances, we are unable to conclude that WHAR has adequately covered the issue of strip mining . . . WHAR has acted unreasonably in failing to cover the issue of strip mining, an issue which clearly may determine the quality of life in Clarksburg for decades to come." The licensee was directed to inform the FCC how it intended to meet its fairness doctrine obligations.

ernment agency, and other allegations of deceptive practices.

National Association of Government Employees, 27 R.R.2d 1309 (June 13, 1973). A violation of the personal attack rule was not found where one side in a labor jurisdictional dispute broadcast a charge that the candidate for the other side had "Mafia connections." The FCC held that the broadcaster reason-

ably could have concluded that no issue of public controversy was involved since the labor dispute involved only a small portion of its audience, and there was no evidence of public interest in, or debate about, the subject. Only if the personal attack occurs in the context of discussion of a public issue would the personal attack doctrine be applicable.

The Commission indicated that licensees generally have discretion to select issues to be carried, and need not cover every important issue which may be considered a controversial issue of public importance. This case, however, was one of the "rare" and "exceptional" instances where remedial action was required because of licensee "failure to adequately cover a 'critical issue' in a particular community."²⁰

Note on Procedures Employed in Processing Fairness Doctrine Complaints. In *Handling of Public Issues Under the Fairness Doctrine* 48 F.C.C.2d 1, 30 R.R.2d 1261 (1974), the Commission described the procedures employed in enforcing the fairness doctrine:

"As a matter of general procedure, we do not monitor broadcasts for possible violations, but act on the basis of complaints received from interested citizens. The complaints are not forwarded to the licensee for his comments unless they present prima facie evidence of a violation. *Allen C. Phelps*, 21 F.C.C. 2d 12 [17 R.R.2d 113] (1969). Thus, broadcasters are not burdened with the task of answering idle or capricious complaints. By way of illustration, the Commission received some 2,400 fairness complaints in fiscal 1973, only 94 of which were forwarded to licensees for their comments," and only seven of which resulted in findings of violations.

"Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the broadcast was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station has afforded, or plans to afford, an opportunity for the presentation of contrasting viewpoints."²¹

20. See *Casenotes* 26 *Cath.U.L.Rev.* 434 (1977); 38 *Ohio St.L.J.* 219 (1977).

In *Handling of Public Issues Under the Fairness Doctrine*, 48 F.C.C.2d 1, 30 R.R.2d 1261 (1974), on reconsideration, 58 F.C.C.2d 691, 36 R.R.2d 1021 (1976), the FCC observed that, while licensees have an affirmative obligation to devote reasonable time to the discussion of public issues, the Commission does not specify any particular amount of time that is appropriate: "we will . . . limit our inquiry to a determination of reasonableness." The FCC further observed, however, that "we have allocated a very large share of the electromagnetic spectrum to broadcasting chiefly because of our belief that this medium can make a great contribution to an informed public opinion." On the issues to be covered,

the FCC commented: "We have, in the past, indicated that some issues are so critical or of such great importance that it would be unreasonable for a licensee to ignore them completely. But such statements on our part are the rare exception, not the rule, and we have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community." The FCC was largely sustained in *National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C.Cir. 1977), *infra* at note 22.

21. See also *Hale v. FCC*, 425 F.2d 556 (D.C.Cir.1970). Without discussion of the factual matters in dispute, the Court sustained the FCC in rejecting a complaint under the fairness

The first and third requirements normally present no difficulty. The second requirement poses some significant substantive problems, of which the Commission took note. It observed, first, that an issue is not of public importance merely because it has received broadcast or newspaper coverage or is being considered by public officials. While these factors are relevant, the principal test is "not the extent of government or media attention, but rather a subjective evaluation of the impact that the issue is likely to have on the community at large;" "the fairness doctrine was not designed for the purpose of providing a forum for the discussion of mere private disputes of no consequence to the general public." Second, on whether the issue is controversial, the criteria were described as more objective: "it is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media." Third, in defining the specific issue: "we would expect a licensee to exercise his good faith judgment as to whether the spokesman had in an obvious and meaningful fashion presented a position on the ultimate controversial issue" in question. "If a licensee's determination is reasonable and arrived at in good faith . . . we will not disturb it." A "fairness response is not required as a result of offhand or unsubstantial statements."

On the fourth requirement—"the basis for the claim that the station has presented only one side of the question"—the Commission explained that this was specified in order to avoid complaints based on imbalance within a single program. "This does not require . . . that the complainant constantly monitor the station." The complainant might base his view on the fact that he regularly listens to the news, public affairs and other non-entertainment programming carried by the station; a number of complainants joining in a complaint of this nature would strengthen the claim. "Complainants should specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been members of the station's audience."

As to the fifth requirement—"whether the station has afforded, or plans to afford, an opportunity for the presentation of contrasting viewpoints"—the effect is to require the complainant to communicate first with the station. If the station furnishes a satisfactory response in the first instance, the Commission's procedures need not be invoked.

On presenting opposing views, the Commission advised that stations cannot simply wait for a demand for time to be made. Efforts to obtain spokesmen for different views must be made by the station, the extent of the effort varying with the magnitude of the ini-

doctrine because of its lack of specificity. The Court sustained as reasonable the FCC's requirement that a

complainant must submit specific information indicating compliance with these five requirements.

tial broadcast. The broadcaster need not present the views of all factions. "In evaluating a 'spectrum' of contrasting viewpoints on an issue, the licensee should make a good faith effort to identify the *major* viewpoints and shades of opinion being debated in the community, and to make a provision for their presentation." Further: "In providing for the coverage of opposing points of view, we believe that the licensee must make a reasonable allowance for presentations by genuine partisans who actually believe in what they are saying." However, the FCC did not insist "that a partisan spokesman must be presented in every instance." The FCC emphasized that equal time is not required, nor any mathematical ratio between opposing views. However, serious imbalance must be avoided. "This imbalance might be a reflection of the total *amount of time* afforded to each side, of the *frequency* with which each side is presented, of the size of the listening *audience* during the various broadcasts, or of a combination of factors." The Commission stated that it would limit its inquiry "to a determination of whether, in light of all the facts and circumstances presented, it is apparent that the licensee has acted in an arbitrary and unreasonable fashion."²²

In responding to fairness doctrine complaints, stations may limit their showing to programs within the time period specified in the complaint, but they may, if they wish, go beyond this period. Broadcasters would be assisted by keeping a record of their public issue programming. While such a record is not required, "it is difficult to see how a broadcaster who is ignorant of such matters could

22. On reconsideration, 58 F.C.C.2d 691, 36 R.R.2d 1021 (1976), the Commission observed: "After the complainant has presented *prima facie* evidence of a fairness doctrine violation, the licensee is called upon to answer an inquiry by the Commission staff which recites the issue specified by the complaint. The licensee is asked whether that issue is a controversial issue of public importance, whether the program in question addressed that issue, and whether other programming has been or will be presented on that issue. The Commission must then decide whether the licensee's responses to these questions are reasonable. . . . Where a licensee poses an alternative issue to that specified by the complaint, such alternative will be considered an implicit denial that the basic thrust of the program addressed the issue specified by the complaint. In such a case the Commission will continue to review the reasonableness of the denial, considering the alternative issue as evidence con-

cerning the licensee's good faith and reasonableness. . . . A hard look at all the facts and competing arguments is required before the determination on licensee reasonableness. . . . [T]he staff then has the responsibility of determining the reasonableness of the licensee's judgment. Rather than substituting its views for those of the licensee, the staff at this stage decides the licensee's reasonableness based on the contentions of all parties and its own evaluation of the evidence."

In *National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C.Cir. 1977), the FCC's Fairness Report was sustained on most of the issues adjudicated. However, the Court of Appeals remanded for further FCC consideration two proposals: (1) that each station list ten controversial issues receiving the most coverage during the broadcast year; and (2) that stations make limited time available (one hour per week) for messages by members of the public.

possibly be making a conscious and positive effort to meet his fairness obligations.”

The Commission rejected a proposal that it consider fairness doctrine complaints only at renewal time, rather than on an individual basis as they arise. The Commission also rejected the concept that opposing views may be adequately presented by other media or stations in the same market.

PUBLIC MEDIA CENTER v. FCC

District of Columbia Circuit Court of Appeals, 1978.
587 F.2d 1322.

TAMM, Circuit Judge:

[On complaint against a number of California radio stations, the FCC ruled that eight stations had violated the fairness doctrine in broadcasting advertisements of Pacific Gas & Electric (PG&E) promoting the desirability of nuclear generation of electric power, while four stations had complied with the fairness doctrine in presentations concerning the same issue. 59 F.C.C.2d 494 (1976). On judicial review, concerned with the four stations found not to have violated the fairness doctrine, the Court of Appeals reversed and remanded because the FCC had not adequately distinguished these four stations from the eight stations found in violation.]

. . . The [petitioners] manifested a twofold concern—whether any anti-nuclear programming would be broadcast and the form in which such programming would be presented. Specifically, the petitioners presented a ten-factor analysis²³ of each station to support their contention that licensees had not provided a reasonable opportunity to present anti-nuclear viewpoints. For example, the petitioners argued that station KPAY had not fulfilled its fairness obligations even though it had broadcast sixty minutes of anti-nuclear programming as compared with twenty-seven minutes of pro-nuclear programming. Characterizing total time as “the most inaccurate way to measure . . . reasonableness,” the petitioners found that: none of the anti-nuclear programming appeared in prime, or drive, time,²⁴ whereas nine minutes were devoted to pro-nuclear program-

23. The ten factors included: (1) the appearance of a viewpoint during drive time; (2) the frequency with which a viewpoint appeared; (3) the total amount of time a viewpoint appeared; (4) the appearance of a viewpoint in periods of high listenership; (5) the period of time over which, and regularity with which, a viewpoint appeared; (6) the presentation of a viewpoint in one-sided programming; (7) the presentation of a viewpoint in short announcement format inter-

spered within other programming; (8) the presentation of a viewpoint in identical and repeated messages; (9) the presentation of a viewpoint to varied audiences; and (10) the presentation of a viewpoint in professionally prepared spots. J.A. at 92-105. [Some footnotes have been omitted; others have been renumbered.]

24. Although television prime time occurs during evening viewing hours, radio prime time is considered to be

ming; pro-nuclear programming appeared on the air twenty-seven times, while anti-nuclear programming was broadcast only twice; pro-nuclear programming was presented during periods of higher listenership than anti-nuclear programming; pro-nuclear programming was broadcast on twenty-six days as compared with anti-nuclear programming that appeared on one day; pro-nuclear programming utilized "the effective short format of a spot ad interspersed within other programming," while anti-nuclear programming appeared in longer length public affairs programming; pro-nuclear programming appeared in similar PG&E advertisements repeated twenty-seven times, but anti-nuclear views were repeated only twice; pro-nuclear programming reached a more varied audience; and pro-nuclear programming appeared in professionally produced advertisements, whereas anti-nuclear programming consisted of a public affairs discussion by two professors. These factual differences, the petitioners alleged, compelled the conclusion that KPAY's presentation of anti-nuclear viewpoints was unreasonable. Similar factual analyses of each of the remaining twelve stations yielded the same conclusion.

The Commission found that the PG&E advertisements addressed a controversial issue of public importance. The Commission then sought to determine whether each of the licensees had met its "fairness doctrine obligation to afford a reasonable opportunity for presentation of viewpoints contrasting those contained in the PG&E announcements." Prior to reaching a decision on the merits, the Commission noted "a number of factors which are relevant considerations in determining what constitutes a 'reasonable opportunity' for the presentation of contrasting viewpoints. . . ." These factors included the amount of drive time given each side; the total amount of time given each side; the frequency with which each side was presented; and the size of the listening audience. The Commission also stressed, however, that the ultimate standard against which station conduct would be judged was whether the public had been left uninformed as to different viewpoints on the issue.

Examination of the Commission's Initial Opinion & Order suggests that the twelve stations were grouped into three categories. First, the Commission found that KATY, KJOY, KPAY, and KVON met the requirements of the fairness doctrine based on the amount of time pro-nuclear views were broadcast as compared with the amount of time devoted to anti-nuclear views.²⁵ This comparison yields a

during drive time—those hours in the early morning and late afternoon during which commuter traffic is at its peak.

25. The actual total time figures can be found in tabular form in Brief for Respondent at Appendix A. The actual

figures, in minutes, for the twelve stations are: KPAY (27:60), KJOY (229:360), KATY (261:298), KVON (94:66), KFOG (192:60), KFRE (166:50), KSRO (176:46), KROY (72:6), KFYV (64.5:1.5), KRED (96:0), KMBY (104:0), KSMA (160:0).

total time ratio of pro-nuclear to anti-nuclear programming that ranged from .45 (KPAY) to 1.4 (KVON). Second, KFOG, KFRE, and KSRO were found to have failed to meet their fairness obligations. None of these stations had a total time ratio as low as the highest of the stations in the first group. *Compare* KFOG (3.2) and KFRE (3.3) and KSRO (3.8) *with* KVON (1.4). However, before reaching its decision, the Commission also discussed the frequency of programming of these three stations, and, with regard to KFRE and KSRO, the disparity of audience size. Third, KFYV, KMBY, KRED, KROY, and KSMA were all adjudged to be in violation of the fairness doctrine. This determination was based on a comparison of the total time devoted to pro-nuclear and anti-nuclear broadcasts and the Commission's belief that the station had not made a diligent attempt to find anti-nuclear spokesmen. Three of these five stations failed to broadcast any anti-nuclear views. The total time ratio of each of the remaining two stations was not as low as the highest of the stations in either the first or second group. *Compare* KROY (12) and KFYV (43) *with* KSRO (3.8) and KVON (1.4).

Were it not for the Commission's own representations, we might conclude that the total time ratio was the sole criterion distinguishing those stations that met their fairness obligations from those stations that did not. However, the Commission explicitly stated:

There is no merit to [the] contention that we found reasonable only those broadcasters which gave more time to the "anti-nuclear" proponents. (See paragraph 57 in the May 18 opinion regarding KVON.) This indicates a misreading of the case and of our normal process of review of fairness doctrine complaints. As is clearly stated in the May 18 opinion (paragraph 43), on each instance we reviewed the reasonableness of the licensee's judgments on the basis of the amount of time, frequency and placement of presentation of the opposing views in the licensee's overall programming. In determining the reasonableness of the licensee's judgments in this matter, we looked at the totality of the circumstances, taking every relevant factor into consideration. As we have stated before, however, there is no precise formula for determining reasonableness.

We interpret this explanation to mean that the Commission's decision was not based exclusively on the total time ratio. Thus, we search the Commission's opinion for another explanation of why four stations differed from eight others.

We begin by noting each of the other factors considered by the Commission: frequency of program presentation, placement of programming in drive time, and the diligence with which stations sought out anti-nuclear spokesmen. To compute frequency, we divide the total number of pro-nuclear broadcasts by the total number of anti-

nuclear broadcasts.²⁶ The four stations found to have fulfilled the fairness doctrine had the following ratios: KVON (13.4), KPAY (13.5), KJOY (25), KATY (28.8). The stations found to have violated the fairness doctrine included: KSRO (8.6), KFYV (21.7), KFOG (27.4), KROY (72), KFRE (83), KRED (96/0), KMBY (104/0), KSMA (160/0). KSRO's ratio is obviously lower than any of the stations absolved of the fairness charges, KFYV's ratio is lower than either KATY or KJOY, and KFOG's ratio is lower than KATY's.

We analyze the placement of presentations by comparing the ratio of minutes of pro-nuclear drive time programming with the total minutes of anti-nuclear drive time programming. The ratios of the four stations in compliance were: KATY (72/0), KJOY (23/0), KPAY (9/0), KVON (14.7). The stations found in violation of the fairness doctrine were: KFOG (83/0), KFYV (34/0), KFRE (44/0), KMBY (28/0), KRED (56/0), KROY (29/0), KSMA (74/0), KSRO (17.2).²⁷ The stations are thus indistinguishable on this ground.

The last factor that the Commission considered was the diligence with which four stations sought anti-nuclear programming. Our evaluation of the record indicates that this factor might be a variant of the total time test. The stations noted for lack of diligence included KMBY, KRED, and KSMA, the only three that had not aired any anti-nuclear programming, and KFYV, the station with the highest total time ratio. Even if this factor provides an independent analytical criterion, it does not distinguish the remaining stations found in violation of the fairness doctrine from those found in compliance.

We cannot affirm a Commission order that does not clearly and explicitly articulate the standards which govern the behavior both of licensees that have violated the fairness doctrine and those that have not.

Although our judicial duties demand great deference to agency expertise, we cannot defer, indeed we cannot even engage in meaningful review, unless we are told *which* factual distinctions separate arguably similarly situated licensees, and *why* those distinctions are important. As this court has repeatedly emphasized, "the failure

26. We relied generally upon the facts presented in Brief for Respondent at Appendix A. Where the appendix indicates that non-PG&E pro-nuclear programming was presented, we looked to the licensees' representations, as set out in the Commission's Initial Opinion & Order, 59 F.C.C.2d at 499-509; J.A. at 263-76, in order to compute the total number of pro-nuclear programs presented. Our task was not simplified by the Commission's failure

to make specific findings as to the frequency of programming. The actual figures for the twelve stations are: KVON (94:7), KPAY (27:2), KJOY (50:2), KATY (173:6), KSRO (147:17), KFYV (65:3), KFOG (192:7), KROY (72:1), KFRE (166:2), KRED (96:0), KMBY (104:0), KSMA (160:0).

27. Brief for Respondent at Appendix A. The actual figures for KVON were 59:4 and for KSRO, 69:4.

of an administrative agency to articulate the reasons for a particular decision makes meaningful review of that decision impossible." . . .

Of course, the total time ratio factually separates the twelve stations into two groups consistent with the results of the Commission's order. Nevertheless, we cannot ignore the Commission's statement that its decision was based on all of the relevant factors. We recognize the central tenet of administrative law that a reviewing court may not affirm an administrative agency's actions on a reasoned basis different from the rationale actually put forth by the agency.

. . . Our task is to review the reasoned decision-making of administrative agencies; it is not to guess what an administrative agency might have done under different circumstances. Accordingly, we remand this case to the Commission for clarification of the reasons underlying its determination that KPAY, KJOY, KATY, and KVON did not violate the fairness doctrine.

AMERICAN SECURITY COUNCIL EDUCATIONAL FOUNDATION v. FCC, — F.2d —, — R.R.2d — (D.C.Cir. 1979). The FCC rejected a fairness doctrine complaint of ASCEF, which had contended that CBS had failed to broadcast balanced presentations on "national security" issues. The basic study had examined all CBS Evening News telecasts in 1972 and had considered all references (except the simple reporting of events) concerned with U. S. military and foreign affairs; Soviet military and foreign policy; Chinese military and foreign policy; and Vietnam affairs. Each item had been broken down into sentences and then divided into three categories: (A) those expressing the view that more should be done about national security, (B) those expressing the view that present national security efforts were appropriate; and (C) those expressing the view that less should be done about national security. The coded sentences had divided as follows: (A) 3.54%; (B) 34.63%; and (C) 61.83%. ASCEF had sent the results of its study to CBS, and CBS had rejected ASCEF's claim that its coverage of national security issues had not been properly balanced. After making additional studies reaching similar conclusions, for programming in 1975 and 1976, ASCEF had filed a fairness doctrine complaint with the FCC in 1976. The FCC had rejected the complaint, without referral to CBS, for failure to state a *prima facie* case. The Commission had concluded, *inter alia*, that ASCEF had failed to define a controversial issue of public importance with sufficient particularity. The Court of Appeals affirmed this basis for rejecting ASCEF's complaint.

The Court noted that the broadcasts ASCEF had studied "arose independently in time and were largely discussed and acted upon on an independent basis." But according to ASCEF the following views were in conflict: (1) A news report quoting Defense Secretary

Laird's statement that he "could not support the [SALT] agreements if the Congress fails to [move] forward on the Trident System, [and] on the B-1 bomber" (Viewpoint B). (2) A news report stating that "[f]or those who have evaded service [the Democratic platform called for] 'amnesty on an appropriate basis' after the [Vietnam] war when the prisoners are returned" (Viewpoint C). (3) A news report concerning the President's trip to China in which it was stated that "the weapons [the Chinese] are so proudly displaying have taken uncounted numbers of American lives in Korea and Southeast Asia" (Viewpoint A).

The Court concluded that an issue is not sufficiently defined for fairness doctrine purposes "if the separate issues comprising it are so indirectly related that a view on one does not, in a way that would be apparent to an average viewer or listener, support or contradict a view on any other. When an 'umbrella' issue is that ill-defined, there is no reasonable basis for determining whether the public is receiving balanced conflicting views." The Court further concluded that acceptance of the ASCEF approach would impose undue burdens on broadcasters. "An editor preparing an evening newscast would be required to decide whether any of the day's news events is tied, even tangentially, to events covered in the past, and whether a report on today's lead story, in some remote way, balances yesterday's, last week's or last year's." There were concurring and dissenting opinions.²⁸

Note on the Application of the Fairness Doctrine to Commercial Announcements. The major application of the fairness doctrine to commercial advertising occurred in *Banzhaf v. FCC*, 132 U.S.App. D.C. 14, 405 F.2d 1082 (D.C.Cir.1968). The FCC there ruled, with judicial approval, that stations carrying cigarette commercials were required, under the fairness doctrine, to devote a "significant amount of time" to warning the public of the hazards of cigarette smoking. The FCC concluded that cigarette commercials "present the point of view that smoking is 'socially acceptable and desirable, manly, and a necessary part of a rich full life'," while government studies and Congressional actions asserted that normal use of cigarettes can be a hazard to the health of millions of persons. "We believe that a station which presents [cigarette] advertisements has the duty of

28. FCC decisions under the fairness doctrine were sustained in *Georgia Power Project v. FCC*, 559 F.2d 237 (5th Cir. 1977) (power company advertisements concerned with general need for electricity found not to raise a controversial issue of public importance); *Council for Employment and Economic*

Energy Use v. FCC, 575 F.2d 311 (1st Cir. 1978) (station permitted to allot free time to respond to paid advertisements about public referendum, in ratio of one free spot for two paid, without regard to respondent's ability to pay).

informing its audience of this controversial issue of public importance—that, however enjoyable, such smoking may be a hazard to the smoker's health." The decisions of both the Commission and the Court emphasized the public interest in health warnings in this context and the novel aspects of the situation: a product which in normal use created serious health hazards documented by government studies.

By Public Law 91-222, Congress provided that, after January 1, 1971, "it shall be unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 84 Stat. 89, 15 U.S.C.A. § 1335. The statutory prohibition was upheld as constitutional in *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.D.C.1971) (one judge dissenting), affirmed per curiam, 405 U.S. 1000 (1972).²⁹

In *Cigarette Advertising*, 27 F.C.C.2d 453, 20 R.R.2d 1669 (1970), the FCC considered whether, under the fairness doctrine, tobacco interests should be afforded an opportunity to respond to anti-smoking announcements after cigarette commercials had been banished from the airwaves. The Commission concluded that, while broadcasters might, if they wished, present the view that smoking may not be hazardous to health, the Commission would not upset as unreasonable a broadcaster judgment that the presentation of such a view was not required, because "the general issue of smoking being a health hazard is no longer controversial". The FCC relied on the findings and actions of government agencies, including Congressional adoption of the requirement that cigarettes be labeled: "Warning: the Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health." The Commission did state that no blanket ruling could be made to cover all cases, and that some anti-smoking announcements might contain controversial matter which would invoke the fairness doctrine. Finally, the Commission rejected the view that, absent cigarette commercials, stations must continue to broadcast a significant number of anti-smoking announcements; the hazards of smoking were considered to be one of many subjects of public concern which the licensee might choose to cover with varying degrees of emphasis. The Commission's decision was sustained in *Larus & Brother Co. v. FCC*, 447 F.2d 876 (4th Cir. 1971).³⁰

29. For further discussion of this case, see p. 321 *infra*.

30. See also *Retail Store Employees Union v. FCC*, 436 F.2d 248 (D.C.Cir. 1970). The Retail Store Employees Union represented employees of Hill's Department Store of Ashtabula, Ohio, who were on strike. In connection with the strike, the union was urging customers of Hill's not to patronize the

store, and, as part of its campaign, had purchased spot advertisements on radio stations in the area. After several months, the stations in the area—including WREO of Ashtabula—declined to carry the union's paid announcements, although they continued to carry the conventional commercial advertisements of Hill's. WREO offered both parties an opportunity to participate in a round table discussion

In a proceeding concerned with Chevron commercials, Alan F. Neckritz, 29 F.C.C.2d 807 (1971), reaffirmed, 37 F.C.C.2d 528 (1972), sustained, 502 F.2d 411 (D.C.Cir. 1974), the FCC held that the fairness doctrine was inapplicable to claims that a particular gasoline would reduce air pollution from automobile emissions. The question of whether the claim was false and misleading was pending before the Federal Trade Commission, and the FCC considered the latter proceeding a more appropriate one to judge the efficacy of a commercial product. In connection with an Esso advertisement, however, the FCC held that the fairness doctrine applied. Wilderness Society, 30 F.C.C.2d 643 (1971). The advertisement had emphasized the need for developing Alaskan oil reserves quickly and affirmed the ability of the oil companies to develop and transport Alaskan oil without environmental damage. The FCC ruled that such advertising took a position on a controversial question of public importance and directed the licensee to submit all of the material it had broadcast, or intended to broadcast, to satisfy its obligations under the fairness doctrine. The FCC subsequently determined that the licensee was adequately covering both sides of the Alaskan pipeline controversy. 31 F.C.C.2d 729, reconsideration denied, 32 F.C.C.2d 714 (1971).

In *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C.Cir. 1971), the claim was made that the fairness doctrine was applicable to advertisements carried by WNBC-TV in New York City promoting large-engine cars and high-test gasolines. Petitioners asserted that these products were especially heavy contributors to air pollution, which had become peculiarly oppressive and dangerous in New York

of issues raised by the strike and boycott, but the offer was not accepted. Over the protest of the union, the FCC renewed the license of WREO without a hearing. 14 R.R.2d 780 (1968). The Court of Appeals reversed.

The Court held that the FCC had not investigated sufficiently the allegations of the union that WREO (and other stations in the area) had declined to carry the union's advertisements as a result of economic pressure from Hill's. The Court also ruled that the FCC's summary rejection of the union's complaint under the fairness doctrine was improper:

"In the present case, it seems clear to us that the strike and the Union boycott were controversial issues of substantial public importance within Ashtabula, the locality primarily served by WREO. The ultimate issue with regard to the boycott was simple: whether or not the public should patronize Hill's Ashtabula. From April through December, Hill's broadcast over WREO more than a thousand spot announcements and more than a

hundred sponsored programs explaining why, in its opinion, the public should patronize its store. During that same period, the Union was denied any opportunity beyond a single roundtable broadcast to explain why, in its opinion, the public should not patronize the store."

The Court indicated that it was not making a definitive ruling on the fairness question, but was seeking a more comprehensive treatment of the question by the FCC. The Court also referred to Congressional policy, expressed in labor legislation, favoring equalization of bargaining power between workers and their employers.

On remand, the FCC determined that WREO had not refused to carry the union's advertisements as a result of economic pressure from Hill's and renewed the WREO license. *Radio Enterprises of Ohio, Inc.*, 26 R.R.2d 519 (1973). The fairness question was deferred for consideration following a general FCC inquiry into the fairness doctrine.

City; petitioners cited various government studies indicating that automobile emissions posed significant dangers to human health and survival and referred to recently enacted Congressional legislation concerned with protecting the quality of the environment (the National Environmental Protection Act of 1969). The Environmental Protection Administration of New York City supported the claim of petitioners, describing air pollution conditions in the City as presenting an increasingly serious hazard to health. The FCC rejected the claim and the Court of Appeals reversed.

The Court refused to accept the FCC's view that cigarettes posed a unique problem and that the ruling in *Banzhaf* should not be extended to other commercials, citing the FCC ruling on the Esso Alaskan pipeline commercial. The Court was not impressed by the FCC's argument that no government agency has as yet urged the complete abandonment of the automobile. "Voices have already been lifted against the fetish of unnecessary horsepower; and some gasoline refiners have begun to make a virtue of necessity by extolling their non-leaded, less dynamic, brands of gasoline. Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance. When there is undisputed evidence, as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel with cigarette advertising is exact and the relevance of *Banzhaf* inescapable."

The Court indicated, however, that "fairness doctrine obligations can be met by public service programs which do give reasonable vent to points of view contrary to those reflected in the offending commercials." The FCC having made no finding "on the question of possible satisfaction of that doctrine by the licensee through the medium of other programs," the Court remanded the case to the Commission for resolution of the issue of whether the licensee had adequately met its obligations under the fairness doctrine, "or whether it must take further positive actions, differing in either kind or degree from what it has been doing, in order to achieve the balance contemplated by the fairness doctrine."

In *Peter C. Herbst*, 27 R.R.2d 861 (Mar. 16, 1973), the FCC declined to apply the fairness doctrine to require a response to advertisements for snowmobiles, despite the pendency of legislative hearings concerning their regulation. The FCC viewed the commercial as one claiming "product efficacy or social utility," as contrasted with the Esso commercials related to the Alaska pipeline. The *Friends of the Earth* litigation was distinguished on the ground that an issue of public health was there involved. Viewing the case as raising the question of applying the fairness doctrine to "ordinary product commercials," the FCC observed that this would extend the

doctrine "to virtually all products—e. g., beer, airplanes, cigars, detergents; would be chaotic and administratively a horror and indeed might even undermine the economic base of the broadcasting industry."

In *Handling of Public Issues Under the Fairness Doctrine*, 48 F.C.C.2d 1, 30 R.R.2d 1261 (1974), on reconsideration, 58 F.C.C.2d 691, 36 R.R.2d 1021 (1976), the FCC restated its position on the application of the fairness doctrine to commercial announcements. The "Esso" commercial case, advertizing to the Alaska pipeline (NBC, 30 F.C.C.2d 643 (1971)), was reaffirmed as an instance in which the fairness doctrine would be applicable: an advertisement taking a position on a controversial issue, either explicitly or by comment on critical subsidiary arguments. Licensees must "make a reasonable, common sense judgment as to whether the 'advertisement' presents a meaningful statement which obviously addresses, and advocates a point of view, on a controversial issue of public importance." The "relationship of the ad to the debate being carried on in the community is critical For example, if the arguments and views expressed in the ad closely parallel the major arguments advanced by partisans on one side or the other of a public debate, it might be reasonable to conclude that one side of the issue involved has been presented thereby raising fairness doctrine obligations."

As to regular product commercials, the FCC concluded that they "make no meaningful contribution toward informing the public on any side of any public issue. . . . In our view, an application of the fairness doctrine to normal product commercials would, at best, provide the public with only one side of a public controversy." The FCC concluded that its original cigarette ruling was improperly decided as a fairness case and that it should not be permitted to stand as a precedent. It further concluded that *Friends of the Earth* (high powered cars and high test gasoline) should be decided differently, and that the *Chevron* case should be reaffirmed.

Commissioner Hooks dissented in part, arguing that broadcasters should make 2% of their customary commercial time available as an open access period in which views in contrast to those embraced in commercial messages could be aired. This would afford about 4 minutes per day for a television station with 190 commercial minutes in a 19 hour day.³¹

In *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975), the FCC's decision in *Peter B. Herbst* (the snowmobile case) was sustained on judicial review. The Court of Appeals accepted the FCC's repudiation of its initial ruling respecting cigarette

31. For further discussion of this proceeding, see note 22 supra.

commercials and the portion on commercial advertising set forth the *Handling of Public Issues* report.³²

NETWORK COVERAGE OF THE DEMOCRATIC NATIONAL CONVENTION

Federal Communications Commission, 1969.
16 F.C.C.2d 650, 15 R.R.2d 792.

AMERICAN BROADCASTING CO.
COLUMBIA BROADCASTING SYSTEM, INC.
NATIONAL BROADCASTING Co., INC.

GENTLEMEN: On September 13, 1968 we wrote each of you requesting comments on the hundreds of complaints we had received concerning your coverage of events in Chicago during the Democratic National Convention in August 1968. You have now sent us your comments and we have evaluated them.

This matter raises for all of us—the broadcasting industry, the Federal Communications Commission, and the American people—some of the most sensitive and sophisticated issues involving the responsibilities which we all share. There is growing awareness of the tremendous influence of the television networks. Their coverage of the national conventions serves to set the stage for the presidential campaigns and election. Such influence must carry with it the highest responsibilities for intellectual integrity and independence.

The complaints before us have alleged that the television coverage did not fairly present the issues on a number of grounds. We

32. See Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 *Harv.L. Rev.* 768 (1972); Comment, *And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising*, 60 *Calif.L.Rev.* 1416 (1972); Putz, *Fairness and Commercial Advertising: A Review and A Proposal*, 6 *U.San.Fran.L.Rev.* 215 (1972); Loevinger, *Politics of Advertising*, 15 *W. & M.L.Rev.* 1 (1973); Collins, *Counter Advertising in the Broadcast Media*, 15 *W. & M.L.Rev.* 799 (1974); Comment, *A Proposed Statutory Right to Respond to Environmental Advertisements*, 69 *Nw.U.L.Rev.* 234 (1974); Simmons, *Commercial Advertising and the Fairness Doctrine: The New FCC Policy in Perspective*, 75 *Colum.L.Rev.* 1083 (1975); Note, *The Fairness Doctrine and Access to Reply*

to Product Commercials, 51 *Ind.L.J.* 756 (1976); Note, *Ring Around the Collar—Chain Around Her Neck: A Proposal to Monitor Sex Role Stereotyping in Television Advertising*, 28 *Hast.L.J.* 149 (1976); Note, *Fairness and Unfairness in Television Product Advertising*, 76 *Mich.L.Rev.* 498 (1978).

The FCC has ruled that fairness doctrine complaints related to entertainment programs are subject to the same standard as applies in the case of product commercials. "In this case, petitioner [seeking denial of renewal] has failed to show that either WJBK-TV's commercial announcements or its entertainment programming has been 'devoted in an obvious and meaningful way' to the discussion of women's issues or the role of women in society." *Storer Broadcasting Co.*, 58 *F.C.C.2d* 468, 474, 36 *R.R.2d* 633, 641 (1976).

will not attempt to list all of them. For example, it was suggested that there was failure to give exposure to the views or statements of city government officials of Chicago with respect to alleged "brutality" by the police; and bias in favor of views or opinions in opposition to the policies of the national Government with respect to the war in Vietnam. There were complaints that the networks showed pictures of the demonstrations in such a way as to be unfair to the Chicago police and failed to report the violent intentions and actions of the demonstrators. Complaints were also received that the networks "attempted to influence the course of the proceedings, spreading rumors—especially concerning the possibility of a Kennedy draft—stirring controversy where none existed, and giving priority to the views of dissident or dissatisfied delegates" (NBC response, p. 8). Complaint was also made that the networks devoted too much time to floor coverage at the expense of coverage at the podium.

The foregoing is not meant to be an exhaustive list of the complaints, but is simply illustrative of the range of complaints received. We shall set out first the responses of the networks, then the general principles applicable, and finally the application of those principles to this matter.

1. The networks' responses.

(a) ABC points out that of the total of 19 hours and 37 minutes of its overall coverage of the convention and surrounding events, approximately 13 minutes and 49 seconds, or 1.1 percent, were devoted to film or tape coverage of the disorders involving the police and demonstrators. As to the complaint that its reports of the disturbances emphasized police brutality and ignored the provocations on the part of some of the demonstrators, ABC states that while on a few occasions it broadcast statements charging the police with resorting to excessive force, it also presented reports and discussions emphasizing the provocative acts on the part of demonstrators and supporting the actions of the police. As examples, it points to an extended commentary by William F. Buckley, Jr., which stressed the provocative acts of demonstrators, including the raising of the Vietcong flag and the use of obscenities, and to its reports that demonstrators blocked traffic, repeatedly refused to obey the orders of the police, attacked an unmarked police car, and threw sticks, rocks, and beer cans at the police.

In this connection, ABC states that its operations in Chicago were limited in that it had only one exterior remote video camera, which was set up in a fixed location in front of the Conrad Hilton Hotel; that while it did have one flash mobile unit operating with videotape capability, this unit, as was the case with its film cameras, could only respond to events already taking place; and that the limitations imposed by the city of Chicago as to where it could set up cameras, combined with inability to transmit a live signal from any

remote location as a result of the communication workers' strike, necessarily precluded its coverage of events leading up to any disturbance. As to the complaints that ABC failed to give exposure to the views of city government officials in Chicago, ABC points to the appearance of Mayor Daley and a Chicago police official in its evening news programs on August 29 and 30 and to presentations within its overall convention coverage.

On the issue of Vietnam, ABC asserts that its coverage included the views of those who support the administration position on Vietnam as well as of those who oppose it. As examples, it cites (i) a 90-minute special program on Wednesday evening, August 28, in which the discussion on the floor of the convention of the platform plank dealing with the war in Vietnam was extensively covered, with the views of proponents as well as opponents of the plank finally adopted being presented; (ii) its special coverage of the California caucus on Tuesday, August 27, at which Vice President Humphrey, Senator McCarthy, and Senator McGovern all spoke.

(b) CBS states that as to the complaint that it failed to report acts of provocation by the Chicago demonstrators, its correspondents did report many instances of provocation, such as the carrying by the demonstrators of Vietcong flags, the hauling down by them of an American flag, the hurling of bottles and stones and plastic bags of liquid, as well as instances of direct incitement of mob violence on the part of demonstration leaders.³³

With respect to the allegation that there was "failure to give exposure to the views or statements of city government officials of Chicago . . .," CBS points out that in the film subsequently prepared on behalf of the city of Chicago, the key presentation of the city's official viewpoint was made, with its permission, by means of excerpting portions of a 23-minute interview by Walter Cronkite with Mayor Daley which had been broadcast by CBS news in prime time on the last night of the convention. It asserts that statements by demonstrators or their supporters were balanced with others by responsible officials including the mayor, the U. S. Attorney, and the chief of police.

On the Vietnam issue, CBS states that it gave extensive coverage to the debate at the convention on that issue. It points out that

33. CBS states for example that on Aug. 26 in "The CBS Evenings News" it carried film of demonstrators waving the Vietcong flag, and also showed an American flag being lowered to half-mast; that twice on the evening of Aug. 29 it showed other films of a militant shouting into a bullhorn, "Go! Go! Go!" while its correspondent repeated no fewer than seven times that the speaker was trying to

provoke the demonstrators to action. CBS also noted that of the 38 hours and 3 minutes that CBS news devoted to television coverage of the Democratic convention, only 32 minutes and 20 seconds, or 1.4 percent of the total, were devoted to film or tape coverage of the demonstrations. [Some footnotes have been omitted; others have been renumbered.]

it carried the floor debate on Wednesday, August 28 on the proposed Vietnam plank live with the result that supporters and opponents of the Administration were thus on the air for more than an hour for each side. It also points to the speeches or statements of Governor Connolly, Senator Inouye, and Vice President Humphrey. CBS further states that it provided daily half hour reports on proceedings before various convention committees during the period from August 19-24, during which testimony was heard from those supporting and opposing the Administration's position on Vietnam; and that on the evening of August 20, it carried live the appearance of Secretary of State Rusk before the platform committee. CBS therefore urges that it has "on an overall basis not only during the Democratic convention but also before and afterwards provided a fair and balanced presentation over the Vietnam war."

CBS concludes by protesting the Commission's request for comments, asserting that this practice is "in direct contravention to strong and frequently eloquent disavowals by the Commission of supervisory concern over the content of particular programs"; that it is "particularly concerned when the complaints to which comment is especially invited are complaints that a licensee has given insufficient attention to views or statements of Government officials or has displayed bias against the policies of the national Government"; and that it urges that "section 326 of the Communications Act, which prohibits to the Commission the power of censorship over radio communications, should be regarded by the Commission as giving it an affirmative obligation to support the independence of broadcast news."

(c) NBC also points to difficulties in covering the events in Chicago. With respect to the allegations that it failed to show the demonstrators' provocative conduct, NBC cites, in a detailed appendix, its daily coverage showing that it "reported the activities of the demonstrators, including the throwing of missiles, the tearing down of an American flag and the taunting of police." . . . As to claims of bias against Mayor Daley, NBC points to several appearances by Mayor Daley on NBC, and other offers of broadcast time to that official (an interview on the convention floor and effort to interview him on another night; a September 8 broadcast of a press conference; and an invitation to appear on a special "Meet the Press" broadcast on September 13).

NBC states that on the issue of Vietnam, it "presented substantially all of the speeches for both the majority and minority positions" and in interviews with principals with specific examples again given, provided for full expression of support for both these positions. Thus, NBC states (p. 7, NBC response) that it ". . . interviewed persons known to be in favor of the Administration position who expressed the majority's view, viz.: David Ginsberg, liaison

man for Vice President Humphrey; Senator Walter Mondale (Minnesota), cochairman of the Humphrey campaign; John Gronouski, of the Humphrey campaign organization; and Senator Birch Bayh."

NBC also denies the claims that it "presented a distorted account of the convention proceedings, stimulated rumors, created controversy and gave undue coverage of minority views." It asserts that interviews on the possibility of a Kennedy draft reflected activity and interest within the Democratic Party, and that the number of interviewees who expressed skepticism about this possibility outnumbered those who thought the draft movement was still alive. It states that reports of dissatisfaction among some of the delegates with the conduct of the convention and the actions of police in quelling demonstrations were no more than a reflection of the fact that there was such dissatisfaction; and that where disturbances within the convention reached the proportions of an incident, as in the case of one delegate's arrest, NBC sought out and presented the views of all parties involved, including the views of the arresting officers. NBC denies that it cut away unnecessarily from significant activity at the podium, stating that its coverage included substantially all of the statements on the majority and minority Vietnam planks, as well as all nominating speeches. NBC points out that the process of selecting a presidential nominee involves more than the activity at the rostrum, and therefore it presented supplementary coverage from the floor of the convention hall and outside the auditorium, in an effort to inform its audience more fully. It attached a list of interviews with delegates, party leaders and spokesmen for candidates, and asserts its belief that the news value of interviews with these persons cannot be seriously doubted.

Finally, NBC urges that the mere transmission to a broadcaster of a formal inquiry by the Commission with respect to such matters as the accuracy or alleged bias of broadcast coverage of controversial issues and public events is deleterious to the journalistic function of the broadcaster; that "few spectres can be more frightening to a person concerned with the vitality of a free press than the vision of a television cameraman turning his camera to one aspect of a public event rather than another because of concern that a governmental agency might want him to do so, or fear of Government sanction if he did not."

2. Background principles

Ordinarily we would dispose of the present matter with a brief ruling based upon established principles long operative in this area. However, in view of the above responses and other pertinent considerations, we shall review briefly some pertinent aspects of the Commission's concern in the area of coverage of controversial is-

sues of public importance by broadcast licensees. See *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 F.R. 10415 (1964).

The general rule is that we do not sit to review the broadcaster's news judgment, the quality of his news and public affairs reporting, or his taste. The exceptions involve the "fairness," "equal opportunity," and "personal attack" doctrines—designed not to affect what is presented, or to stifle the presentation of views, but rather to encourage a full, free, and fair discussion. We have also investigated allegations such as willful distortion or the self-serving use of the airwaves to promote the licensee's private interests.

Since they are not pertinent, we do not cover such matters as the recent ruling in *National Broadcasting Co.*, 14 F.C.C.2d 713 (1968) (concerning commentary by a network newsman on issues involving an economic conflict of interest without disclosure of such conflict).³⁴

34. [Ed.] On March 19, 1964, Chet Huntley, NBC newscaster and commentator, broadcast an NBC radio commentary opposing the importation of Australian beef. At the time, Mr. Huntley was feeding 500 head of cattle on a New Jersey farm. On February 22, 1968, Mr. Huntley commented favorably on the position of cattle growers with respect to food marketing methods and an antitrust suit brought by cattlemen against grocery chains. On November 22, 1967, May 27, 1968 and June 10, 1968, Mr. Huntley broadcast comments critical of the Wholesome Meat Act of 1967, indicating among other things that the legislation adversely affected cattle growers. At the time of these broadcasts, Mr. Huntley owned a cattle ranch in Montana and was an officer and stockholder of a firm engaged in cattle feeding operations in Iowa.

The FCC ruled that NBC knew, or should have known, of Mr. Huntley's cattle interests at the times of these broadcasts and that "NBC did not exercise reasonable diligence in light of information publicly available and information brought to its attention." The FCC found NBC's explanation of its handling of these episodes to be unsatisfactory, and ordered NBC to submit a statement directed to these matters, discussing "any revision in procedures which is contemplated." More generally, the FCC observed:

"The licensee is responsible for the integrity of its news operations. To

insure that integrity, the licensee must exercise reasonable diligence to determine whether or when one of its news employees is properly discharging his news functions in connection with a matter as to which he has a significant private interest which might reasonably be thought to have an effect on the discharge of that function. There are, of course, a variety of factual situations which might confront the licensee and a corresponding variety of actions which it might take. It might determine that the conflict is of a minimal or insignificant nature, or that it is so great as to call for the substitution of another, disinterested news employee to deal with this particular matter, or that while there could be said to be a significant conflict, broadcast journalism would be best served by permitting the employee to continue his duties while divulging the nature of the conflict to the audience, so that they are made aware of the fact that in this instance the commentator does have a significant private interest in the matter he is discussing. In short, here as in so many areas, the licensee is called upon to make reasonable, good faith statements as to the nature of any conflict and the remedial action, if any, called for."

See Note, *Conflicts of Interest in News Reporting*, 69 *Colum.L.Rev.* 881 (1969).

In *Broadcast of Sports Events*, 48 F.C.C. 2d 235, 30 R.R.2d 1597 (1974) the FCC notified licensees that "they will be

A. *Reasonable opportunity for presentation of contrasting viewpoints.*

The Commission's concern with fairness has, since the inception of the fairness doctrine, been to see to it that the licensee, having chosen to cover an issue of public importance, affords a reasonable opportunity for the presentation of contrasting viewpoints. There is no requirement of precisely equal time—it calls only for making reasonable opportunity available for the presentation of significant opposing positions. This requirement thus affords the licensee great leeway including allowance for honest mistakes of judgment. See Editorializing Report, paragraph 18, 13 F.C.C. at page 1255.

The fairness doctrine does not in any way prescribe the presentation of a news item or viewpoint nor does it specify any particular manner of presentation. . . .

. . . [T]he Commission has never examined news coverage as a censor might to determine whether it is fair in the sense of presenting the "truth" of an event as the Commission might see it. The question whether a news medium has been fair in covering a news event would turn on an evaluation of such matters as what occurred, what facts did the news medium have in its possession, what other facts should it reasonably have obtained, what did it actually report, etc. For example, on the issue whether the networks "fairly" depicted the demonstrators' provocation which led to the police reaction, the Commission would be required to seek to ascertain first the "truth" of the situation—what actually occurred; next what facts and film footage the networks possessed on the matter; what other facts and film footage they "fairly" and reasonably should have obtained; and finally in light of the foregoing, whether the reports actually presented were fair.

But however appropriate such inquiries might be for critics or students of the mass media, they are not appropriate for this Government licensing agency. It is important that the public understand that the fairness doctrine is not concerned with fairness in this sense. This is not because such actual fairness is not important, but rather because its determination by a Government agency is inconsistent with our concept of a free press. The Government would then be determining what is the "truth" in each news situation—what actually occurred and whether the licensee deviated too substantially from that

required to disclose clearly, publicly and prominently during each broadcast of an athletic event, the existence of any arrangement whereby announcers broadcasting the event may be, directly or indirectly, chosen, paid, approved and/or removed by parties other than the licensee and/or network upon

which the event is broadcast. Further, licensees and networks are reminded of their responsibility to refrain from engaging in or permitting others to engage in, deliberate falsification, distortion or suppression of facts."

“truth.” We do not sit as a review body of the “truth” concerning news events.

Aside from unusual situations of the kinds discussed herein, it is not the proper concern of this Commission why a licensee presented a particular film segment or failed to present some other segment. Such choices are not reviewable by this agency.

Accordingly, in light of the facts before us we shall not treat further such complaints as that the networks switched away from the podium to an undue extent or that they sought to “spread rumors” regarding a Kennedy draft. These are matters for the journalistic judgment of the networks, with any review a matter to be undertaken by media critics and students of the mass media. Similarly, we do not consider further whether the presentation of the demonstrations broadcast was unfair, in the sense of considering which portions of the film were shown and which were not.³⁵ Rather, we shall consider the overall question of whether reasonable opportunity for contrasting viewpoints was afforded with respect to this and other controversial issues referred to in the complaints we have received.

In so holding, we are not saying that there is nothing to the above or other complaints received—or that the networks should ignore these matters. It may be that critics or students of the media will point up deficiencies or areas of improvement for the networks in their news coverage of events like the Democratic Convention. Similarly, as one network notes in its reply, it is important to have the reactions of viewers—to be sensitive to communications from the public. A large outpouring of complaints, or indeed a single complaint, may point up a deficiency or an appropriate improvement. In short, taking proper cognizance of complaints and criticism does not undermine the independence of broadcast news, but rather may serve to assist it in discharging more effectively its vital task of fully and fairly informing the American public.

B. *Distorting or staging the news.*

There is a further related problem which should be clarified, and that involves charges that a licensee has not only been unfair, but that he has deliberately slanted or distorted the news. This also encompasses the issue of staging the news.

Here again it is important to make clear the proper area of concern of the Commission. We are not considering “staging” in the sense that persons or organizations may engage in certain conduct because of television—whether a press conference or a demonstration.

35. For similar reasons, we do not inquire into the question whether, no matter what restrictions on live camera usage were imposed, additional

film via hand cameras was available to the networks; the use or nonuse of film from whatever source was a matter for journalistic judgment.

This issue has been raised, for example, before the National Commission on Causes and Prevention of Violence. We do not denigrate in any way the importance or complexity of the issue. It is a matter calling for the most thorough examination by the media and by appropriate entities not involved in the licensing of broadcast stations. But the judgment when to turn off the lights and send the cameras away is again not one subject to review by this Commission. We do not sit to decide: "Here the licensee exercised good journalistic judgment in staying"; or "Here it should have left."

There are other aspects of this matter. In a sense, every televised press conference may be said to be "staged" to some extent; depiction of scenes in a television documentary—on how the poor live on a typical day in the ghetto, for example—also necessarily involves camera direction, lights, action instructions, etc. The term "pseudo-event" describes a whole class of such activities that constitute much of what journalists treat as "news." Few would question the professional propriety of asking public officials to smile again or to repeat handshakes, while the cameras are focussed upon them. In short, while there can, of course, be difficult gray areas, there are also many areas of permissible licensee judgment in this field.

The staging of the news with which we are here concerned is neither an area coming clearly within the licensee's journalistic judgment nor even a gray area. Rather, it is the deliberate staging of alleged "news events" along the line of the charges set out under No. 3 *infra* (i. e., a purportedly significant "event" which did not in fact occur but rather is "acted out" at the behest of news personnel). Where such staging occurs, it may constitute a range of abuses as serious as those present in the *Richards* case.³⁶ (See also par. 17, "Editorializing Report," 13 F.C.C. at pp. 1254-55.) In the *Richards* case, according to charges made by newsmen, the licensee instructed his news staff to slant news reports in specified ways. Such slanting of the news amounts to a fraud upon the public and is patently inconsistent with the licensee's obligation to operate his facilities in the public interest. It calls for a full hearing to determine the facts and thus whether the licensee is qualified to hold the broadcast permit.

The *Richards* situation is most unusual. What can occur more frequently is the slanting or staging of a "news event" by an employee without the express direction or knowledge of the licensee and its news supervisors, and perhaps even against their specific instructions to eschew at all times such "staging."³⁷ To place the license in jeopardy

36. See KMPC, Station of Stars, F.C.C. 49, 1021, 14 R.R. 4831 (1949).

[Ed.] See also Star Stations of Indiana, Inc., 51 F.C.C.2d 95, 32 R.R.2d 1151 (1975), where broadcast licenses were not renewed on the ground, *inter alia*, that the licensee afforded favorable publicity to preferred political candi-

dates, deliberately slanting the news by reporting only positive news items as to them.

37. The licensee, which is responsible for the integrity of its news operations, must clearly inform its news employees of its policy against staging "news events" and be diligent in tak-

for the occasional isolated lapse of an employee would be unjust where the licensee has adequately discharged its responsibilities, might tend to discourage broadcast journalism, and might thus be at odds with the very reason for our allocation of so much scarce spectrum space to broadcasting—our realization of the valuable contribution it can make to an informed electorate. (See par. 6, "Editorializing Report," 13 F.C.C. at p. 1249).

Accordingly, in the absence of licensee direction or an abdication of licensee responsibility, a hearing on the license renewal would not be called for. However, where extrinsic evidence has been presented to the Commission suggesting that a licensee has staged or culpably distorted the presentation of a news event, this becomes a matter of concern both to the Commission and to the licensee, which must of course be vitally interested in preserving the integrity of its news operations. The matter thus may be appropriately investigated by the Commission, or by the licensee with a detailed report to the Commission.

We stress that in this area of staging or distorting the news, we believe that the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events. Otherwise, the matter would again come down to a judgment as to what was presented, as against what should have been presented—a judgmental area for broadcast journalism which this Commission must eschew. For the Commission to investigate mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this Government agency.

3. Complaints in this case.

With this as background, we turn to a disposition of the complaints in this case. First, as to the fairness doctrine (sec. 2(A), above), in light of the discussion in section 1, above, there is no substantial basis for concluding that the networks failed to afford "reasonable opportunity for presentation of contrasting viewpoints" on the issues at the Chicago convention, such as the Vietnam war and the civil disorders which occurred there. . . .

ing appropriate steps, either prophylactic or remedial, to implement that policy. For example, the licensee should implement its policies in this respect by investigating significant charges of "staging" which might involve its news employees and stand ready to take action against any employee found guilty of such improper activity. See, e. g., statement of NBC before the National Commission on Causes and Prevention of Violence,

where it set out the following policy on covering demonstrations to its news employees: "A last and most serious point. We do not reenact, simulate, dramatize, stage or aid a demonstration of any kind. If it happens, we try to cover it; if we miss it, we don't fake it. We don't try to make it happen. This simple injunction must not be forgotten. If it is forgotten, we will attempt as severe a punishment as possible."

We stress that in so holding, we are not passing judgment on the quality of the networks' coverage. It is the role of the public, critics, and students of the mass media, either to comment or to be critical with regard to such matters, and we will not repeat the discussion, *supra*, as to the networks' taking appropriate cognizance of such critics and complaints. In this sensitive area, the licensing agency must stick closely to the function of determining the narrow issue whether there was a failure to afford "reasonable opportunity for the discussion of conflicting views." (Sec. 315(a).)

Turning now to the staging aspects of the matter, we have conducted our own preliminary investigation and have also maintained liaison with other interested governmental entities concerned with these matters. We have received reports of some "staged" incidents on the part of some television news personnel. We stress that we are not now finding that there were such "staged" incidents; or that if such incidents did occur, network news personnel were responsible; or, finally, that any allegedly staged incidents were aired.

The incidents in question are as follows:

(i) A United States Senator is reported to have stated that he saw a newsreel crew in Grant Park arrange to have a girl hippy (wearing a bandage across her forehead a la "Spirit of '76") walk up to a line of National Guard troops and begin shouting "Don't hit me!" when the newsreel crew gave the cue and began shooting.

(ii) The U.S. Attorney for the Northern District of Illinois, Mr. Thomas A. Foran, and Assistant U.S. Attorney Michael Nash stated that they witnessed the following: After the 8 p. m. confrontation between police and demonstrators in Michigan Avenue in front of the Hilton on Wednesday night, August 28, 1968, the demonstrators retreated slowly northward, followed by a line of police. Behind the line of police, what appeared to be a newsman was kicking various pieces of burning trash into a pile on Michigan Avenue. There was a semicircle of newsmen, with cameras, standing and watching him. After he had a small fire burning on the street, he was handed a "Welcome to Chicago" sign, which he then began to ignite in the fire. When the sign started to burn, he laid it on top of the fire and signalled to the semicircle of men who filmed the burning sign.

(iii) The U.S. Attorney for the Northern District of Illinois, Mr. Foran, stated that he witnessed the following incident on Tuesday afternoon, August 26, 1968, near the Logan statue in Grant Park: An individual who was sitting on the grass with his back up against a tree, was holding a large bandage in his hand, conversing with a three-man camera crew, one of whom had the CBS trademark on his jacket. After a brief conversation, the camera crew began filming the individual and he held the bandage

along the side of his head. Mr. Foran approached in order to ascertain what they were doing, but when he inquired, the camera team immediately walked away and the individual on the ground cursed him and left the area. Mr. Foran observed no visible injury to the individual's head.

(iv) Assistant U.S. Attorney James J. Casey stated that he was in Lincoln Park on Sunday evening, August 25, 1968, at approximately 9:15 p. m.; that he saw an individual lying on the grass at the south end of the park, who was being filmed by a crew which Casey identified as CBS because of certain markings on the equipment they were using; that two young ladies dressed in white medical smocks were on their knees apparently giving first aid to the individual lying on the ground; that after several minutes, he observed the camera lights go off and the "injured" individual stood up and had a conversation with the camera crew; and that he observed no apparent injury. Assistant Corporation Counsel Charles N. Goldstein, who was with Mr. Casey, made a statement to the same effect, adding that "The conclusion that this was a staged incident was further evidenced at the time by the fact that the television crew, as I seem to recall, were giving verbal directions to the young people who were the object of the camera's view."

We shall continue our consideration of the above matters. The incidents are here brought to the networks' attention for investigation, since they may involve the integrity of the networks' news operation. Indeed, we recognize that, in view of the widespread publicity, such investigation by the networks may be underway or already completed. We request the submission, within 30 days of the date of this letter, of detailed reports, including, of course, information as to whether film of such incidents was taken by a network news team and, if so, a full description of the circumstances and whether such film was broadcast. Incidents (i) and (ii) could involve the three networks (or, as we stated, none of them); incidents (iii) and (iv) appear, on the basis of information presently available, to involve charges against CBS only.

CONCLUSION

The foregoing, with the exception of the reported incidents described [above] disposes of the complaints we have received. As stated, the actual disposition does not require extended treatment and comes well within established guidelines. We have set out these guidelines again because of possible public confusion, and also because of the puzzling assertions in the NBC and CBS responses to the effect that a fairness inquiry from the Commission—made, as stated in our letter of September 13, 1968, in accordance with established procedure that goes back many years and has involved many prior referrals of

fairness complaints to the networks—suddenly raises the specter of a Government agency indicating to broadcast journalists whether to cover an aspect of a public event or to criticize public officials. We have made clear, in decision after decision, the right of broadcasters to be as outspoken as they wish, and that allowance must be made for honest mistakes on their part. . . .

The right to be critical of public officials is so well engrained in the first amendment as to make any comment by this Commission wholly superfluous. Indeed, one of the most fundamental purposes of the amendment is to insure the freedom of the press to criticize Government.

In view of this background, we should perhaps have simply sloughed aside the networks' assertions. However, in this sensitive area, we believe it better to err on the side of removing any possible doubt as to the Commission's position on these matters. We have therefore set forth once again the guiding principle for Commission action in this field. Finally, we have matched, and shall continue to match, these principles with our actions.³⁸

COLUMBIA BROADCASTING SYSTEM v. DEMOCRATIC NATIONAL COMMITTEE

United States Supreme Court, 1973.
412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court (Parts I, II, and IV) . . .

We granted the writs of certiorari in these cases to consider whether a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak out on issues they consider important violates the Federal Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C.A. § 151 et seq., or the First Amendment.

In two orders announced the same day, the Federal Communications Commission ruled that a broadcaster who meets his public obli-

38. [Ed.] For a recent adjudication, see *Black Producers Ass'n*, 45 R.R.2d 199 (1979). See also Comment, *The First Amendment and Regulation of Television News*, 72 *Colum.L.Rev.* 746 (1972). See also Sullivan, *Editorials and Controversy: The Editor's Dilemma*, 32 *Geo.Wash.L.Rev.* 719 (1964); Hutchinson and Clark, *Self-Censorship in Broadcasting—The Cowardly Lions*, 18 *N.Y.L.F.* 1 (1972).

New Approaches to TV Criticism (1975); E. Epstein, *News from Nowhere* (1973); F. Friendly, *Due to Circumstances Beyond Our Control* (1967); H. Skornia, *Television and the News: A Critical Appraisal* (1968); F. Wolf, *Television Programming for News and Public Affairs: A Quantitative Analysis of Networks and Stations* (1972).

See also notes 6, 7 and 34 *supra* and note 41 *infra*.

On broadcast journalism generally, see H. Ashmore, *Fear in the Air* (1973); D. Cater, *Television as a Social Force*;

gation to provide full and fair coverage of public issues is not required to accept editorial advertisements. *Democratic National Committee*, 25 F.C.C.2d 216; *Business Executives' Move for Vietnam Peace*, 25 F.C.C.2d 242. A divided Court of Appeals reversed the Commission, holding that a broadcaster's fixed policy of refusing editorial advertisements violates the First Amendment; the court remanded the cases to the Commission to develop procedures and guidelines for administering a First Amendment right of access. *Business Executives' Move For Vietnam Peace v. FCC*, 146 U.S.App.D.C. 181, 450 F.2d 642 (1971).

The complainants in these actions are the Democratic National Committee (DNC) and the Business Executives' Move for Vietnam Peace (BEM), a national organization of businessmen opposed to United States involvement in the Vietnam conflict. In January 1970, BEM filed a complaint with the Commission charging that radio station WTOP in Washington, D.C., had refused to sell it time to broadcast a series of one-minute spot announcements expressing BEM views on Vietnam. WTOP, in common with many, but not all, broadcasters, followed a policy of refusing to sell time for spot announcements to individuals and groups who wished to expound their views on controversial issues. WTOP took the position that since it presented full and fair coverage of important public questions, including the Vietnam conflict, it was justified in refusing to accept editorial advertisements. WTOP also submitted evidence showing that the station had aired the views of critics of our Vietnam policy on numerous occasions. BEM challenged the fairness of WTOP's coverage of criticism of that policy, but it presented no evidence in support of that claim.

Four months later, in May 1970, DNC filed with the Commission a request for a declaratory ruling:

"That under the First Amendment to the Constitution and the Communications Act, a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues."

DNC claimed that it intended to purchase time from radio and television stations and from the national networks in order to present the views of the Democratic Party and to solicit funds. Unlike BEM, DNC did not object to the policies of any particular broadcaster but claimed that its prior "experiences in this area make it clear that it will encounter considerable difficulty—if not total frustration of its efforts—in carrying out its plans in the event the Commission should decline to issue a ruling as requested." DNC cited *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), as establishing a limited constitutional right of access to the airwaves.

In two separate opinions, the Commission rejected respondents' claims that "responsible" individuals and groups have a right to pur-

chase advertising time to comment on public issues without regard to whether the broadcaster has complied with the Fairness Doctrine. The Commission viewed the issue as one of major significance in administering the regulatory scheme relating to the electronic media, one going to the heart of the system of broadcasting which has developed in this country” 25 F.C.C.2d at 221. After reviewing the legislative history of the Communications Act, the provisions of the Act itself, the Commission’s decisions under the Act, and the difficult problems inherent in administering a right of access, the Commission rejected the demands of BEM and DNC.

The Commission also rejected BEM’s claim that WTOP had violated the Fairness Doctrine by failing to air views such as those held by members of BEM; the Commission pointed out that BEM had made only a “general allegation” of unfairness in WTOP’s coverage of the Vietnam conflict and that the station had adequately rebutted the charge by affidavit. The Commission did, however, uphold DNC’s position that the statute recognized a right of political parties to purchase broadcast time for the purpose of soliciting funds. The Commission noted that Congress has accorded special consideration for access for political parties, see 47 U.S.C.A. § 315(a), and that solicitation of funds by political parties is both feasible and appropriate in the short space of time generally allotted to spot advertisements.³⁹

A majority of the Court of Appeals reversed the Commission, holding that “a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted.” 146 U.S.App.D.C., at 185, 450 F.2d, at 646. Recognizing that the broadcast frequencies are a scarce resource inherently unavailable to all, the court nevertheless concluded that the First Amendment mandated an “abridgeable” right to present editorial advertisements. The court reasoned that a broadcaster’s policy of airing commercial advertisements but not editorial advertisements constitutes unconstitutional discrimination. The court did not, however, order that either BEM’s or DNC’s proposed announcements must be accepted by the broadcasters; rather, it remanded the cases to the Commission to develop “reasonable procedures and regulations determining which and how many ‘editorial advertisements’ will be put on the air.” *Ibid.*

I

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public’s right

39. The Commission’s rulings against BEM’s Fairness Doctrine complaint and in favor of DNC’s claim that political parties should be permitted to purchase airtime for solicitation of

funds were not appealed to the Court of Appeals and are not before us here. [Some footnotes have been omitted; others have been renumbered.]

to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time, Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned. The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.

Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission. . . . The judgment of the Legislative Branch cannot be ignored or under-valued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment. That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem. Thus, before confronting the specific legal issues in these cases, we turn to an examination of the legislative and administrative development of our broadcast system over the last half century.

II

. . . [O]nce it was accepted that broadcasting was subject to regulation, Congress was confronted with a major dilemma: how to strike a proper balance between private and public control. . . . Congress appears to have concluded, however, that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided.

The legislative history of the Radio Act of 1927, the model for our present statutory scheme, . . . reveals that in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee. Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues. Some members of Congress—those whose views were ultimately rejected—strenuously objected to the unregulated power of broadcasters to reject applications for service. See, e. g., H.R.Rep. No. 404, 69th Cong., 1st Sess., 18 (minority report). They regarded

the exercise of such power to be "private censorship," which should be controlled by treating broadcasters as public utilities. . . .

. . . Instead, Congress after prolonged consideration adopted § 3(h), which specifically provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Other provisions of the 1934 Act also evince a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations. Although the Commission was given the authority to issue renewable three-year licenses to broadcasters and to promulgate rules and regulations governing the use of those licenses, both consistent with the "public convenience, interest, or necessity," § 326 of the Act specifically provides that:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C.A. § 326.

From these provisions it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act. License renewal proceedings, in which the listening public can be heard, are a principal means of such regulation. See *Office of Communication of United Church of Christ v. FCC*, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966), and 138 U.S.App.D.C. 112, 425 F.2d 543 (1969).

Subsequent developments in broadcast regulation illustrate how this regulatory scheme has evolved. Of particular importance, in light of Congress' flat refusal to impose a "common carrier" right of access for all persons wishing to speak out on public issues, is the Commission's "Fairness Doctrine," which evolved gradually over the years spanning federal regulation of the broadcast media. . . .

Since it is physically impossible to provide time for all viewpoints . . . the right to exercise editorial judgment was granted to the broadcaster. The broadcaster, therefore, is allowed significant journalistic discretion in deciding how best to fulfill its Fairness Doctrine obligations, although that discretion is bounded by rules designed to assure that the public interest in fairness is furthered. In its decision in the instant cases, the Commission described the boundaries as follows:

"The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views be-

cause of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners. . . . This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.' . . ."

Thus, under the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance. The basic principle underlying that responsibility is "the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter" Report of Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949). Consistent with that philosophy, the Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities. . . . Congress has not yet seen fit to alter that policy, although since 1934 it has amended the Act on several occasions and considered various proposals that would have vested private individuals with a right of access.

IV

There remains for consideration the question whether the "public interest" standard of the Communications Act requires broadcasters to accept editorial advertisements or, whether, assuming governmental action, broadcasters are required to do so by reason of the First Amendment. . . .

The Commission was justified in concluding that the public interest in providing access to the marketplace of "ideas and experiences" would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth. Cf. *Red Lion*, supra, at 392, 89 S.Ct., at 1807. Even under a first-come-first-served system, proposed by the dissenting Commissioner in these cases, the views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently. Moreover, there is the substantial danger, as the Court of Appeals acknowledged, 146 U.S.App.D.C., at 203, 450 F.2d, at 664, that the time allotted for editorial advertising could be monopolized by those of one political persuasion.

These problems would not necessarily be solved by applying the Fairness Doctrine, including the *Cullman* doctrine, to editorial advertising. If broadcasters were required to provide time, free when necessary, for the discussion of the various shades of opinion on the

issue discussed in the advertisement, the affluent could still determine in large part the issues to be discussed. Thus, the very premise of the Court of Appeals' holding—that a right of access is necessary to allow individuals and groups the opportunity for self-initiated speech—would have little meaning to those who could not afford to purchase time in the first instance.

If the Fairness Doctrine were applied to editorial advertising, there is also the substantial danger that the effective operation of that doctrine would be jeopardized. To minimize financial hardship and to comply fully with its public responsibilities a broadcaster might well be forced to make regular programming time available to those holding a view different from that expressed in an editorial advertisement; indeed, BEM has suggested as much in its brief. The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not. The public interest would no longer be "paramount" but, rather, subordinate to private whim especially since, under the Court of Appeals' decision, a broadcaster would be largely precluded from rejecting editorial advertisements that dealt with matters trivial or insignificant or already fairly covered by the broadcaster. 146 U.S.App.D.C., at 196 n. 36, 197, 450 F.2d, at 657 n. 36, 658. If the Fairness Doctrine and the *Cullman* doctrine were suspended to alleviate these problems, as respondents suggest might be appropriate, the question arises whether we would have abandoned more than we have gained. Under such a regime the congressional objective of balanced coverage of public issues would be seriously threatened.

Nor can we accept the Court of Appeals' view that every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

It was reasonable for Congress to conclude that the public interest in being informed requires periodic accountability on the part of those who are entrusted with the use of broadcast frequencies, scarce as they are. In the delicate balancing historically followed in the regula-

tion of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be "robust, and wide-open" does not mean that we should exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators.

The Court of Appeals discounted those difficulties by stressing that it was merely mandating a "modest reform," requiring only that broadcasters be required to accept some editorial advertising. 146 U.S.App.D.C., at 202, 203, 450 F.2d, at 663. The court suggested that broadcasters could place an "outside limit on the total amount of editorial advertising they will sell" and that the Commission and the broadcasters could develop "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints." *Id.*, at 202, 203, 450 F.2d, at 663, 664. If the Commission decided to apply the Fairness Doctrine to editorial advertisements and as a result broadcasters suffered financial harm, the court thought the "Commission could make necessary adjustments." *Id.*, at 203, 450 F.2d, at 664. Thus, without providing any specific answers to the substantial objections raised by the Commission and the broadcasters, other than to express repeatedly its "confidence" in the Commission's ability to overcome any difficulties, the court remanded the cases to the Commission for the development of regulations to implement a constitutional right of access.

By minimizing the difficult problems involved in implementing such a right of access, the Court of Appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment—the risk of an enlargement of Government control over the content of broadcast discussion of public issues. . . . This risk is inherent in the Court of Appeals' remand requiring regulations and procedures to sort out requests to be heard—a process involving the very editing that licensees now perform as to regular programming. Although the use of a public resource by the broadcast media permits a limited degree of Government surveillance, as is not true with respect to private media, see *National Broadcasting Co. v. United States*, 319 U.S., at 216–219, 63 S.Ct., at 1009–1011, the Government's power over licensees, as we have noted, is by no means absolute and is carefully circumscribed by the Act itself.

Under a constitutionally commanded and Government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the Commission would be required to oversee far

more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.

Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good-faith effort to meet the public interest in being fully and fairly informed. The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements. To sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result.⁴⁰

The Commission is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a "captive audience." . . . The "captive" nature of the broadcast audience was recognized as early as 1924 when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that "the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested—and he may resent its invasion of his set." As the broadcast media became more pervasive in our society, the problem has become more acute. . . . It is no answer to say that because we tolerate pervasive commercial advertisements we can also live with its political counterparts.

The rationale for the Court of Appeals' decision imposing a constitutional right of access on the broadcast media was that the licensee impermissibly discriminates by accepting commercial advertisements while refusing editorial advertisements. The court relied on decisions holding that state-supported school newspapers and public transit companies were prohibited by the First Amendment from excluding controversial editorial advertisements in favor of commercial advertisements. The court also attempted to analogize this case to some of our decisions holding that States may not constitutionally ban certain protected speech while at the same time permitting other speech in public areas. . . .

40. DNC has urged in this Court that we at least recognize a right of our national parties to purchase airtime for the purpose of discussing public

issues. We see no principled means under the First Amendment of favoring access by organized political parties over other groups and individuals.

Those decisions provide little guidance, however, in resolving the question whether the First Amendment requires the Commission to mandate a private right of access to the broadcast media. In none of those cases did the forum sought for expression have an affirmative and independent statutory obligation to provide full and fair coverage of public issues, such as Congress has imposed on all broadcast licensees. In short, there is no "discrimination" against controversial speech present in this case. The question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when.

The opinion of the Court of Appeals asserted that the Fairness Doctrine, insofar as it allows broadcasters to exercise certain journalistic judgments over the discussion of public issues, is inadequate to meet the public's interest in being informed. The present system, the court held, "conforms . . . to a paternalistic structure in which licensees and bureaucrats decide what issues are 'important,' and how 'fully' to cover them, and the format, time and style of the coverage." 146 U.S.App.D.C., at 195, 450 F.2d, at 656. The forced sale of advertising time for editorial spot announcements would, according to the Court of Appeals majority, remedy this deficiency. That conclusion was premised on the notion that advertising time, as opposed to programming time, involves a "special and separate mode of expression" because advertising content, unlike programming content, is generally prepared and edited by the advertiser. Thus, that court concluded, a broadcaster's policy against using advertising time for editorial messages "may well ignore opportunities to enliven and enrich the public's overall information." *Id.*, at 197, 450 F.2d, at 658. The Court of Appeals' holding would serve to transfer a large share of responsibility for balanced broadcasting from an identifiable, regulated entity—the licensee—to unregulated speakers who could afford the cost.

We reject the suggestion that the Fairness Doctrine permits broadcasters to preside over a "paternalistic" regime. See *Red Lion*, 395 U.S., at 390, 89 S.Ct., at 1806. That doctrine admittedly has not always brought to the public perfect or, indeed, even consistently high-quality treatment of all public events and issues; but the remedy does not lie in diluting licensee responsibility. The Commission stressed that, while the licensee has discretion in fulfilling his obligations under the Fairness Doctrine, he is required to "present representative community views and voices on controversial issues which are of importance to [its] listeners," and it is prohibited from "excluding partisan voices and always itself presenting views in a bland, inoffensive manner . . ." 25 F.C.C.2d, at 222. A broadcaster neglects that obligation only at the risk of losing his license.

Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable. . . .

The problems perceived by the Court of Appeals majority are by no means new; as we have seen, the history of the Communications Act and the activities of the Commission over a period of 40 years reflect a continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees. . . . At the very least, courts should not freeze this necessarily dynamic process into a constitutional holding. . . .

The judgment of the Court of Appeals is reversed.⁴¹

41. [Ed.] The portions reproduced above were supported by a majority of the Court. Chief Justice Burger, in Part III of his opinion, concluded that governmental involvement in broadcast regulation did not make the actions of broadcast licensees government actions subject to the constraints of the First Amendment. On this point, Justices Stewart and Rehnquist concurred.

Justice Stewart also concurred in Parts I and II of the Chief Justice's opinion and was substantially in accord as to Part IV, although in a separate opinion he expressed serious misgivings about government surveillance of broadcast program content. Justice Douglas concurred in the judgment on the ground that all government regulation of broadcast program content, including the Fairness Doctrine, was unconstitutional.

Justices Brennan and Marshall dissented, supporting the position of the Court of Appeals.

The literature on the access question is quite extensive. For contrasting views see Barron, *Access to the Press—A New First Amendment Right*, 80 *Harv.L.Rev.* 1641 (1967), expanded in J. Barron, *Freedom of the Press for Whom?* (1973); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 *Harv.L.Rev.* 768 (1972); B. Schmidt, *Freedom of the Press vs. Public Access* 119-216 (1976). For reviews of

the literature and discussions of alternatives, see Comment, *Right of Access to Broadcast Media for Paid Editorial Advertising—A Plea to Congress*, 22 *U.C.L.A.L.Rev.* 258 (1974); Lange, *Role of Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 *N.C.L.Rev.* 1 (1973).

See also Comment, *Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance After CBS?* 122 *U.Pa.L.Rev.* 1283 (1974); Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 *Harv.Civil Rights L.Rev.* 137 (1975).

Closely related are concerns about network or industry censorship. See Johnson, *Freedom to Create: The Implications of Antitrust Policy for Television Programming Content*, 8 *Osgoode Hall L.J.* 11 (1970); Comment, *We Pick 'Em: You Watch 'Em: First Amendment Rights of Television Viewers*, 43 *S.Cal.L.Rev.* 826 (1970); Note, *The Listener's Right to Hear in Broadcasting*, 22 *Stan.L.Rev.* 863 (1970); Cohen, *The Advertiser's Influence on TV Programming, 1970 Law and Social Order* 405; Brenner, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 28 *Fed. Com.B.J.* 1 (1975); Note, *Limits of Broadcast Self Regulation Under the First Amendment*, 27 *Stan.L.Rev.* 1527 (1975). See also notes 6, 7, 32 and 38 *supra*.

Chapter VII
REGULATION OF PROGRAMMING:
OBJECTIONABLE PROGRAM
MATERIAL

Introductory Note on Programs of an Objectionable Character. In some cases, the FCC focuses on particular programs or types of programs and objects to their being broadcast over licensed facilities. While the entire performance of the licensee is generally taken into consideration, the crux of the controversy is the specific program material which the Commission believes should not have been broadcast at all.

Three main categories are involved: (a) fraud and deception; (b) lotteries and gambling; and (c) obscenity and other improprieties.

(a) *Fraud and deception.* Section 1343 of the Criminal Code, 18 U.S.C.A. § 1343, provides:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.”

Since broadcasting practices seldom involve direct efforts to defraud, this statute is rarely invoked and other methods of regulation must be considered. The problem of deception may be divided into three parts: (a) false and misleading advertising; (b) deceptive program material; and (c) failure to differentiate between sponsored and unsponsored material.

With respect to false and misleading advertising, the Commission, in early renewal cases, commented upon deceptive commercials and received assurances from licensees that they would be discontinued if their licenses were renewed.¹

The present position of the FTC is indicated by a public notice to all licensees entitled Licensee Responsibility With Respect to the Broadcast of False, Misleading or Deceptive Advertising (Nov. 7,

1. Farmers & Bankers Life Ins. Co., 2 F.C.C. 455 (1936); Don Lee Broadcasting System, 2 F.C.C. 642 (1936); KMPC, Inc., 7 F.C.C. 449 (1939). See also Report to the President by the Attorney General on Deceptive Prac-

tices in Broadcasting Media, 19 R.R. 1901 (1959) (“Deceptive Practices Report”). On program regulation generally, see authorities cited supra p. 200.

1961) (32 F.C.C.2d 396). A new publication of the Federal Trade Commission, described as an "Advertising Alert" was announced.

"The 'Alert' will contain information pertaining to Complaints and Orders which have been issued by the Federal Trade Commission. If there is submitted to a licensee advertising matter which has been the subject of an FTC *Complaint*, he should realize that, although no final determination has been made that the advertising in question is false or deceptive, a question has been raised as to its propriety, and he should therefore exercise particular care in deciding whether to accept it for broadcast. An *Order* issued by the Federal Trade Commission against an advertiser, which has become final, is a formal determination by that agency that the particular advertising in question is false or deceptive. Should it come to this Commission's attention that a licensee has broadcast advertising which is known to have been the subject of a final Order by the FTC, serious question would be raised as to the adequacy of the measures instituted and carried out by the licensee in the fulfillment of his responsibility, and as to his operation in the public interest.

"In this regard, particular attention is directed to the fact that licensee responsibility is not limited merely to a review of the advertising copy submitted for broadcast, but that the licensee has the additional obligation to take reasonable steps to satisfy himself as to the reliability and reputation of every prospective advertiser and as to his ability to fulfill promises made to the public over the licensed facilities. The fact that a particular product or advertisement has not been the subject of Federal Trade Commission action in no way lessens the licensee's responsibility with regard to it. On the contrary, it is hoped that the information received from these 'Alerts' will make it possible for licensees to recognize questionable enterprises, claims, guarantees, and the like, and where deemed inappropriate for broadcast, to bring them to the attention of the Federal Trade Commission for possible further investigation."²

Concerning deceptive program material, the FCC historically has played a more passive role. When it was found, in the late fifties, that high stake television quiz programs were not being conducted as honest contests of intellect and skill, the Congress added a criminal provision to the Communications Act directed at "purportedly bona fide" contests which in fact were "prearranged and predetermined."³ Thereafter the Commission became more active in moving against

2. In *Westinghouse Broadcasting Co.*, 27 R.R.2d 670 (1973), a proceeding was pending before the Federal Trade Commission concerning the deceptiveness of particular advertising. The FCC ruled that, until the FTC proceeding was concluded, the broadcaster was not required to reject the advertising,

but was expected to exercise care before accepting it. It was held to be sufficient that the broadcaster here required documentation of the claims made or required appropriate changes in advertising content.

3. 47 U.S.C.A. § 509. See *Deceptive Practices Report*, supra.

these and other deceptive program practices.⁴ In addition, the FCC's regulations require that announcements be made of mechanical reproduction of a program where such is necessary to prevent deception of the audience.⁵

On the distinction between sponsored and unsponsored matter, the Communications Act, since its inception, has required that announcement be made of commercial sponsorship. In conjunction with the quiz show scandals of the fifties, it was found that this requirement was being circumvented by a practice known as "payola." Payments were being made by commercial interests to obtain specific broadcasting statements or actions, not directly to the broadcasting station, but to employees or program producers. Thus, disc jockeys were given payments for featuring particular records on their programs; or producers were rewarded for inserting "plugs" in the course of a dramatic or comedy sketch.⁶ Congress responded by articulating in greater detail the circumstances under which announcements must be made, requiring reports to the station licensee of any payments made to station employees or program producers.⁷ The Commission has promulgated implementing regulations.⁸

The Commission also requires that an announcement be made if any outside assistance is afforded in connection with a political program or one involving the discussion of public controversial issues.⁹

(b) *Lotteries and gambling.* Section 1304 of the Criminal Code, originally enacted as part of the Communications Act of 1934, provides:¹⁰

"Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

"Each day's broadcasting shall constitute a separate offense."

4. Eleven Ten Broadcasting Corp., 22 R.R. 699 (1962).

5. 47 C.F.R. §§ 73.118, 73.288, 73.653.

6. See Deceptive Practices Report, *supra*.

7. 47 U.S.C.A. §§ 317, 508.

8. 47 C.F.R. §§ 73.119, 73.289, 73.654. See also Public Notice on Sponsorship

Identification Rules, 28 F.R. 4732 (1963); Maher, Purity Versus Plugola: A Study of the Federal Communications Commission's Sponsorship Identification Rules, 23 De Paul L.Rev. 903 (1974).

9. *Ibid.*

10. 18 U.S.C.A. § 1304.

The FCC has promulgated implementing regulations.¹¹ An earlier Commission effort to rely on this provision was attacked in *FCC v. American Broadcasting Co.*¹² The FCC had interpreted § 1304 as forbidding certain kinds of “give-away” programs, which distributed prizes to home listeners, selected wholly or in part on the basis of chance, as awards for correctly answering questions. The programs were unlawful, in the FCC’s judgment, where it was essential or of assistance in winning prizes for the person selected to have listened to or viewed the “give-away” program. By regulation, the FCC had provided that such broadcasting would result in the denial of applications for construction permits, licenses, renewal of licenses, and other broadcasting authorizations. The regulation was based exclusively on § 1304 and was defended solely as an interpretation of that statute. The Commission was enjoined from enforcing its regulation on the ground that a contestant’s listening at home to a radio or television program did not satisfy one of the requirements of § 1304—that the contestant furnish some consideration. The Supreme Court commented that “the Commission, concurrently with the Department of Justice, has power to enforce § 1304.”

“Indeed, the Commission would be remiss in its duties if it failed, in the exercise of its licensing authority, to aid in implementing the statute, either by rule or by individual decisions.

“ . . . The ‘public interest, convenience, or necessity’ standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding. In any event, the standard is sufficiently broad to permit the Commission to consider the applicant’s past or proposed violation of a criminal statute especially designed to bar certain conduct by operators of radio and television stations. . . .

“But the Commission’s power in this respect is limited by the scope of the statute. Unless the ‘give-away’ programs involved here are illegal under § 1304, the Commission cannot employ the statute to make them so by agency action. . . .”

The decision of the Supreme Court affirmed a judgment of a three-judge District Court. In his opinion for the District Court, Judge Leibell observed:

“Broadcasting and television are entitled to the protection of the First Amendment to the Constitution, guaranteeing freedom of speech and of the press. . . . The Rules of the Commission, *in their subject matter* (lotteries), did not infringe the right of free speech or free press guaranteed by the First Amend-

11. 47 C.F.R. §§ 73.122, 73.292, 73.656.

12. 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954).

ment. . . . But in so far as some of their provisions [paragraph (b) (2), (3) and (4)] go beyond the scope of Section 1304 of the Criminal Code, they may be considered as a form of 'censorship' and to that extent they would be in violation of the First Amendment."

In *New Jersey State Lottery Commission v. United States*, 491 F.2d 219 (3d Cir. 1974), a radio station sought a declaratory ruling on whether its broadcast of the winning weekly number in the New Jersey State Lottery would violate 18 U.S.C.A. § 1304. Broadcasts each Thursday on three consecutive newscasts were contemplated. The FCC ruled that such broadcasts would violate 18 U.S.C.A. § 1304, but the Court of Appeals reversed. The Court observed that, on a typical Thursday, 2,750,000 lottery ticket holders were interested in the winning number and that the identity of the winning number was an appropriate news item. However, the Court declined to rest its decision on this basis and ruled that the status of information as news was not subject to government review and that the First Amendment protected broadcasters in transmitting such information as they considered to be newsworthy. The Court considered it logical to restrict 18 U.S.C.A. § 1304 to "promotion of lotteries for which the station receives compensation" and held open the possibility that "some uncompensated promotional announcements outside the context of broadcast journalism might be found by the FCC to be promotional, and not news, and hence prohibited by 18 U.S.C.A. § 1304."

While the *New Jersey Lottery* case was pending, Congress enacted 18 U.S.C.A. § 1307(a), providing that 18 U.S.C.A. § 1304 "shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under color of State law . . . broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts a lottery." 88 Stat. 1916 (1975). The Supreme Court, which had granted certiorari to review the Court of Appeals decision in the *New Jersey Lottery* case, remanded the case to the Court of Appeals to consider the impact of the new statute. 420 U.S. 371, 95 S.Ct. 941, 43 L.Ed.2d 260 (1975). On remand, the Court of Appeals held that the statute had not mooted the controversy because it did not protect a station in a state without a lottery from broadcasting lottery results from a neighboring state. It adhered to its prior decision overturning the FCC ruling. 34 R.R. 2d 825 (3d Cir. July 14, 1975).¹³

(c) *Obscenity and other improprieties.* Section 1464 of the Criminal Code, based on a provision in the Radio Act of 1927, provides:¹⁴

13. See Volnar, *The Games Consumers Play*, 25 Fed.Com.Bar J. 121 (1973); Note, *Lot is Cast Into the Lap: Federal Communications Commission Mis-*

treatment of State Lottery Broadcasts, 6 Loyola U.L.J. 407 (1975).

14. 18 U.S.C.A. § 1464.

“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 and imprisoned not more than two years, or both.”

The Commission has not often relied on this provision in broadcast cases.¹⁵ However, other improprieties have attracted its attention.

In *KFKB Broadcasting Ass'n v. Federal Radio Commission*,¹⁶ the Commission refused to renew the radio station license of Dr. Brinkley, a rather unusual practitioner of the healing arts. In addition to the station, Dr. Brinkley ran a hospital and a “pharmaceutical association.” His mode of operation included personal appearances on the air for three half-hour periods each day, during which time he would read letters from persons complaining of ailments. On the basis of such letters, the doctor would diagnose the nature of the ailments and prescribe treatments, which usually consisted of one or more of the prescriptions handled by his pharmaceutical association. The prescriptions were described by number only, so that they could be obtained only from members of the doctor’s association, who would remit part of the purchase price to the station. Over 90% of the station’s receipts were derived from Dr. Brinkley’s hospital and pharmaceutical association. The Commission refused to renew the license on two grounds: (1) “the practice of a physician’s prescribing treatment for a patient whom he has never seen, and bases (sic) his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimicable to the public health and safety, and for that reason is not in the public interest”; and (2) “the operation of Station KFKB is conducted only in the personal interest of Dr. John R. Brinkley” and not in “the interest of the listening public.” The Court of Appeals sustained the Commission on both grounds, observing that Congress intended that “broadcasting should not be a mere adjunct of a particular business but should be of a public character.”

Trinity Methodist Church v. Federal Radio Commission,¹⁷ was decided about the same time. A minister in charge of a station’s operation broadcast criticisms of judges that were held to be contempts of court; made defamatory statements about public officials which he was unable to substantiate; threatened to disclose damaging information about a prominent unnamed person unless a contribution was forthcoming; spoke freely of pimps and prostitutes; bitterly criticized the Roman Catholic Church; and alluded slightly to the Jews as a race. The Commission refused to renew the station’s license because of the attacks on religion, the “sensational” rather than “instructive” character of the broadcasts, and the contempt convictions. The Court of Appeals affirmed, deploring the possibility that radio might

15. See *Mile High Stations, Inc.* 20 R.R. 345 (1960), and cases cited.

17. 60 App.D.C. 79, 62 F.2d 850 (1932), certiorari denied 288 U.S. 599, 53 S. Ct. 317, 77 L.Ed. 975 (1933).

16. 47 F.2d 670 (D.C.Cir.1931).

be used "to obstruct the administration of justice, offend the religious sensibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality."

An alternative method of preventing objectionable programming is to consider probable program practices as one aspect of the "character" of the applicant. Thus, in *Independent Broadcasting Co. v. FCC*,¹⁸ the FCC concluded that a minister's character was not such as was required for broadcast licensees, where the minister "had used intemperate language in his writings, sermons and broadcasts; . . . had a constant habit of attacking the honesty and sincerity of those individuals and groups who did not agree with him; . . . had attempted to institute economic boycotts of persons and groups who did not cooperate with him as he demanded; and . . . had constantly solicited funds on the basis of statements of urgent need which were contrary to fact." The Court of Appeals concluded that this finding and others justified the Commission's refusal to license the minister.

In several instances, the Commission has investigated alleged communist affiliations of applicants for broadcast licenses; but in each case the charges of subversive associations have been found to be unsubstantiated.¹⁹ In cases not involving broadcast licensees, the Commission has been sustained in making inquiries into alleged communist affiliations of applicants.²⁰

In *Palmetto Broadcasting Co. (WDKD)*,²¹ the Commission refused to renew the AM broadcast license of the only station in Kingstree, South Carolina. One of several grounds for the decision was the licensee's broadcast of the "Charlie Walker Show," a disc jockey program which the Commission held to be "coarse, vulgar, suggestive, and susceptible of indecent, double meaning." The program had been carried for over ten years and had occupied 25% of the licensee's broadcast day. The preponderance of testimony of listeners supported the view that the programming was unacceptable in the community of license, and the licensee himself described some of the broadcasts as "suggestive, vulgar and of an uncouth nature. He discharged Walker and stated to the Commission that he had taken steps to prevent recurrence of such offensive programming."

18. 89 U.S.App.D.C. 396, 193 F.2d 900 (1951), certiorari denied 344 U.S. 837, 73 S.Ct. 14, 97 L.Ed. 652 (1952).

19. See *Dispatch, Inc.*, 13 R.R. 237, 274 (1957); *Pacifica Foundation*, 1 R.R.2d 747 (1964).

20. *Borrow v. FCC*, 109 U.S.App.D.C. 224, 285 F.2d 666 (1960), certiorari denied 364 U.S. 892, 81 S.Ct. 223, 5 L.Ed.2d 188 (1960), rehearing denied 364 U.S. 939, 81 S.Ct. 376, 5 L.Ed.2d 371;

Cronan v. FCC, 109 U.S.App.D.C. 208, 285 F.2d 288 (1960), certiorari denied 366 U.S. 904, 81 S.Ct. 1046, 6 L.Ed.2d 203 (1961); *Blumenthal v. FCC*, 115 U.S.App.D.C. 305, 318 F.2d 276 (1963), certiorari denied 373 U.S. 951, 83 S.Ct. 1679, 10 L.Ed.2d 706 (1963).

21. 33 FCC 250, 23 R.R. 483 (1962), reconsideration denied, 34 FCC 101, 23 R.R. 486 (1963), affirmed sub nom. *Robinson v. FCC*, 118 U.S.App.D.C. 144, 334 F.2d 534 (1964).

The Commission declined to proceed under 18 U.S.C.A. § 1464, which would have required a finding of obscenity or indecency. Instead, it affirmed its obligation to consider objectionable programming at the time of license renewal under the general public interest standard. Otherwise, “[r]adio could become predominantly a purveyor of smut and patent vulgarity—yet unless the matter broadcast reached the level of obscenity under 18 U.S.C.A. § 1464, the Commission . . . would be powerless to prevent this perversion or misuse of a valuable resource. The housewife, the teen-ager, the young child—all—would simply be subjected to the great possibility of hearing such patently offensive programming whenever they turn the dial.” The Commission disclaimed any authority “to set itself up as a national arbiter of taste” or to decide that a pattern of broadcasts was offensive “on the basis of our own taste or preference for what we believe should be broadcast. What we must find is that the broadcasts in question are flagrantly offensive—that by any standard, however reasonably weighted for the licensee, taking into account the record evidence, the broadcasts are obviously or patently offensive.” Considering the substantial time devoted to this type of programming, the FCC concluded that the licensee’s practice “represents an intolerable waste of the only operating broadcast facilities in the community—facilities which were granted to this licensee to meet the needs and interests of the Kingstree area.”

By contrast, in *Pacifica Foundation*²² the Commission renewed broadcast authorizations despite public complaints about the licensee’s programming. Before considering objections to five programs, the Commission observed: “Unlike Palmetto where there was [a substantial pattern of operation inconsistent with the public interest standard,] here we are dealing with a few isolated programs, presented over a four-year period. It would thus appear that there is no substantial problem, on an overall basis, warranting further inquiry. While this would normally conclude the matter, we have determined to treat the issues raised by *Pacifica*’s response to the complaints, because we think it would serve a useful purpose, both to the industry and to the public.”

As to three programs, the licensee defended their broadcast on the merits: (1) “The Zoo Story” was a play by serious playwright; (2) “The Kid” was a reading by Mr. Pomerantz, a nationally recognized writer, of a portion of an unfinished novel; and (3) “Live and Let Live” was a program in which eight homosexuals discussed their attitudes and problems. The Commission sustained the licensee: “We recognize that as shown by the complaints here, such provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission’s licensing power, to rule such programming off the airwaves.

22. 1 R.R.2d 747 (1964).

. . . . Pacifica's judgments as to the above programs clearly fall within the very great discretion which the Act wisely vests in the licensee. In this connection, we also note that Pacifica took into account the nature of the broadcast medium when it scheduled such programming for the late evening hours (after 10 p. m., when the number of children in the listening audience is at a minimum).

As to two programs, the licensee stated that some passages did not measure up to its own standards of good taste. The explanations given for the errors were found by the Commission to be credible. "Therefore, even assuming *arguendo*, that the broadcasts were inconsistent with the public interest standard, it is clear that no unfavorable action upon the renewal applications is called for. The standard of public interest is not so rigid that an honest mistake or error on the part of a licensee results in drastic action against him where his overall record demonstrates a reasonable effort to serve the needs and interests of his community."

YALE BROADCASTING CO. v. FCC

Court of Appeals for the District of Columbia, 1973.
155 U.S.App.D.C. 390, 478 F.2d 594, certiorari denied 414 U.S. 914,
94 S.Ct. 211, 38 L.Ed.2d 152.

WILKEY, CIRCUIT JUDGE:

The source of this controversy is a Notice issued by the Federal Communications Commission regarding "drug oriented" music allegedly played by some radio stations. This Notice and a subsequent Order, the stated purposes of which were to remind broadcasters of a pre-existing duty, required licensees to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug use. Appellant, a radio station licensee, argues first that the Notice and the Order are an unconstitutional infringement of its First Amendment right to free speech. In the alternative, appellant contends that they impose new duties on licensees and must, therefore, be the subject of rulemaking procedures. Finally it is argued that the statements' requirements are impermissibly vague and that the FCC has abused its discretion in refusing to clarify its position. Finding none of these arguments of the licensee valid, we affirm the action of the FCC.

I. Substance of the First and Second Notices.

In the late 1960's and early 1970's the FCC began receiving complaints from the public regarding alleged "drug oriented" songs played by certain radio broadcasters. In response to these complaints the Commission issued a Notice, the stated purpose of which was to re-

mind broadcasters of their duty to broadcast in the public interest.²³ To fulfill this obligation licensees were told that they must make “reasonable efforts” to determine before broadcast the meaning of music containing drug oriented lyrics. The Notice specified that this knowledge must be in the possession of a management level executive of the station, who must then make a judgment regarding the wisdom of playing music containing references to drugs or the drug culture.

This initial Notice led to substantial confusion within the broadcast industry and among the public. Confusion centered around the meaning of phrases such as “knowing the content of the lyrics,” “ascertain before broadcast,” and “reasonable efforts.”

In order to clarify these ambiguities, the FCC issued a second Memorandum and Order clarifying and modifying certain parts of the original Notice.²⁴ The thrust of this Order was that (1) the Commission was not prohibiting the playing of “drug oriented” records, (2) no reprisals would be taken against stations that played “drug oriented” music, but (3) it was still necessary for a station to “know” the content of records played and make a “judgment” regarding the wisdom of playing such records.

II. Interpretation of the Definitive Order.

The Commission went to great lengths to illustrate what it meant by saying that a broadcaster must “know” what is being broadcast. The Order emphasizes that it is not requiring the unreasonable and that the Commission was “not calling for an extensive investigation of each . . . record” that dealt with drugs. It also made clear that there was no general requirement to prescreen records.

The Commission in its Order was obviously not asking broadcasters to decipher every syllable, settle every ambiguity, or satisfy every conceivable objection prior to airing a composition. A broadcaster must know what he can reasonably be expected to know in light of the nature of the music being broadcast. It may, for example, be quite simple for a broadcaster to determine that an instrumental piece has little relevance to drugs. Conversely, it may be extremely difficult to determine what thought, if any, some popular lyrics are attempting to convey. In either case, only what can reasonably be understood is demanded of the broadcaster.

Despite all its attempts to assuage broadcasters’ fears, the Commission realized that if an Order can be misunderstood, it will be misunderstood—at least by some licensees. To remove any excuse for misunderstanding, the Commission specified examples of how a broadcaster could obtain the requisite knowledge. A licensee could fulfill

23. Public Notice, 28 F.C.C.2d 400 (1971). [Some footnotes have been omitted; others have been renumbered.]

24. Memorandum Opinion and Order, 31 F.C.C.2d 377 (1971).

its obligation through (1) pre-screening by a responsible station employee, (2) monitoring selections while they were being played, or (3) considering and responding to complaints made by members of the public. The Order made clear that these procedures were merely suggestions, and were not to be regarded as either absolute requirements or the exclusive means for fulfilling a station's public interest obligation.

Having made clear our understanding of what the Commission has done, we now take up appellant's arguments seriatim.

III. An Unconstitutional Burden on Freedom of Speech.

Appellant's first argument is that the Commission's action imposes an unconstitutional burden on a broadcaster's freedom of speech. This contention rests primarily on the Supreme Court's opinion in *Smith v. California*,²⁵ in which a bookseller was convicted of possessing and selling obscene literature. The Supreme Court reversed the conviction. Although the State had a legitimate purpose in seeking to ban the distribution of obscene materials, it could not accomplish this goal by placing on the bookseller the procedural burden of examining every book in his store. To make a bookseller criminally liable for all the books sold would necessarily "tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature"

Appellant compares its own situation to that of the bookseller in *Smith* and argues that the Order imposes an unconstitutional burden on a broadcaster's freedom of speech. The two situations are easily distinguishable:

Most obviously, a radio station can only broadcast for a finite period of twenty-four hours each day; at any one time a bookstore may contain thousands of hours' worth of readable material. Even if the Commission had ordered that stations pre-screen all materials broadcast, the burden would not be nearly so great as the burden imposed on the bookseller in *Smith*. As it is, broadcasters are not even required to pre-screen their maximum of twenty-four hours of daily programming. Broadcasters have specifically been told that they may gain "knowledge" of what they broadcast in other ways.

A more subtle but no less compelling answer to appellant's argument rests upon *why* knowledge of drug oriented music is required by the Commission. In *Smith*, knowledge was imputed to the purveyor in order that a criminal sanction might be imposed and the dissemination halted. Here the goal is to assure the broadcaster has adequate knowledge. Knowledge is required in order that the broadcaster can make a judgment about the wisdom of its programming. It is beyond

25. 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).

dispute that the Commission requires stations to broadcast in the public interest. In order for a broadcaster to determine whether it is acting in the public interest, knowledge of its own programming is required. The Order issued by the Commission has merely reminded the industry of this fundamental metaphysical observation—in order to make a judgment about the value of programming one must have knowledge of that programming.

We say that the licensee must have *knowledge* of what it is broadcasting; the precise *understanding* which may be required of the licensee is only that which is reasonable. No radio licensee faces any realistic possibility of a penalty for misinterpreting the lyrics it has chosen or permitted to be broadcast. If the lyrics are completely obscure, the station is not put on notice that it is in fact broadcasting material which would encourage drug abuse. If the lyrics are meaningless, incoherent, the same conclusion follows. The argument of the appellant licensee, that so many of these lyrics are obscure and ambiguous, really is a circumstance available to some degree in his defense for permitting their broadcast, at least until their meaning is clarified. Some lyrics or sounds are virtually unintelligible. To the extent they are completely meaningless gibberish and approach the equivalent of machinery operating or the din of traffic, they, of course, do not communicate with respect to drugs or anything else, and are not within the ambit of the Commission's order. Speech is an expression of sound or visual symbols which is intelligible to some other human beings. At some point along the scale of human intelligibility the sounds produced may slide over from characteristics of free speech, which should be protected, to those of noise pollution, which the Commission has ample authority to abate.²⁶

We not only think appellant's argument invalid, we express our astonishment that the licensee would argue that before the broadcast it has no knowledge, and cannot be required to have any knowledge, of material it puts out over the airwaves. We can understand that the individual radio licensees would not be expected to know in advance the content or the quality of a network program, or a free flowing panel discussion of public issues, or other audience participation program, and certainly not a political broadcast. But with reference to the broadcast of that which is frequently termed "canned music," we think the Commission may require that the purveyors of this to the public make a reasonable effort to know what is in the "can." No producer of pork and beans is allowed to put out on a grocery shelf a can without knowing what is in it and standing back of both its content and quality. The Commission is not required to allow radio licensees, being freely granted the use of limited air channels, to spew out to the listening public canned music, whose content and quality before broadcast is totally unknown.

26. Cf. Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (1972).

Supposedly a radio licensee is performing a public service—that is the *raison d'être* of the license. If the licensee does not have specific knowledge of what it is broadcasting, how can it claim to be operating in the public interest? Far from constituting any threat to freedom of speech of the licensee, we conclude that for the Commission to have been less insistent on licensees discharging their obligations would have verged on an evasion of the Commission's own responsibilities.

By the expression of the above views we have no desire whatsoever to express a value judgment on different types of music, poetry, sound, instrumentation, etc., which may appeal to different classes of our most diverse public. "*De gustibus non est disputandum.*" But what we are saying is that whatever the style, whatever the expression put out over the air by the radio station, for the licensee to claim that it has no responsibility to evaluate its product is for the radio station to abnegate completely what we had always considered its responsibility as a licensee. All in all, and quite unintentionally, the appellant-licensee in its free speech argument here has told us a great deal about quality in this particular medium of our culture.

IV. The Requirement of Rulemaking.

We turn next to appellant's contention that the Commission in its Order has imposed a new duty on the broadcasting industry. If the FCC were indeed imposing a new duty on its licensees, its action should be subject to the public debate and scrutiny of rulemaking proceedings. If the Commission is simply reminding broadcasters of an already existing duty, rulemaking is not required. We conclude that the stated purpose and the actual result of the Commission's Notice and Order was to remind the industry of a pre-existing duty.

There is a long-standing Commission policy of reminding licensees of their responsibility in a particular area whenever there appears to be licensee indifference. A notice quite similar to the one challenged here was issued with respect to foreign language broadcasting.²⁷ There, a Commission inquiry had revealed that many licensees were carrying foreign language broadcasts without having any familiarity with the foreign language. Broadcasters were accordingly advised:

Licensee responsibility requires that internal procedures be established and maintained to insure sufficient familiarity with the foreign language to know what is being broadcast and whether it conforms to the station's policies and to the requirements of the Commission's rules. Failure of licensees to establish and main-

27. Public Notice Concerning Foreign Language Programs, 9 P. & F. Radio Regs.2d 1901 (1967).

tain such control over foreign language programming will raise serious questions as to whether the station's operation serves the public interest.

In addition to this example, the Commission has reminded broadcasters of their obligations in a number of other specific situations.

. . .

V. Asserted Vagueness.

Perhaps the most strenuously urged and least meritorious of appellant's arguments are based upon the contention that the Commission's Order is impermissibly vague. From this common starting point, appellant argues (1) that the Order is unconstitutionally vague, or (2) that the Order is so vague that the Commission abused its discretion in refusing to clarify it.

It is indisputable that generally the Government may not draw a line between permissible and impermissible speech in such an unclear and imprecise manner that "men of common intelligence must necessarily guess at its meaning and differ as to its application." We shall assume for the moment that this standard applies with full force to the broadcast industry. Even under this standard the Commission's Order is not unconstitutionally vague. In fact, the Commission has done an admirable job of explaining the nature and degree of knowledge expected of broadcasters. As illustrated in Part II of this opinion, this court has no difficulty understanding what the Commission expects of its licensees.

Removed from appellant's obfuscation, the structure, purpose and requirements of the Order are quite clear. First, the Order defines what it is attempting to achieve. Secondly, it provides three examples of ways a broadcaster *may* attain this goal. Thirdly, the Order does not forbid a broadcaster from attaining the goal by another means. Thus the Order avoids the constitutional infirmity of vagueness by providing explicit ways for a broadcaster to meet its requirements while simultaneously avoiding overbreadth by not limiting compliance to the methods specified.

. . .

VI. Conclusion.

In spite of the horrendous forebodings which brought appellant into court the fact is that appellant has recently had its license renewed. Likewise, there has been no showing or suggestion that the standard enunciated in the Order has been employed to deny any license to a broadcaster. If such a denial does occur and can be shown to be unfair or due to a misapplication of the Commission's own guidelines (as described in Part II of our opinion), then redress may be sought in the courts. . . .

ON MOTION FOR REHEARING EN BANC

PER CURIAM.

The motion for rehearing *en banc* initiated by a member of the Court in regular active service is denied, a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure).

Separate Statement by Chief Judge BAZELON as to why he would grant rehearing *en banc, sua sponte*.

BAZELON, Chief Judge:

The Commission's initial statement in the area of "drug-oriented" songs was a "Public Notice" issued on March 5, 1971. The Notice, entitled "Licensee Responsibility to Review Records Before Their Broadcast", did not specifically prohibit the playing of particular songs. But broadcasters might well have read it as a prohibition. For one thing, two members of the Commission, including the member reported to be the originator of the Notice, appended to it a formal statement explaining that their goal was to "discourage, if not eliminate, the playing of records which tend to promote and/or glorify the use of illegal drugs." Five weeks after the Notice was issued, the Commission's Bureau of Complaints and Compliance provided broadcasters the names of 22 songs which had come to its attention as "so-called drug-oriented song lyrics."

The Commission's action was reported by responsible organs of the press as an act of censorship. It appears that radio stations moved quickly to ban certain songs. In some cases stations stopped playing, regardless of subject or lyric, all the works of particular artists whose views might lift the Commission's eyebrow. Broadcasters circulated the list of 22 songs throughout the industry as a "do not play" list.

The Commission's subsequent "Memorandum Opinion and Order", issued on April 16, 1971, and designated by the Commission as its "definitive statement" on the subject, appeared to backtrack somewhat. The Order repudiated the list of 22 songs. It stated that the evaluation of which records to play "is one solely for the licensee", and that "[t]he Commission cannot make or review such individual licensee judgment."

But the Commission's order went further. Instead of rescinding the Public Notice, the Order restated its basic threat: "the broadcaster could jeopardize his license by failing to exercise licensee responsibility in this area." As we have recognized, "licensee responsibility" is a nebulous concept. It could be taken to mean—as the panel opinion takes it—only that "a broadcaster must 'know' what it is broadcasting." On the other hand, in light of the earlier Notice,

and in light of the renewed warnings in the Order about the dangers of "drug-oriented" popular songs, broadcasters might have concluded that "responsibility" meant "prohibition".

The Commissioners themselves were unclear on the matter. The Order expressed full adherence to the policy of the prior Notice. But two Commissioners issued concurring statements indicating that the Order restored the status quo prior to the March 5 Notice. A third Commissioner issued a dissenting statement indicating that the Order did not restore the status quo. A fourth Commissioner issued a rather enigmatic statement indicating his agreement with both the Notice and the Order but observing that they established an "impossible assignment." The confusion was crystallized later in 1971 in Congressional testimony by FCC Chairman Burch. At one point, the Chairman offered this assurance:

Chairman Burch: . . . [C]ontrary to Commissioner Johnson's statement that we banned drug lyrics, we did not ban drug lyrics. . . .

Moments later, however, the following ensued:

Senator Nelson: All I am asking is: If somebody calls to the FCC's attention that a particular station is playing songs that, in fact, do promote the use of drugs in the unanimous judgment of the Commission, if you came to that conclusion, what would you do?

Chairman Burch: I know what I would do, I probably would vote to take the license away.

. . . The Commission's chameleon-like directives reflect the spectrum from confusion to deliberate obfuscation. The court must look to the impact of these directives, not merely their language. Such review is all the more necessary where the Commission's directives are couched in code words for license renewal such as "public interest" or "licensee responsibility". Seven years ago, a member of the Commission explained:

Talk of "responsibility" of a broadcaster in this connection is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments. Since the imposition of the duty of such "responsibility" involves Commission compulsion to perform the function of selection and exclusion and Commission supervision of the manner in which that function is performed, the Commission still retains the ultimate power to determine what is and what is not permitted on the air. . . .

The panel opinion indicates that the present challenges to the Commission's directives are premature; that the Commission's final sanction is denial of a license, and until that sanction is imposed, the

petitioners cannot demonstrate any harm from the Commission's actions. Opposed to this viewpoint is the often recognized principle that the threat of legal sanction can have as much effect on the conduct of threatened parties as the sanction itself. If that principle applies here, as petitioners argue, then there is a judicially cognizable injury as soon as broadcasters begin to alter their programming to avoid governmental reprisal. . . .²⁸

REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIAL

Federal Communications Commission, 1975.
51 F.C.C.2d 418, 32 R.R.2d 1367.

In response to Congressional directives, the Federal Communications Commission submits its report of actions with respect to televised violence and obscenity. This report addresses "specific positive action taken and planned by the Commission to protect children from excessive programming of violence and obscenity."

Congressional concern over the effects of television upon young people has been longstanding. The Senate Judiciary Committee's Subcommittee on Juvenile Delinquency under Senators Kefauver and later Dodd conducted investigations into this area in 1954, 1955, 1961-62, and 1964. In 1969, the National Commission on the Causes and Prevention of Violence, chaired by Dr. Milton Eisenhower, reported that:

"It is reasonable to conclude that a constant diet of violent behavior on television has an adverse effect on human character and attitudes. Violence on television encourages violent forms of behavior, and fosters moral and social values about violence in daily life which are unacceptable in a civilized society."

Subsequent to this finding, the Senate Commerce Committee's Communications Subcommittee, under Senator John O. Pastore, requested the Department of Health, Education and Welfare to initiate an inquiry into "the present scientific knowledge about the effect of entertainment television on children's behavior".

Results of that one-year study by the Surgeon General's Scientific Advisory Committee on Television and Social Behavior,²⁹ added sup-

28. [Ed.] See Note, Drug Lyrics, the FCC, and the First Amendment, 5 *Loyola of L.A.L.Rev.* 329 (1972); Hutchinson and Clark, Self-Censorship in Broadcasting—The Cowardly Lions, 18 *N.Y.L.F.* 1 (1972); Comment, FCC—First Amendment—Constitutionality of Proscribing Drug Oriented Songs, 19 *N.Y.L.F.* 902 (1974); Comment, Musical Expression and First Amendment

Considerations, 24 *De Paul L.Rev.* 143 (1974).

29. "Television and Growing Up: The Impact of Televised Violence, A Report to the Surgeon General From the Surgeon General's Scientific Advisory Committee on Television and Violence," (1972).

[Ed.] See Note, Regulation of Televised Violence, 26 *Stan.L.Rev.* 1291

port to the view that a steady stream of violence on television may have an adverse effect upon our society—and particularly on children. Continuing studies funded by the Department of Health, Education and Welfare during 1972–74, as reported in the April 3–5, 1974 hearings before Senator Pastor's Subcommittee, gave further evidence of the harmful effects of televised violence on children. Research continues in this area, but the existing evidence is sufficient to justify consideration of changes in industry practices.

The Federal Communications Commission has received substantial evidence that parents, the Congress, and others are deeply concerned. In 1972, the Commission received over 2,000 complaints about violent or sexually-oriented programs. In 1974, that volume had increased to nearly 25,000. Further, the Commission has received petitions to deny broadcast license renewals and petitions for rule making expressing the desire that the Commission take action with respect to televised violence, particularly as it affects children. Mindful of the public interest questions raised by the Report to the Surgeon General, subsequent research findings, and the continuing concerns of Congress and the general public, the Commission undertook a study of specific solutions to the problems of televised violence and sexually-oriented material in mid-1974.

Staff discussion and study focused upon two questions: (1) what steps might be taken to prohibit the broadcasting of obscene or indecent material and (2) what steps might be taken to protect children from other sexually-oriented or violent material which might be inappropriate for them. With respect to questions of obscene and indecent material, direct governmental action is required by statute, and the Commission intends to meet its responsibilities in this area. With respect to the broader question of what is *appropriate* for viewing by children, the Commission is of the view that industry self-regulation is preferable to the adoption of rigid governmental standards. We believe that this is the case for two principal reasons: (1) the adoption of rules might involve the government too deeply in programming content, raising serious constitutional questions, and (2) judgments concerning the suitability of particular types of programs for children are highly subjective. As a practical mat-

(1974); Atkin, Murray and Nayman, *The Surgeon General's Research Program on Television and Social Behavior: A Review of Empirical Findings*, 16 J.Broad. 21 (1972); D. Cater and S. Strickland, *TV Violence and the Child: The Evaluation and Fate of the Surgeon General's Report* (1975).

See also G. Comstock et al., *Television and Human Behavior: The Research Horizon, Future and Present* (Rand Corp. 1975); G. Comstock et al., *Television and Human Behavior: The Key*

Studies (Rand Corp. 1975); G. Comstock and M. Fisher, *Television and Human Behavior: A Guide to Pertinent Scientific Literature* (Rand Corp. 1975); G. Comstock, *Television Portrayals and Aggressive Behavior* (Rand Corp. 1976); G. Comstock, *Television and Its Viewers: What Social Science Sees* (Rand Corp. 1976).

See also *The Violence Profile: An Exchange of Views*, 21 J.Broad. 273 (1977).

ter, it would be difficult to construct rules which would take into account all of the subjective considerations involved in making such judgments. We are concerned that an attempt at drafting such rules could lead to extreme results which would be unacceptable to the American public.³⁰

SEXUAL OR VIOLENT MATERIAL WHICH IS INAPPROPRIATE FOR CHILDREN

Administrative actions regulating violent and sexual material must be reconciled with constitutional and statutory limitations on the Commission's authority to regulate program content. Although the unique characteristics of broadcasting may justify greater governmental supervision than would be constitutionally permissible in other media, it is clear that broadcasting is entitled to First Amendment protection. . . . Congress expressed its concern that the Commission exercise restraint in the area of program regulation by enacting Section 326 of the Communications Act which specifically prohibits "censorship" by this agency.

On the other hand, the Communications Act requires the Commission to insure that broadcast licensees operate in a manner consistent with the "public interest." In the *Red Lion* decision, the Supreme Court affirmed the view that broadcasters are "public trustees" with fiduciary responsibilities to their communities. The Commission has long maintained the policy that program service in the public interest is an essential part of a licensee's obligation. Programming Policy Statement, 20 P&F RR 1901 (1960). We have also made it clear that broadcasters have particular responsibilities to serve the special needs of children. Children's Television Report and Policy Statement, 39 FR 39396 [31 RR2d 1228] (November 6, 1974).

Regulatory action to limit violent and sexually-oriented programming which is neither obscene nor indecent is less desirable than effective self-regulation, since government-imposed limitations raise sensitive First Amendment problems. In addition, any rule making in these areas would require finding an appropriate balance between

30. As Chairman Richard E. Wiley stated in his February 10, 1975 speech to the National Association of Television Program Executives, at Atlanta, Georgia: "Short of an absolute ban on all forms of 'violence'—including even slapstick comedy—the question of what is appropriate for family viewing necessarily must be judged in highly subjective terms. Under a rigid objective test, I suppose that it would be argued that many traditional children's films should be banned because they include some element of violence

—for example, episodes in *Peter Pan* when Captain Hook is eaten by a crocodile or in *Snow White* where the young heroine is poisoned by the witch. Such an extreme result simply does not make sense and would not be acceptable to the American people. Indeed, the lack of an acceptable objective standard is one of the best reasons why—the Constitution aside—I feel that self-regulation is to be preferred over the adoption of inflexible governmental rules."

the need to protect children from harmful material and the adult audience's interest in diverse programming. Government rules could create the risk of improper governmental interference in sensitive, subjective decisions about programming, could tend to freeze present standards and could also discourage creative developments in the medium.

With these considerations in mind, Chairman Wiley initiated the first of a series of discussions with the executives of the three major television networks on November 22, 1974. In suggesting such meetings, the Chairman sought to serve as a catalyst for the achievement of meaningful self-regulatory reform. He suggested the following specific proposals for the networks to consider:

(1) **New Commitment.** There should be a new commitment to reduce the level and intensity of violent and sexually-oriented material.

(2) **Scheduling.** Programs which are considered to be inappropriate for viewing by young children should not be broadcast prior to 9 p. m. local time.

(3) **Warnings.** At times when such programs are broadcast, they should include audio and video warning at the outset of the program (and at the first "break"), in addition, similar to the practice in France, a small white dot might be placed in the corner of the screen during the course of a program to warn those viewers who tune in while the program is in progress that it may not be appropriate for viewing by young children.

(4) **Advance Notice.** Affiliates should be provided warnings in advance to be included in local TV Guide and newspaper program listings and promotional materials.

In addition, the Chairman raised the possibility of adoption of a rating system similar to that used in the motion picture industry. In making these suggestions, it was understood that the decision as to which programs are so excessively violent or explicitly sexually-oriented as to be inappropriate for young children would remain in the broadcaster's sound discretion. Also, it was recognized that non-entertainment programming, such as news, public affairs, documentaries and instructional programs would be exempt from the scheduling rule.

At the time of the November 22nd meeting, no commitments were sought from the networks and none were offered. The meeting provided an opportunity for a free and candid exploration of a mutually recognized problem affecting broadcast service. Arrangements were made at that time for a continuation of discussions at the staff level and for a later meeting with top network executives. Staff members

of the Commission met separately with representatives of each network in New York on December 10-11, 1974.

Not all of the proposals advanced by the Commission were found to be acceptable by the networks. However, each of the networks developed a set of guidelines which it believed should govern its programming, and policy statements incorporating these guidelines were released to the public. A common element of the three statements is that they provide that the first hour of network entertainment programming in prime time will be suitable for viewing by the entire family.

A second meeting between the Commission's Chairman and the network officials was held in Washington on January 10, 1975. At this meeting, representatives of the National Association of Broadcasters were present. During the course of this meeting, each of the networks made it clear that programs presented during this "Family Viewing" period would be appropriate for young children. Also discussed at that meeting were proposals that reforms be incorporated in the NAB Code.

On February 4, 1975, the NAB Television Code Review Board adopted a proposed amendment to the NAB Television Code similar to the guidelines adopted by the three networks but which would expand the "Family Viewing" period to include "the hour immediately preceding" the first hour of network programming in prime time.

. . .

Taken together, the three network statements and the NAB proposed policy would establish the following guidelines for the Fall 1975 television season:

(1) **Scheduling.** "The first hour of network entertainment programming in prime time" and "the immediately preceding hour," is to be designated as a "Family Viewing" period. In effect, this would include the period between 7 p. m. and 9 p. m. Eastern Time during the first six days of the week. On Sunday, network programming typically begins at a different time; the guidelines would therefore provide that the "Family Viewing" period will begin and end a half-hour earlier.

(2) **Warnings.** "Viewer advisories" will be broadcast in audio and video form "in the occasional case when an entertainment program" broadcast during the "Family Viewing" period contains material which may be unsuitable for viewing by younger family members. In addition, "viewer advisories" will be used in later evening hours for programs which contain material that might be disturbing to significant portions of the viewing audience.

(3) **Advance Notice.** Broadcasters will attempt to notify publishers of television program listings as to programs which will contain "advisories." Responsible use of "advisories" in promotional material is also advised.

Thus, the network and NAB proposals are designed to give parents general notice that after the evening news, and for the duration of the designated period, the broadcaster will make every effort to assure that programming presented (including series and movies) will be appropriate for the entire family. After that time, parents themselves will have to exercise greater caution to be confident that particular programs are suitable for their children. Warnings would continue to be broadcast in later hours to notify viewers of those programs that might be disturbing to significant portions of the audiences.

The Commission believes that the recent actions taken by the three networks and the National Association of Broadcasters Television Code Review Board are commendable and go a long way toward establishing appropriate protections for children from violent and sexually-oriented material. This new commitment suggests that the broadcast industry is prepared to regulate itself in a fashion that will obviate any need for governmental regulation in this sensitive area.

It is inevitable that there will be some disagreements over particular programs and the question of their suitability for children. Interpretation of which programs are appropriate for family viewing remains, as it should, the responsibility of the broadcaster. The success of this program will depend upon whether that responsibility is exercised both with good faith and common sense judgment. Thus, meaningful evaluation by Congress and the public of the efficacy of these self-regulatory measures must await observation of how they are interpreted and applied by the broadcasters.

The industry proposal represents an effort to strike a balance between two conflicting objectives. On the one hand, it is imperative that licensees act to assist parents in protecting their children from objectionable programming. On the other hand, broadcasters believe that if the medium is to achieve its full maturity, it must continue to present sensitive and controversial themes which are appropriate, and of interest, to adult audiences.

Parents, in our view, have—and should retain—the primary responsibility for their children's well-being. This traditional and revered principle, like other examples which could be cited, has been adversely affected by the corrosive processes of technological and social change in twentieth-century American life. Nevertheless, we believe that it deserves continuing affirmation.

Television, as a guest in the American home, also has some responsibilities in this area. In providing a forum for the discussion of excessive violence and sexual material on television, the Commission

has sought to remind broadcasters of their responsibility to provide some measure of support to concerned parents.

It is obvious that the reforms proposed by the industry will not provide absolute assurance that children or particularly sensitive adults will be insulated from objectionable material. However, no reform short of a wholesale proscription of all violent and sexually-oriented material would have that effect. Surveys have indicated that some children will be viewing television during all hours of the broadcast day, and not just during the hours now designated for "Family Viewing". Some, who are not properly supervised, may be exposed to programming which a responsible adult would consider inappropriate for them. We believe, however, that the industry plan provides a reasonable accommodation of parental and industry responsibilities.

It should be stressed that the networks do not view the post 9 p. m. viewing period as a time to be filled with blood, gore and explicit sexual depictions. The presidents of all three networks have assured the Commission that there will continue to be restraint in the selection and presentation of program material later in the evening.

We recognize that there will be some disagreements with specific aspects of these industry self-regulatory measures. As we have already indicated, the "Family Viewing" period will be presented at different hours in different time zones. This special period would ordinarily end at 9:00 p. m. in New York and Los Angeles, at 8:00 p. m. in the Midwest, and as early as 7:00 p. m. in portions of the Mountain Time Zone.³¹ In addition, the fact that the "Family Viewing" period may be presented at a different time on Sunday may create some confusion.

The success of the entire "Family Viewing" principle depends upon the good faith and responsibility of the networks and other broadcasters. It is important that the "program advisories" and advance notices not be used in a titillating fashion so as to commercially exploit the presentation of violent or sexually-oriented material. Also, the new guidelines will not gain the acceptance of the American people if broadcasters prove to be unreasonably expansive in deciding which programs are appropriate for family viewing.

Despite these considerations, we believe the new guidelines represent a major accomplishment for industry self-regulation, and we are optimistic that these principles will be applied in a responsible manner which will be acceptable to the American people.

31. In this regard, the networks have informed us that a standard based on 9:00 local time would require prohi-

bitively expensive separate program transmission to each time zone.

BROADCAST OF OBSCENE OR INDECENT MATERIAL

Congress has authorized the Commission to enforce Title 18, United States Code, Section 1464 which prohibits utterance of “any obscene, indecent or profane language by means of radio communication.” The Commission is further authorized to utilize its administrative remedies against broadcast licensees who violate Section 1464.³² The Commission has utilized these administrative remedies on a number of occasions. It has exercised its powers carefully, however, with due regard to the sensitive constitutional issues involved.

The Commission believes that Title 18, Section 1464 may be inadequate for the purpose of prohibiting explicit visual depictions of sexual material. The precise terms of the statute refer to “utter[ance] of . . . language.” It is, therefore, uncertain whether the Commission has statutory authority to proceed against the video depiction of obscene or indecent material. For this reason, we will include in our legislative proposals for action by this Congress an amendment to Section 1464 which would eliminate this uncertainty. In addition, our proposal would extend the prohibition to cable television.

. . . [I]t is apparent to the Commission that particularly on radio the problem of “indecent” language has not abated and that the standards set forth in prior opinions have failed to resolve the problem. Thus, we adopted on February 12, 1975, a declaratory order clarifying the Commission’s position on the broadcasting of indecent language in violation of 18 U.S.C. § 1464. In re Citizen’s Complaint Against Pacifica Foundation (WBAI-FM), . . . [See 32 RR 2d 1331]. The previous definition of “indecent” language . . . is clarified by eliminating the test “utterly without redeeming social value” which the Supreme Court modified in *Miller v. California*, 413 U.S. 15 (1973). The new definition of “indecent” is tied to the use of language that describes, in terms patently offensive as measured by contemporary community standards for broadcast media, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.³³

We are hopeful that the combined effects of the declaratory order and the proposed amendment to 10 U.S.C.A. § 1464 will clarify the broadcast standards for obscene and indecent speech as well as visual

32. The Commission may (1) revoke a station license, (2) issue a cease and desist order, or (3) impose a monetary forfeiture for violation of Section 1464, 47 U.S.C.A. §§ 312(a), 312(b), 503 (b)(1)(E). It may also (4) deny license

renewal or (5) grant a short term license renewal, 47 U.S.C.A. §§ 307, 308.

33. [Ed.] See The Supreme Court decision in *Pacifica*, *infra* at pp. 302-319.

depictions and will prove effective in abating the problems which have arisen in these areas.³⁴

WRITERS GUILD OF AMERICA v. FCC, 423 F.Supp. 1064 (C.D. Cal.1976). The three television networks and the National Association of Broadcasters adopted a "family viewing policy" which provided that: "Entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour. In the occasional case when an entertainment program is deemed to be inappropriate for such an audience, advisories should be used to alert viewers." The period encompassed was 7:00 to 9:00 p. m. on the East and West Coasts, and 6:00 to 8:00 p. m. in the Central and Mountain Time Zones. The NAB Television Code Review Board was authorized to determine whether particular programming conformed with this policy. Violation of the policy, if not corrected, was a basis for expelling the offending network or station from the NAB.

Plaintiffs, consisting primarily of creators, writers and producers of television programming allegedly prejudiced by the introduction and implementation of the family viewing concept, sued the three television networks, the FCC and the NAB, alleging violations of the First Amendment, § 326 of the Communications Act, the Administrative Procedure Act, and the Sherman Act. Resolution of claims under the Sherman Act was deferred, and § 326 of the Communications Act was held to be enforceable only in proceedings before the FCC. The First Amendment and the Administrative Procedure Act provided the basis of the Court's decision.

The critical finding of the Court was that the FCC Chairman, Richard Wiley, and the FCC staff—acting on behalf of the Commission—pressured the networks and the NAB to adopt the family viewing plan despite the initial opposition of the latter to the plan. The Court concluded that each network or station, acting independently, was free to adopt the family viewing concept, relying on *CBS v.*

34. [Ed.] In *Illinois Citizens Committee for Broadcasting v. FCC*, 169 U.S.App.D.C. 166, 515 F.2d 397 (1975), an FCC determination that a radio broadcast was obscene, in violation of 18 U.S.C.A. § 1464, was upheld on judicial review. The broadcast, part of a "Femme Forum" program carried by Sonderling Broadcasting Company weekdays from 10:00 a. m. to 3:00 p. m., consisted of discussions between telephone callers and the program host about sexual topics. The program material found to be obscene involved

explicit discussions and descriptions of oral sex. Sonderling paid a \$2,000 forfeiture, removed the program, and declined to challenge the FCC ruling. A citizen group was held to have standing to challenge the soundness of the FCC's determination, but the Court of Appeals concluded that the FCC had applied the proper constitutional standard in finding the program to be obscene in violation of the statute. The probable presence of children in the listening audience was held to be relevant to a finding of obscenity.

Democratic National Committee, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed. 2d 772 (1973). However, the Court ruled that neither the FCC nor the NAB could seek to achieve the same result by applying pressure on individual networks or stations, requiring them to abdicate their independent programming judgment. "Even when station managers are willing to abdicate their responsibilities by delegating their programming authority in exchange for membership in the NAB (with the convenient advantages of access to lobbying and informational services together with whatever prestige attaches to membership), the First Amendment requirement of diversity in decision-making does not protect such tie-in arrangements." Here the case was clearer, because broadcasters joined "forces with government officials to bring about industry-wide adherence to a government plan to suppress offensive materials in the early evening hours."

The Court observed that the "root" of the FCC's ability to apply pressure was "the uncertainty of the relicensing process and the vagueness of standards which govern it." While disclaiming authority to formulate rules regulating the portrayal of violence, the FCC has maintained that it can review past programming in determining whether renewal of a broadcaster's license is in the public interest. In this case the FCC neither claimed the power, nor conceded the absence of the power, to force broadcasters to adopt the family viewing policy. "It is precisely this sort of ambiguity that has given the Chairman such bargaining power with the broadcasting industry.

"This court will not rule that the Commission could not develop constitutional regulations (properly supported in a record pursuant to the procedures and protections of the APA) which deal with the questions of violence or of programming for children in the early evening hours. It may be, for example, that a record could be compiled that would demonstrate that particular types of programming are so demonstrably injurious to the public health that their entitlement to First Amendment protection in the broadcasting medium could properly be questioned . . .

"Here, however, the government defendants have made no attempt to suggest that the government policy is supported by evidence sufficient to permit the court to conclude that exceptions to First Amendment principles justify government regulation. Indeed the record in this case unmistakably demonstrates that the policy as enacted is so vague that no one can adequately define it . . .

"Moreover this court holds that unless the Commission enacts valid regulations giving fair notice to licensees of what is expected, the Commission has no authority to use the licensing process to control the depiction of violence or the presentation of adult material on television . . .

"This is not to say that the Commission is powerless to prevent abuses. Evidence was presented in this case that some broadcasters

have programmed violence not because they believe it is in the public interest but because it is in the financial interest of the licensee [T]he Commission has the right and the duty to prevent and control deliberate deviations from the requirement of independent programming. In the absence of valid regulation, however, it has no right to interfere with those decisions.

“But this court is not prepared to hold that the Commission acts beyond its power when it merely brings to the attention of broadcasters considerations which they may wish independently to consider in their programming. [But] the Commission has no right to accompany its suggestions with vague or explicit threats of regulatory action should broadcasters consider and reject them”

The Court also found the FCC's actions in this case objectionable because they failed to comply with the Administrative Procedure Act, requiring public notice and opportunity for public comment before new policies are adopted by a government agency.

While thus declaring the actions of the FCC and NAB unlawful, the Court declined to prohibit individual networks from continuing the family viewing policy, since each network had the First Amendment right to continue or discontinue the policy. The Court declared that NAB efforts to enforce the family viewing policy would be unlawful. The Court also declared that “the FCC may not enforce the family viewing policy and, in the absence of valid statutes or regulations, may not use the licensing process to prevent programming which it regards as offensive.” Injunctive relief was declined by the Court in the belief that defendants would voluntarily conform to the guidelines thus declared; if further lawless conduct should occur, the Court was prepared to issue appropriate injunctive relief.

The government defendants were held to be protected against damage claims by the defense of sovereign immunity; the private defendants were not similarly protected and were held liable for financial damages to any claimant establishing such damages.³⁵

FCC v. PACIFICA FOUNDATION

Supreme Court of the United States, 1978.
438 U.S. 726 57 L.Ed.2d 1073, 98 S.Ct. 3026.

Mr. Justice STEVENS delivered the opinion of the Court (Parts I, II, III and IV-C) and an opinion in which THE CHIEF JUSTICE and Mr. Justice REHNQUIST joined (Parts IV-A and IV-B).

35. On the family viewing hour and the *Writers Guild* litigation, see Casenotes, 28 *Syr.L.Rev.* 583 (1977); 20 *Ariz.L.Rev.* 315 (1978); Note, Family Viewing Hour, An Assault on the First Amend-

ment? 4 *Ilust.Const.L.Q.* 935 (1977); Note, It's All in the Family: Family Viewing and the First Amendment, 7 *N.Y.U.Rev.L. & Soc. Change* 83 (1978).

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station owned by respondent, Pacifica Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."

The complaint was forwarded to the station for comment. In its response, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that immediately before its broadcast listeners had been advised that it included "sensitive language which might be regarded as offensive to some."

On February 21, 1975, the Commission issued a Declaratory Order granting the complaint and holding that Pacifica "could have been the subject of administrative sanctions." 56 F.C.C.2d 94, 99 (1975). The Commission did not impose formal sanctions, but it did state that the order would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress."³⁶

In its Memorandum Opinion the commission stated that it intended to "clarify the standards which will be utilized in considering" the growing number of complaints about indecent speech on the airwaves. *Id.*, at 94. Advancing several reasons for treating broadcast speech differently from other forms of expression,³⁷ the Commission

36. *Ibid.* The Commission noted: "Congress has specifically empowered the FCC to (1) revoke a station's license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S.C.A. §§ 312(a), 312(b), 503(b)(1)(E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S.C.A. §§ 307, 308." *Id.*, at 96 n. 3.

[Some footnotes have been omitted; others have been renumbered.]

37. "Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to

found a power to regulate indecent broadcasting in two statutes: 18 U.S.C.A. § 1464, which forbids the use of “any obscene, indecent, or profane language by means of radio communications,” and 47 U.S.C.A. § 303(g), which requires the Commission to “encourage the larger and more effective use of radio in the public interest.”

The Commission characterized the language used in the Carlin monologue as “patently offensive,” though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the “law generally speaks to *channeling* behavior more than actually prohibiting it. . . . [T]he concept of ‘indecent’ is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.” 56 F.C.C.2d, at 98.³⁸

Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they “were broadcast at a time when children were undoubtedly in the audience (i. e., in the early afternoon),” and that the prerecorded language, with these offensive words “repeated over and over,” was “deliberately broadcast.” *Id.*, at 99. In summary, the Commission stated: “We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C.A. 1464.”³⁹

After the order issued, the Commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that it “never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.” 59 F.C.C.2d 892 (1976). The Commission noted that its “declaratory order was issued in a specific factual

extra deference, see *Rowan v. Post Office Dept.*, 397 U.S. 728 [90 S.Ct. 1484, 25 L.Ed.2d 736] (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.” 56 F.C.C.2d, at 97.

38. Thus, the Commission suggested, if an offensive broadcast had literary, artistic, political or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience. *Ibid.*

39. [Ed.] The words were shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.

context,” and declined to comment on various hypothetical situations presented by the petition.⁴⁰ . . .

The United States Court of Appeals for the District of Columbia reversed, with each of the three judges on the panel writing separately. 556 F.2d 9. Judge Tamm concluded that the order represented censorship and was expressly prohibited by § 326 of the Communications Act. Alternatively, Judge Tamm read the Commission opinion as the functional equivalent of a rule and concluded that it was “overbroad.” *Id.*, at 18. Chief Judge Bazelon’s concurrence rested on the Constitution. He was persuaded that § 326’s prohibition against censorship is inapplicable to broadcasts forbidden by § 1464. However, he concluded that § 1464 must be narrowly construed to cover only language that is obscene or otherwise unprotected by the First Amendment. *Id.*, at 24–30. Judge Leventhal, in dissent, stated that the only issue was whether the Commission could regulate the language “*as broadcast.*” *Id.*, at 31. Emphasizing the interest in protecting children, not only from exposure to indecent language, but also from exposure to the idea that such language has official approval, *id.* at 37, and n. 18, he concluded that the Commission had correctly condemned the daytime broadcast as indecent.

I

The general statements in the Commission’s memorandum opinion do not change the character of its order. Its action was an adjudication under 5 U.S.C.A. § 554(e) (1976 ed.); it did not purport to engage in formal rulemaking or in the promulgation of any regulations. The order “was issued in a special factual context”; questions concerning possible action in other contexts were expressly reserved for the future. The specific holding was carefully confined to the monologue “*as broadcast.*”

II

The relevant statutory questions are whether the Commission’s action is forbidden “censorship” within the meaning of 47 U.S.C.A. § 326 and whether speech that concededly is not obscene may be restricted as “indecent” under the authority of 18 U.S.C.A. § 1464. The questions are not unrelated, for the two statutory provisions have a common origin. Nevertheless, we analyze them separately.

40. The Commission did, however comment that:
 “[I]n some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.’ Under these circumstances we believe that it would

be inequitable for us to hold a licensee responsible for indecent language We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community’s needs, interests and tastes.” 59 F.C.C.2d, at 893 n. 1.

The prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties.

[The Court discussed several Court of Appeals decisions, including *KFKB*, 49 F.2d 670, and *Trinity*, 62 F.2d 850.]

Entirely apart from the fact that the subsequent review of program content is not the sort of censorship at which the statute was directed, its history makes it perfectly clear that it was not intended to limit the Commission's power to regulate the broadcast of obscene, indecent, or profane language. [The legislative history of § 326 was discussed.]

We conclude, therefore, that § 326 does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.

III

The only other statutory question presented by this case is whether the afternoon broadcast of the "Filthy Words" monologue was indecent within the meaning of § 1464.⁴¹ Even that question is narrowly confined by the arguments of the parties.

The Commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent. Pacifica takes issue with the Commission's definition of indecency, but does not dispute the Commission's preliminary determination that each of the components of its definition was present. Specifically, Pacifica does not quarrel with the conclusion that this afternoon broadcast was patently offensive. Pacifica's claim that the broadcast was not indecent within the meaning of the statute rests entirely on the absence of prurient appeal.

The plain language of the statute does not support Pacifica's argument. The words "obscene, indecent, or profane" are written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality.

41. In addition to § 1464, the Commission also relied on its power to regulate in the public interest under 47 U.S.C.A. § 303(g). We do not need to

consider whether § 303 may have independent significance in a case such as this. . . .

Pacifica argues, however, that this Court has construed the term "indecent" in related statutes to mean "obscene," as that term was defined in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419. Pacifica relies most heavily on the construction this Court gave to 18 U.S.C.A. § 1461 in *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590. . . . *Hamling* rejected a vagueness attack on § 1461, which forbids the mailing of "obscene, lewd, lascivious, indecent, filthy, or vile" material. In holding that the statute's coverage is limited to obscenity . . . the Court adopted a construction which assured the statute's constitutionality.

The reasons supporting *Hamling's* construction of § 1461 do not apply to § 1464. Although the history of the former revealed a primary concern with the prurient, the Commission has long interpreted § 1464 as encompassing more than the obscene.⁴² The former statute deals primarily with printed matter enclosed in sealed envelopes mailed from one individual to another; the latter deals with the content of public broadcasts. It is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means.⁴³

Because neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language, we reject Pacifica's construction of the statute. When that construction is put to one side, there is no

42. "[W]hile a nudist magazine may be within the protection of the First Amendment. . . . the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C.A. § 1464 Similarly, regardless of whether the 'four-letter words' and sexual description, set forth in 'Lady Chatterley's Lover,' (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activities on radio or TV would raise similar public interest and § 1464 questions." Programming Policy Statement, 44 F.C.C. 2303, 2307 (1960). See also WUHY-FM, 24 F.C.C.2d 408, 412 (1970); *Sonderling Broadcasting Corp.*, 27 R.R.2d 285, on reconsideration, 41 F.C.C.2d 777 (1973), *aff'd* on other grounds sub nom. *Illinois Citizens Committee for Broadcasting v. FCC*, 169 U.S.App.D.C. 166, 515 F.2d 397 (1974); *Mile High Stations, Inc.*, 28 F.C.C. 795 (1960); *Palmetto Broadcasting Co.*, 33 F.C.C. 250 (1962), reconsideration denied, 34 F.C.C. 101 (1963), *aff'd* on other grounds sub nom. *Robinson v. F.C.C.*, 118 U.S.App.D.C. 144, 334 F.2d

534, cert. denied, 379 U.S. 843, 85 S.Ct. 84, 13 L.Ed.2d 49 (1964).

43. This conclusion is re-enforced by noting the different constitutional limits on Congress' power to regulate the two different subjects. Use of the postal power to regulate material that is not fraudulent or obscene raises "grave constitutional questions." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586. But it is well settled that the First Amendment has a special meaning in the broadcasting context. See, e. g., *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697; *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371; *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772. For this reason, the presumption that Congress never intends to exceed constitutional limits, which supported *Hamling's* narrow reading of § 1461, does not support a comparable reading of § 1464.

basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast.

IV

Pacifica makes two constitutional attacks on the Commission's order. First, it argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast of the "Filthy Words" monologue is not itself protected by the First Amendment. Second, Pacifica argues that inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

A

The first argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast. As the Commission itself emphasized, its order was "issued in a specific factual context." 59 F.C.C.2d, at 893. That approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context—it cannot be adequately judged in the abstract.

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities.⁴⁴ While some of these references may be protected, they surely lie at the periphery of First Amendment concern. Cf. *Bates v. State Bar*, 433 U.S. 350, 380–381, 97 S.Ct. 2691, 2707–2708, 53 L.Ed.2d 810; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61, 96 S.Ct. 2440, 2448, 49 L.Ed.2d 310. . . .

B

When the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances.⁴⁵ For if the government has any such power, this was an appropriate occasion for its exercise.

44. A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

45. Pacifica's position would of course deprive the Commission of any power to regulate erotic telecasts unless they were obscene under *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419. Anything that could be sold

at a newsstand for private examination could be publicly displayed on television.

We are assured by Pacifica that the free play of market forces will discourage indecent programming. "Smut may," as Judge Leventhal put it, "drive itself from the market and confound Gresham," 181 U.S.App.D.C., at 158, 556 F.2d at 35; the prosperity of those who traffic in pornographic literature and films would appear to justify his skepticism.

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content.⁴⁶ Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four letter words—First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends.⁴⁷ Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said, “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031.

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. See, e. g., *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303. Indeed, we may assume, *arguendo*, that this monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its “social value,” to use Mr. Justice Murphy's term, vary with the circumstances. Words that are

46. The monologue does present a point of view; it attempts to show that the words it uses are “harmless” and that our attitudes toward them are “essentially silly.” . . . The Commission objects, not to this point of view, but to the way in which it is expressed. The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet.

47. The Commission stated: “Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions” 56 F.C.C.2d, at 98. Our society has a tradition of performing certain bodily functions in private, and of severely limiting the public exposure or discussion of such matters. Verbal or physical acts exposing those intimacies are offensive irrespective of any message that may accompany the exposure.

commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion's lyric is another's vulgarity. Cf. *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284.⁴⁸

In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.

C

We have long recognized that each medium of expression presents special First Amendment problems. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503, 72 S.Ct. 777, 780-781, 96 L.Ed. 1098. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. . . .

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder. *Rowan v. Post Office Department*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give

48. The importance of context is illustrated by the *Cohen* case. That case arose when Paul Cohen entered a Los Angeles courthouse wearing a jacket emblazoned with the words "Fuck the Draft." After entering the courtroom, he took the jacket off and folded it. *Id.*, at 19 n. 3, 91 S.Ct., at 1785. So far as the evidence showed, no one in the courthouse was offended by his jacket. Nonetheless, when he left the courtroom, Cohen was arrested, convicted of disturbing the peace, and sentenced to 30 days in prison.

In holding that criminal sanctions could not be imposed on Cohen for his political statement in a public place, the Court rejected the argument that

his speech would offend unwilling viewers; it noted that "there was no evidence that persons powerless to avoid [his] conduct did in fact object to it." *Id.*, at 22, 91 S.Ct., at 1786. In contrast, in this case the Commission was responding to a listener's strenuous complaint, and Pacifica does not question its determination that this afternoon broadcast was likely to offend listeners. It should be noted that the Commission imposed a far more moderate penalty on Pacifica than the state court imposed on Cohen. Even the strongest civil penalty at the Commission's command does not include criminal prosecution. See n. [36] *supra*.

the caller a constitutional immunity or avoid a harm that has already taken place.

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, that the government's interest in the "well being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. *Id.*, at 640 and 639, 88 S.Ct., at 1280.⁴⁹ The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

The judgment of the Court of Appeals is reversed.

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN, joins, concurring.

49. The Commission's action does not by any means reduce adults to hearing only what is fit for children. Cf. *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412. Adults who feel the need may purchase tapes and records or go to theatres and nightclubs to hear these words. In

fact, the Commission has not unequivocally closed even broadcasting to speech of this sort; whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided.

I join Parts I, II, III, and IV(C) of MR. JUSTICE STEVENS' opinion. . . .

The Commission's holding does not prevent willing adults from purchasing Carlin's record [or] from attending his performances. . . . On its face, it does not prevent respondent from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, nor from broadcasting discussions of the contemporary use of language at any time during the day. The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here. In short, I agree that on the facts of this case, the Commission's order did not violate respondent's First Amendment rights.

II

. . . [M]y views are generally in accord with what is said in Part IV(C) of MR. JUSTICE STEVENS' opinion. . . . I therefore join that portion of his opinion. I do not join Part IV(B), however, because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection. . . . In my view, the result in this case does not turn on whether Carlin's monologue, viewed as a whole, or the words that comprise it, have more or less "value" than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him.

The result turns instead on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes. Moreover, I doubt whether today's decision will prevent any adult who wishes to receive Carlin's message in Carlin's own words from doing so, and from making for himself a value judgment as to the merit of the message and words. . . . These are the grounds upon which I join the judgment of the Court as to Part IV.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I agree with MR. JUSTICE STEWART that, under *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), and *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), the word "indecent" in 18 U.S.C.A. § 1464

must be construed to prohibit only obscene speech.⁵⁰ I would, therefore, normally refrain from expressing my views on any constitutional issues implicated in this case. However, I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose *its* notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.

I

For the second time in two years, see *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Court refuses to embrace the notion, completely antithetical to basic First Amendment values, that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court. . . . Moreover, as do all parties, all Members of the Court agree that the Carlin monologue aired by Station WBAI does not fall within one of the categories of speech, such as "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), or obscenity, *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), that is totally without First Amendment protection. This conclusion, of course, is compelled by our cases expressly holding that communications containing some of the words found condemnable here are fully protected by the First Amendment in other contexts. . . . Yet despite the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content, and despite our unanimous agreement that the Carlin monologue is protected speech, a majority of the Court nevertheless finds that, on the facts of this case, the FCC is not constitutionally barred from imposing sanctions on Pacifica for its airing of the Carlin monologue. This majority apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast of Carlin's "Dirty Words" recording is a permissible time, place, and manner regulation. *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). Both the opinion of my Brother STEVENS and the opinion of my Brother POWELL rely principally on two factors in reaching this conclusion: (1) the capacity of a radio broadcast to intrude into the unwilling listener's home, and (2) the presence of children in the listening audience. Dispassionate analysis, removed from individual notions as to what is proper and what is not, starkly reveals that these justifications, whether individually or together, simply do not support even the professedly moderate degree of governmental homogenization of radio communications—if, indeed, such homogenization can ever be moderate given the pre-eminent status of the right of free speech in our constitutional scheme—that the Court today permits.

50. [Ed.] Justice Stewart's dissenting opinion also was joined by Justice White.

A

Without question, the privacy interests of an individual in his home are substantial and deserving of significant protection. In finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second, it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many—including the FCC and this Court—might find offensive.

. . . I am in wholehearted agreement with my brethren that an individual's right "to be let alone" when engaged in private activity within the confines of his own home . . . is entitled to the greatest solicitude. *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). However, I believe that an individual's actions in switching on and listening to communications transmitted over the public airways and directed to the public at-large do not implicate fundamental privacy interests, even when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse. . . . Although an individual's decision to allow public radio communications into his home undoubtedly does not abrogate all of his privacy interests, the residual privacy interests he retains vis-à-vis the communication he voluntarily admits into his home are surely no greater than those of the people present in the corridor of the Los Angeles courthouse in *Cohen* who bore witness to the words "Fuck the Draft" emblazoned across Cohen's jacket. Their privacy interests were held insufficient to justify punishing Cohen for his offensive communication.

Even if an individual who voluntarily opens his home to radio communications retains privacy interests of sufficient moment to justify a ban on protected speech if those interests are "invaded in an essentially intolerable manner," *Cohen v. California*, supra, 403 U.S., at 21, 91 S.Ct., at 1786, the very fact that those interests are threatened only by a radio broadcast precludes any intolerable invasion of privacy; for unlike other intrusive modes of communication, such as sound trucks, "[t]he radio can be turned off," *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974)—and with a minimum of effort. . . . Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. . . .

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals comprising the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds. *Rowan v. Post Office Department*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), relied on by the FCC and by the opinions of my Brothers POWELL and STEVENS, confirms rather than belies this conclusion. In *Rowan*, the Court upheld a statute, 39 U.S.C.A. § 4009, permitting householders to require that mail advertisers stop sending them lewd or offensive materials and remove their names from mailing lists. Unlike the situation here, householders who wished to receive the sender's communications were not prevented from doing so. Equally important, the determination of offensiveness *vel non* under the statute involved in *Rowan* was completely within the hands of the individual householder; no governmental evaluation of the worth of the mail's content stood between the mailer and the householder. In contrast, the visage of the censor is all too discernable here.

B

Most parents will undoubtedly find understandable as well as commendable the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency. . . .

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them. It thus ignores our recent admonition that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." . . . The Court's refusal to follow its own pronouncements is especially lamentable since it has the anomalous subsidiary effect, at least in the radio context at issue here, of making completely unavailable to adults material which may not constitutionally be kept even from children. . . .

In concluding that the presence of children in the listening audience provides an adequate basis for the FCC to impose sanctions for Pacifica's broadcast of the Carlin monologue, the opinions of my Brother POWELL, and my Brother STEVENS, both stress the time-honored right of a parent to raise his child as he sees fit—a right

this Court has consistently been vigilant to protect. See *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Yet this principle supports a result directly contrary to that reached by the Court. *Yoder* and *Pierce* hold that parents, *not* the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that.

C

As demonstrated above, neither of the factors relied on by both the opinion of my Brother POWELL and the opinion of my Brother STEVENS—the intrusive nature of radio and the presence of children in the listening audience—can, when taken on its own terms, support the FCC's disapproval of the Carlin monologue. These two asserted justifications are further plagued by a common failing: the lack of principled limits on their use as a basis for FCC censorship. No such limits come readily to mind, and neither of the opinions comprising the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communications the Commission finds offensive. Taken to their logical extreme, these rationales would support the cleansing of public radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.⁵¹

In order to dispel the spectre of the possibility of so unpalatable a degree of censorship, and to defuse Pacifica's overbreadth challenge, the FCC insists that it desires only the authority to reprimand a broadcaster on facts analogous to those present in this case, which

51. Although ultimately dependent upon the outcome of review in this Court, the approach taken by my Brother STEVENS would not appear to tolerate the FCC's suppression of any speech, such as political speech, falling within the core area of First Amendment concern. The same, how-

ever, cannot be said of the approach taken by my Brother POWELL, which, on its face, permits the Commission to censor even political speech if it is sufficiently offensive to community standards. A result more contrary to rudimentary First Amendment principles is difficult to imagine.

it describes as involving "broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual or excretory activities and organs in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience." Brief for the Federal Communications Commission 45. The opinions of both my Brother POWELL and my Brother STEVENS take the FCC at its word, and consequently do no more than permit the Commission to censor the afternoon broadcast of the "sort of verbal shock treatment," opinion of Mr. Justice POWELL, . . . involved here. To insure that the FCC's regulation of protected speech does not exceed these bounds, my Brother POWELL is content to rely upon the judgment of the Commission while my Brother STEVENS deems it prudent to rely on this Court's ability accurately to assess the worth of various kinds of speech. For my own part, even accepting that this case is limited to its facts, I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand.

II

The absence of any hesitancy in the opinions of my Brothers POWELL and STEVENS to approve the FCC's censorship of the Carlin monologue on the basis of two demonstrably inadequate grounds is a function of their perception that the decision will result in little, if any, curtailment of communicative exchanges protected by the First Amendment. Although the extent to which the Court stands ready to countenance FCC censorship of protected speech is unclear from today's decision, I find the reasoning by which my Brethren conclude that the FCC censorship they approve will not significantly infringe on First Amendment values both disingenuous as to reality and wrong as a matter of law.

My Brother STEVENS, in reaching a result apologetically described as narrow, . . . takes comfort in his observation that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication," . . . and finds solace in his conviction that "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word "censor" is such a word. Mr. Justice Harlan, speaking for the Court, recognized the truism that a speaker's choice of words cannot surgically be separated from the ideas he desires to

express when he warned that “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.” *Cohen v. California*, 403 U.S., at 26, 91 S.Ct., at 1788. Moreover, even if an alternative phrasing may communicate a speaker’s abstract ideas as effectively as those words he is forbidden to use, it is doubtful that the sterilized message will convey the emotion that is an essential part of so many communications. . . .

My Brother STEVENS also finds relevant to his First Amendment analysis the fact that “[a]dulterers who feel the need may purchase tapes and records or go to theatres and nightclubs to hear [the tabooed] words.” . . . My Brother POWELL agrees . . . The opinions of my Brethren display both a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin’s message may not be able to afford, and a naive innocence of the reality that in many cases the medium may well be the message.

The Court apparently believes that the FCC’s actions here can be analogized to the zoning ordinances upheld in *Young v. American Mini Theatres*, supra. For two reasons, it is wrong. First, the zoning ordinances found to pass constitutional muster in *Young* had valid goals other than the channeling of protected speech. *Id.*, 427 U.S., at 71 n. 34, 96 S.Ct., at 2453 (opinion of STEVENS, J.); *id.*, at 80, 96 S.Ct., at 2457 (POWELL, J., concurring). No such goals are present here. Second, and crucial to the opinions of my Brothers POWELL and STEVENS in *Young*—opinions, which, as they do in this case, supply the bare five-person majority of the Court—the ordinances did not restrict the access of distributors or exhibitors to the market or impair the viewing public’s access to the regulated material. *Id.*, at 62, 71 n. 35, 96 S.Ct., at 2453 (opinion of STEVENS, J.); *id.*, at 77, 96 S.Ct., at 2455 (POWELL, J., concurring). Again, this is not the situation here. Both those desiring to receive Carlin’s message over the radio and those wishing to send it to them are prevented from doing so by the Commission’s actions. . . .

III

It is quite evident that I find the Court’s attempt to unstitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case dangerous as well as lamentable. Yet there runs throughout the opinions of my Brothers POWELL and STEVENS another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.

The words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that comprise this Nation. Academic research indicates that this is indeed the case. . . .

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences comprised of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds.⁵² In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking. . . .⁵³

Note on State Regulation of Broadcast Program Content. State efforts to control the content of broadcasts originating within their borders have met with varying responses. In *Allen B. Dumont Laboratories v. Carroll*,⁵⁴ a Pennsylvania movie censorship statute was

52. Under the approach taken by my Brother POWELL, the availability of broadcasts *about* groups whose members comprise such audiences might also be affected. Both news broadcasts about activities involving these groups and public affairs broadcasts about their concerns are apt to contain interviews, statements, or remarks by group leaders and members which may contain offensive language to an extent by Brother POWELL finds unacceptable.

3. See Note, *Offensive Speech and the FCC*, 79 Yale L.J. 1343 (1970); Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 Harv.L.Rev. 664 (1971); Note, *Filthy Words, the FCC and the First Amendment: Regulating Broadcast Obscenity*, 61 Va.L.Rev. 579 (1975); Comment, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, 1974 Ariz.St.L.J. 457 (1974); Note, *Pacifica Foundation v. FCC: "Filthy Words," the First Amendment and the Broadcast Media*, 78 Colum.L.Rev. 164 (1978); Wing, *Morality and Broadcasting: FCC Regulation of "Indecent" Material Following Pacifica*, 31 Fed.Com.L.J. 145 (1978).

In *WGBH Educational Foundation*, 69 F.C.C.2d 1250, 43 R.R.2d 1436 (1978),

the renewal of Boston's noncommercial educational station was opposed on the ground that it broadcast offensive programs, including sexually oriented material and vulgar language. The FCC ruled that the programs, while offensive to some, were not obscene and were not a basis for refusing to renew WGBH's license. As to the vulgar language, the FCC observed that it intended "strictly to observe the narrowness of the *Pacifica* holding," and that the situation presented here "clearly is distinguishable from the *Pacifica* case." "First, the words . . . were contained in one program broadcast after 11:00 p. m. (where the words were used two times), and in one other program (a minority-oriented Broadway play) broadcast at 5:30 p. m. (where one of the words was used once) . . . [L]ate evening hours such as are present here are [not] within the intent of [*Pacifica*]. Further, the single word contained in the 5:30 p. m. program should not call for us to act under the holding of *Pacifica*. [These] programs differ dramatically from the concentrated and repeated assault involved in *Pacifica*."

54. 184 F.2d 153 (3d Cir. 1950), certiorari denied 340 U.S. 929, 71 S.Ct. 490, 95 L.Ed. 670 (1951).

in issue. State officials contended that, before films could be shown on Pennsylvania television stations, they had to be submitted to the state agency for its approval. In an action for a declaratory judgment, the court held that the state regulation was invalid: "Congress has occupied fully the field of television regulation and . . . that field is no longer open to the States." The state officials relied on § 326 of the Act, forbidding censorship by the FCC, and argued that this left the field open to the states. The court rejected the contention, reviewing the nature of the FCC's functions and observing that Congress was not unconcerned about program content but decided against the technique of prior restraint. "Congress thus set up a species of 'program control' far broader and more effective than the antique method of censorship which Pennsylvania endeavors to effectuate in the instant case."

The Supreme Court considered one facet of the problem in *Head v. New Mexico Board*.⁵⁵ A radio station operating in New Mexico, near the Texas border, was enjoined by a New Mexico court from accepting advertising from a Texas optometrist which violated a New Mexico statute prohibiting references to price in such advertising. The Supreme Court sustained the injunction, over objections based on the commerce clause and the preemptive effect of the federal communications legislation. As to the latter, the Court observed that the regulatory authority given the FCC, which was assumed to extend to advertising practices, could not have been intended "to supplant all the detailed state regulation of professional advertising practices, particularly when the grant of power to the Commission was accompanied by no substantive standard other than 'public interest, convenience and necessity.'" The *Dumont* case was referred to as one "which held state censorship . . . preempted by those provisions of the federal act expressly dealing with 'communications containing profane or obscene words, language or meaning'. 47 U.S.C.A. § 303(m)(1)(D)."⁵⁶ The Court in the *Head* case also referred to the FCC's attitude toward state regulation of advertising, which the Commission considered to complement its own regulatory functions. As an example, the Court cited the following Commission statement of policy:

"In those localities or states where the sale of alcoholic beverages is prohibited by state or local statutes, such advertising by radio in those areas would, of course, not be in the public interest. . . . Obviously, the same is true with respect to those areas where advertising of alcoholic beverages is prohibited by law."

55. 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed. 2d 983 (1963).

"the license of any operator," and confers no authority upon the Commission to deal with station licensees.

56. This provision, while mentioned in *Dumont*, refers to the suspension of

In a concurring opinion, Justice Brennan made an extensive survey of the authorities relative to regulation of broadcast advertising.⁵⁷

CAPITAL BROADCASTING Co. v. MITCHELL, 333 F.Supp. 582 (D.D.C.1971), affirmed per curiam, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972). Six radio stations challenged the constitutionality of Public Law 91-922, 84 Stat. 89 (1970), 15 U.S.C.A. § 1335, which made it unlawful "to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." The constitutional challenge was rejected, one judge dissenting.

As to the First Amendment, the Court observed that "product advertising is less vigorously protected than other forms of speech," and that the "unique characteristics of electronic communication make it especially subject to regulation in the public interest." However, the Court also observed that "Congress has the power to prohibit the advertising of cigarettes in any media." The Court found it "dispositive that the Act has no substantial effect on the exercise of petitioners' First Amendment rights. Even assuming that loss of revenue from cigarette advertisements affects petitioners with sufficient First Amendment interest, petitioners, themselves, have lost no right to speak—they have only lost an ability to collect revenue from others for broadcasting their commercial messages."

As to the claim that the statute improperly discriminated against broadcasters, the Court found a "rational basis for placing a ban on cigarette advertisements on broadcast facilities while allowing such advertisements in print. . . . Substantial evidence showed that the most persuasive advertising was being conducted on radio and television, and these broadcasts were particularly effective in reaching a very large audience of young people. Thus, Congress knew of the close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people, and was no doubt aware that the younger the individual, the greater the reliance on the broadcast message rather than the written word." Further, "[w]ritten messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air.' In an age of omnipresent radio, . . . [i]t is difficult to calculate the subliminal impact of this pervasive propaganda Moreover, Congress could rationally distinguish radio and television from other media on the basis that the public owns the airwaves and that licensees must operate broadcast facilities in the public interest under the supervision of a federal regulatory agency. Legislation concerning newspapers and magazines must take into account the fact that the printed media are privately owned."

57. In *Missouri Broadcasters Ass'n v. Danforth*, 26 R.R.2d 967 (Mo.Cir.Ct., 16th Jud.Dist., 1973), it was held that

state laws pertaining to broadcast of lottery information had been preempted by federal legislation.

VIRGINIA STATE BOARD OF PHARMACY v. VIRGINIA CITIZENS CONSUMER COUNCIL, INC., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed. 2d 346 (1976). A Virginia statute precluded a licensed pharmacist from publishing, advertising or promoting, "directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription." The statute was challenged as violative of the First Amendment by prescription drug consumers who pointed to the very large variations in prescription drug prices (ranging up to 650%) and who claimed that they would be benefited if the statutory prohibition were lifted and advertising freely allowed. The Supreme Court sustained the claim and invalidated the statute.

The Court ruled initially that the drug consumers had standing to attack the statute, since, "if there is a right to advertise, there is a reciprocal right to receive the advertising." The Court further observed that previously it had indicated, in a number of decisions, "that commercial speech is unprotected." The validity of the "commercial speech" exception to First Amendment protection was considered to be squarely presented in this case:

"Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The 'idea' he wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.'"

In concluding that such speech was entitled to First Amendment protection, the Court observed that the "purely economic" interest of the advertiser did not disqualify him for protection; that consumers had a keen interest in such information ("Those whom the suppression of prescription drug information hits the hardest are the poor, the sick, and particularly the aged."); that society also may have a strong interest in the free flow of commercial information, some of which, though entirely "commercial," may be of "general public interest" (referring to cases protecting advertising relating to abortions, to wild-life protection, and to domestic vs. imported products); and that such an element could readily be added to most commercial advertising: "Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not."

More generally the Court observed:

". . . Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason,

and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal."

The Court discussed the reasons Virginia advanced in support of suppressing the advertising of prescription drug prices, relating principally to maintaining "a high degree of professionalism on the part of licensed pharmacists." It was believed that emphasis on price competition would erode stable pharmacist-customer relationships and pharmacist attention to the known problems of individual customers. The Court rejected this justification because it rested in large measure on the advantages of keeping citizens in ignorance. It stressed an alternative approach.

" . . . That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the 'professional' pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have re-enforced our view that it is. We so hold."

The Court indicated that regulation was not foreclosed as to "time, place, and manner"; as to false and misleading advertising; as to proposed transactions which are themselves illegal; and, possi-

bly, as to advertising in the context of other professions, such as law and medicine. "Finally, the special problems of the electronic broadcast media are not in this case," citing *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.D.C.1971), affirmed per curiam, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972).⁵⁸

58. Justice Stevens did not participate. Chief Justice Burger and Justice Stewart concurred in separate opinions. Justice Rehnquist dissented.

New Constitutional Doctrine, 44 U.Chi. L.Rev. 205 (1976); K. Middleton, *Commercial Speech and the First Amendment* (1977).

See Comment, *First Amendment Protection for Commercial Advertising: The*

Chapter VIII

REGULATION OF PROGRAMMING: "BALANCE," RESPONSIVENESS AND SPECIAL RESPONSIBILITIES

*Introductory Note on Balanced Programming and Responsiveness to Community Needs.*¹ As previously noted, the Commission early condemned the use of radio stations for narrow ideological purposes. The same rationale was applied to narrow commercial purposes. As indicated in connection with the *Brinkley* litigation, radio stations were not to be used primarily as adjuncts to the non-broadcast business interests of the licensee. Licensed facilities were to serve the needs of the general public, not the licensee or some restricted group. Thus, in *Food Terminal Broadcasting Co.*,² the Commission refused to license a station to disseminate food marketing reports to a limited number of interested merchants. From these extreme cases, the idea evolved that stations should endeavor to present a "balanced" program schedule, with items of interest to all segments of the listening audience.

It also was thought appropriate that the licensee should become familiar with the community to be served, both to determine the kind

1. On FCC efforts to attain program "balance," see Pierson, *The Need for Modification of Section 326, 18 Fed. Com.B.J.* 15 (1963); Barrow, *The Attainment of Balanced Program Service in Television*, 52 *Va.L.Rev.* 633 (1968); Comment, *The Wasteland Revisited: A Modest Attack Upon the FCC's Category System*, 17 *U.C.L.A.L.Rev.* 868 (1970); Goldberg, *A Proposal to Deregulate Broadcast Programming*, 42 *Geo.Wash.L.Rev.* 73 (1973); Note, *Judicial Review of FCC Program Diversity Regulation*, 75 *Colum.L.Rev.* 401 (1975); Schiro, *Diversity in Television's Speech: Balancing Programs in the Eyes of the Viewer*, 27 *Case W.Res. L.Rev.* 336 (1976).

On special problems posed by religious programming, see Loevinger, *Religious Liberty and Broadcasting*, 33 *Geo.Wash.L.Rev.* 631 (1965); Cox, *The FCC, the Constitution and Religious Broadcast Programming*, 34 *Geo. Wash.L.Rev.* 196 (1965).

On the underlying economic problems, see Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 *Q.J.Econ.* 194 (1952). More recent dis-

cussions include McGowan, *Competition, Regulation, and Performance in Television Broadcasting*, 1967 *Wash. U.L.Q.* 499; Greenberg, *Television Station Profitability and FCC Regulatory Policy*, 17 *J.Lud.Econ.* 210 (1969); Greenberg & Barnett, *TV Program Diversity—New Evidence and Old Theories*, 61 *Amer.Econ.Rev.Papers & Proc.* 89 (1971); Levin, *Program Duplication, Diversity and Effective Viewer Choices: Some Empirical Findings*, 61 *Amer.Econ.Rev.Papers & Proc.* 81 (1971); Hall & Battiyala, *Market Structure and Duplication in TV Broadcasting*, 47 *Land Econ.* 405 (1971); Bowman and Farley, *An Analysis of Television Program Choice*, 4 *Applied Econ.* 245 (Dec. 1972); Bowman, *Consumer Choice and Television* 7 *Applied Econ.* 175 (Sept. 1975); S. Besen and B. Mitchell, *Watergate and Television: An Economic Analysis* (Rand Corp. 1975); Beebe, *Institutional Structure and Program Choices in Television Markets*, 91 *Q.J.Econ.* 15 (1977); Crandall, *The Regulation of Television Broadcasting: How Costly is the "Public Interest," Regulation*, Jan.-Feb. 1978, p. 31.

2. 6 *F.C.C.* 271 (1938).

of programming required and to fulfill the station's role as a local institution. This attitude was manifested in *Simmons v. FCC*,³ where the Commission denied an application for change in frequency and increase in power of an AM station. The applicant proposed to carry all the programs of a national network, whether commercial or sustaining, and program independently only those parts of the broadcast day that remained. Holding that such a proposal would have to be denied without regard to the existence of an application seeking comparative consideration, the Commission observed that "a program policy which makes no effort whatsoever to tailor the programs offered by the national network organization to the particular needs of the community served by the radio station does not meet the public service responsibilities of a radio broadcast licensee. . . . [It is an abdication] of the duty and responsibility of a broadcast station licensee to determine for itself the nature and character of a program service which will best meet the needs of listeners in its area, . . . an abdication to an organization which makes no pretense to scheduling its programs with the particular needs and desires of one service area in mind." The Commission was sustained by the Court of Appeals, one judge dissenting on this point.

**PUBLIC SERVICE RESPONSIBILITY OF
BROADCAST LICENSEES**

Federal Communications Commission, 1946.⁴

. . . [T]he Commission must determine, with respect to each application granted or denied or renewed, whether or not the program service proposed is "in the public interest, convenience, and necessity."

The Federal Radio Commission was faced with this problem from the very beginning, and in 1928 it laid down a broad definition which may still be cited in part:

"Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this. . . . The emphasis should be on the *receiving* of service and the standard of public interest, convenience, or necessity should be construed accordingly. . . . The *entire* listening public within the service area of a station, or of a group of stations in one community, is entitled to service from that station or stations. . . . In a sense a broadcasting station may be regarded as a sort of mouthpiece on the air for the community

3. 83 U.S.App.D.C. 202, 169 F.2d 670 (1948), certiorari denied 335 U.S. 846, 69 S.Ct. 67, 93 L.Ed. 396 (1948).

4. [Ed.] Footnotes have been omitted. This publication was widely known as the "Blue Book."

it serves, over which its public events of general interest, its political campaigns, its election results, its athletic contests, its orchestras and artists, and discussion of its public issues may be broadcast. *If . . . the station performs its duty in furnishing a well rounded program, the rights of the community have been achieved.*" (In re Great Lakes Broadcasting Co., F.R.C. Docket No. 4900; cf. 3rd Annual Report of the F.R.C., pp. 32-36.) (Emphasis supplied)

THE CARRYING OF SUSTAINING PROGRAMS

[S]ince the early days of broadcasting, broadcasters and the Commission alike have recognized that sustaining programs . . . play an integral and irreplaceable part in the American system of broadcasting.

The Commission, as well as broadcasters themselves, has always insisted that a "well-balanced program structure" is an essential part of broadcasting in the public interest. At least since 1928, and continuing to the present, stations have been asked, on renewal, to set forth the average amount of time, or percentage of time, devoted to entertainment programs, religious programs, educational programs, agricultural programs, fraternal programs, etc.; and the Commission has from time to time relied upon the data thus set forth in determining whether a station has maintained a well-balanced program structure.

In metropolitan areas where the listener has his choice of several stations, balanced service to listeners can be achieved either by means of a balanced program structure for each station or by means of a number of comparatively specialized stations which, considered together, offer a balanced service to the community. In New York City, a considerable degree of specialization on the part of particular stations has already arisen—one station featuring a preponderance of classical music, another a preponderance of dance music, etc. With the larger number of stations which FM will make possible, such specialization may arise in other cities. To make possible this development on a sound community basis, the Commission proposes in its application forms hereafter to afford applicants an opportunity to state whether they propose a balanced program structure or special emphasis on program service of a particular type or types.

Experience has shown that in general advertisers prefer to sponsor programs of news and entertainment. There are exceptions;

but they do not alter the fact that if decisions today were left solely or predominantly to advertisers, news and entertainment would occupy substantially all of the time. The concept of a well-rounded structure can obviously not be maintained if the decision is left wholly or preponderantly in the hands of advertisers in search of a market, each concerned with his particular half hour, rather than in the hands of stations and networks responsible under the statute for overall program balance in the public interest.

It has long been an established policy of broadcasters themselves and of the Commission that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time.

[Sustaining] programs . . . have done much to enrich American broadcasting. It may well be that they have kept in the radio audience many whose tastes and interests would otherwise cause them to turn to other media. Radio might easily deteriorate into a means of amusing only one cultural stratum of the American public if commercially sponsored entertainment were not leavened by programs having a different cultural appeal.

Special problems are involved in connection with program service designed especially for farmers—market reports, crop reports, weather reports, talks on farming, and other broadcasts specifically intended for rural listeners.

THE CARRYING OF LOCAL LIVE PROGRAMS

In granting and renewing licenses, the Commission has given repeated and explicit recognition to the need for adequate reflection in programs of local interests, activities and talent. Assurances by the applicant that “local talent will be available”; that there will be “a reasonable portion of time for programs which include religious, educational, and civic matters”; that “time will be devoted to local news at frequent intervals, to market reports, agricultural topics and to various civic and political activities that occur in the city” have contributed to favorable decision on many applications. As the Commission noted in its *Supplemental Report on Chain Broadcasting* (1941):

“It has been the consistent intention of the Commission to assure that an adequate amount of time *during the good listening hours* shall be made available to meet the needs of the community in terms of public expression and of local interest. If these regu-

lations do not accomplish this objective, the subject will be given further consideration." (Emphasis supplied.)

. . . .
. . . . A positive responsibility rests upon local stations to make articulate the voice of the community. Unless time is earmarked for such a purpose, unless talent is positively sought and given at least some degree of expert assistance, radio stations have abdicated their local responsibilities and have become mere common carriers of program material piped in from outside the community.

DISCUSSION OF PUBLIC ISSUES

. . . .
One matter of primary concern can be met by an over-all statement of policy, and must be met as part of the general problem of over-all program balance. This is the question of the *quantity* of time which should be made available for the discussion of public issues.

The problems involved in making time available for the discussion of public issues are admittedly complex. Any vigorous presentation of a point of view will of necessity annoy or offend at least some listeners. There may be a temptation, accordingly, for broadcasters to avoid as much as possible any discussion over their stations, and to limit their broadcasts to entertainment programs which offend no one.

To operate in this manner, obviously, is to thwart the effectiveness of broadcasting in a democracy.

. . . .
The carrying of any particular public discussion, of course, is a problem for the individual broadcaster. But the public interest clearly requires that an adequate amount of time be made available for the discussion of public issues; and the Commission, in determining whether a station has served the public interest, will take into consideration the amount of time which has been or will be devoted to the discussion of public issues.

. . . .
[The Commission's Report also discussed advertising excesses, a topic reserved for later consideration.

[In conclusion, the Commission observed: "Primary responsibility for the American system of broadcasting rests with the licensee of broadcasting stations, including the network organizations." But the Commission also affirmed its "statutory responsibility for the public interest, of which it cannot divest itself." Operation in the public interest, the Commission concluded, involved the devotion of a reasonable proportion of time, during good listening hours, to sustaining programs, local live programs, and discussion programs.

Note would also be taken of network sustaining programs available to, but not carried by, an affiliated station. To assure closer attention to these elements of the public interest, the Commission proposed to revise the definitions employed in keeping program logs, so that different types of programs might be distinguished in a more meaningful way. It also proposed to obtain information which would indicate the extent to which programs of diverse types were being distributed among different segments of the broadcast day. The information thus obtained was to be employed in considering both initial and renewal applications. With respect to the latter, a comparison was to be made between the programs originally promised and those actually performed.]⁵

COMMISSION POLICY ON PROGRAMMING

Federal Communications Commission, 1960.
25 Fed.Reg. 7291, 20 R.R. 1901.

[This statement of policy, in the nature of an interim report, grew out of a proceeding in which there had been a staff study and an en banc hearing by the Commission and in which further proceedings were contemplated.]

Although the Commission must determine whether the total program service of broadcasters is reasonably responsive to the interests and needs of the public they serve, it may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program. To do so would "lay a forbidden burden upon the exercise of liberty protected by the Constitution." . . .

Nevertheless, several witnesses in this proceeding have advanced persuasive arguments urging us to require licensees to present specific

5. [Ed.] Following the release of the Blue Book, a number of renewal applications were set for hearing because of apparent programming deficiencies: inadequate balance among different program categories, inadequate proportion of sustaining programs, inadequate proportion of local live programs, inadequate provision for discussion of public issues, excessive commercialization. However, upon showings by the licensees that they were endeavoring to bring their program policies into line with the Blue Book's criteria, their licenses were renewed. Community Broadcasting Co., 12 F.C.C. 85 (1947); Howard W. Davis, 12 F.C.C. 91 (1947); Eugene J. Roth, 12 F.C.C. 102 (1947). At the same time, the broadcasting

industry became quite vocal in condemning the Blue Book as an infringement upon their right to free expression and their freedom to formulate independent business policies. See, for example, Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 1333, 80th Cong., 1st Sess. (1947) *passim*. With the advent of television, and the shift of regulatory emphasis, any remaining momentum that the Blue Book possessed was largely dissipated.

See Meyer, *The Blue Book*, 6 J.Broad. 197 (Summer 1962), and *Reaction to the Blue Book*, 6 J.Broad. 295 (Fall 1962).

types of programs on the theory that such action would enhance freedom of expression rather than tend to abridge it. With respect to this proposition we are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgement of freedom of speech and press flatly forbids governmental interference, benign or otherwise. . . .

In addition, there appears a second problem quite unrelated to the question of censorship that would enter into the Commission's assumption of supervision over program content. The Commission's role as a practical matter, let alone a legal matter, cannot be one of program dictation or program supervision. In this connection we think the words of Justice Douglas are particularly appropriate.

"The music selected by one bureaucrat may be as offensive to some as it is soothing to others. The news commentator chosen to report on the events of the day may give overtones to the news that pleases the bureaucrat but which rile the . . . audience. The political philosophy which one radio sponsor exudes may be thought by the official who makes up the programs as the best for the welfare of the people. But the man who listens to it . . . may think it marks the destruction of the Republic. . . . Today it is a business enterprise working out a radio program under the auspices of government. Tomorrow it may be a dominant political or religious group. . . . Once a man is forced to submit to one type of program, he can be forced to submit to another. It may be but a short step from a cultural program to a political program. . . . The strength of our system is in the dignity, resourcefulness and the intelligence of our people. Our confidence is in their ability to make the wisest choice. That system cannot flourish if regimentation takes hold." 6

Having discussed the limitations upon the Commission in the consideration of programming, there remains for discussion the exceptions to those limitations and the area of affirmative responsibility which the Commission may appropriately exercise under its statutory obligation to find that the public interest, convenience and necessity will be served by the granting of a license to broadcast.

In view of the fact that a broadcaster is required to program his station in the public interest, convenience and necessity, it follows despite the limitations of the First Amendment and Section 326 of the Act, that his freedom to program is not absolute. The Commission does not conceive that it is barred by the Constitution or by stat-

6. Public Utilities Commission of District of Columbia v. Pollak, 343 U.S. 451, 468, 72 S.Ct. 813, 823, 96 L.Ed.

1068. Dissenting Opinion. [This footnote has been renumbered; others have been omitted.]

ute from exercising any responsibility with respect to programming. It does conceive that the manner or extent of the exercise of such responsibility can introduce constitutional or statutory questions. It readily concedes that it is precluded from examining a program for taste or content, unless the recognized exceptions to censorship apply: for example, obscenity, profanity, indecency, programs inciting to riots, programs designed or inducing toward the commission of crime, lotteries, etc. These exceptions, in part, are written into the United States Code and, in part, are recognized in judicial decision. See Sections 1304, 1343 and 1464 of Title 18 of the United States Code (lotteries, fraud by radio, utterance of obscene, indecent or profane language by radio). . . .

. . .

Formerly by reason of administrative policy, and since September 14, 1959, by necessary implication from the amended language of Section 315 of the Communications Act, the Commission has had the responsibility for determining whether licensees "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." This responsibility usually is of the generic kind and thus, in the absence of unusual circumstances, is not exercised with regard to particular situations but rather in terms of operating policies of stations as viewed over a reasonable period of time. This, in the past, has meant a review, usually in terms of filed complaints, in connection with the applications made each three year period for renewal of station licenses. . . .⁷

. . .

The confines of the licensee's duty are set by the general standard "the public interest, convenience or necessity." The initial and principal execution of that standard, in terms of the area he is licensed to serve, is the obligation of the licensee. The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met his public responsibility. It is the duty of the Commission, in the first instance, to select persons as licensees who meet the qualifications laid down in the Act, and on a continuing basis to review the operations of such licensees from time to time to provide reasonable assurance to the public that the broadcast service it receives is such as its direct and justifiable interest requires.

. . .

Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all

7. [Ed.] The FCC's practice in this respect has been revised. See pp. 240-243.

programs and advertising material which they present to the public. With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter and to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages. This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community.

Although the individual station licensee continues to bear legal responsibility for all matter broadcast over his facilities, the structure of broadcasting, as developed in practical operation, is such—especially in television—that, in reality, the station licensee has little part in the creation, production, selection and control of network program offerings. Licensees place “practical reliance” on networks for the selection and supervision of network programs which, of course, are the principal broadcast fare of the vast majority of television stations throughout the country.

In the fulfillment of his obligation the broadcaster should consider the tastes, needs and desires of the public he is licensed to serve in developing his programming and should exercise conscientious efforts not only to ascertain them but also to carry them out as well as he reasonably can. He should reasonably attempt to meet all such needs and interests on an equitable basis. Particular areas of interest and types of appropriate service may, of course, differ from community to community, and from time to time. However, the Commission does expect its broadcast licensees to take the necessary steps to inform themselves of the real needs and interests of the areas they serve, and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests.

The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programs for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, (7) Editorialization by Licensees, (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, (11) Weather and Market Reports, (12) Sports Programs, (13) Service to Minority Groups, (14) Entertainment Programming.

The elements set out above are neither all-embracing nor constant. We reemphasize that they do not serve and have never been

intended as a rigid mold or fixed formula for station operation. The ascertainment of the needed elements of the broadcast matter to be provided by a particular licensee for the audience he is obligated to serve remains primarily the function of the licensee. His honest and prudent judgments will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the licensee.

The programs provided first by "chains" of stations and then by networks have always been recognized by this Commission as of great value to the station licensee in providing a well-rounded community service. The importance of network programs need not be reemphasized as they have constituted an integral part of the well-rounded program service provided by the broadcast business in most communities.

Our own observations and the testimony in this inquiry have persuaded us that there is no public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating station performance. However, this does not relieve the station from responsibility for retaining the flexibility to accommodate public needs.

Sponsorship of public affairs and other similar programs may very well encourage broadcasters to greater efforts in these vital areas. This is borne out by statements made in this proceeding in which it was pointed out that under modern conditions sponsorship fosters rather than diminishes the availability of important public affairs and "cultural" broadcast programming. There is some convincing evidence, for instance, that at the network level there is a direct relation between commercial sponsorship and "clearance" of public affairs and other "cultural" programs. Agency executives have testified that there is unused advertising support for public affairs type programming. The networks and some stations have scheduled these types of programs during "prime time."

To enable the Commission in its licensing functions to make the necessary public interest finding, we intend to revise Part IV of our application forms to require a statement by the applicant, whether for new facilities, renewal or modification, as to: (1) the measures he has taken and the effort he has made to determine the tastes, needs and desires of his community or service area, and (2) the manner in which he proposes to meet those needs and desires.

Thus we do not intend to guide the licensee along the path of programming; on the contrary the licensee must find his own path with the guidance of those whom his signal is to serve. We will thus steer clear of the bans of censorship without disregarding the public's vital interest. What we propose will not be served by pre-planned program format submissions accompanied by complimentary references from

local citizens. What we propose is documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life—public officials, educators, religious, the entertainment media, agriculture, business, labor—professional and eleemosynary organizations, and others who bespeak the interests which make up the community.

By the care spent in obtaining and reflecting the views thus obtained, which clearly cannot be accepted without attention to the business judgment of the licensee if his station is to be an operating success, will the standard of programming in the public interest be best fulfilled. This would not ordinarily be the case if program formats have been decided upon by the licensee before he undertakes his planning and consultation, for the result would show little stimulation on the part of the two local groups above referenced. And it is the composite of their contributive planning, led and sifted by the expert judgment of the licensee, which will assure to the station the appropriate attention to the public interest which will permit the Commission to find that a license may issue. By his narrative development, in his application, of the planning, consulting, shaping, revising, creating, discarding and evaluation of programming thus conceived or discussed, the licensee discharges the public interest facet of his business calling without Government dictation or supervision and permits the Commission to discharge its responsibility to the public without invasion of spheres of freedom properly denied to it. By the practicality and specificity of his narrative the licensee facilitates the application of expert judgment by the Commission.

Numbers of suggestions were made during the en banc hearings concerning possible uses by the Commission of codes of broadcast practices adopted by segments of the industry as part of a process of self-regulation. While the Commission has not endorsed any specific code of broadcast practices, we consider the efforts of the industry to maintain high standards of conduct to be highly commendable and urge that the industry persevere in these efforts.

Note on Applications of the Commission's Program Policy Statement. In *Suburban Broadcasters*,⁹ the Commission applied its policy

8. [Ed.] The separate statement of Commissioner Hyde has been omitted. 302 F.2d 191 (1962), certiorari denied 371 U.S. 821, 83 S.Ct. 37, 9 L.Ed.2d 60 (1962).

9. 20 R.R. 951 (1961), sustained sub nom. *Henry v. FCC*, 112 U.S.App.D.C. 257.

statement to a specific case. Applicants for an FM facility in Elizabeth, New Jersey, were found to be legally, technically and financially qualified, and they were not confronted with any other application entitled to comparative consideration. But their application was denied because of the inadequacy of their program proposals. None of the applicants was a resident of Elizabeth. They had made no inquiry into the characteristics or programming needs of that community. Their program proposals were duplicates of proposals previously submitted in connection with applications for facilities in Berwyn, Illinois, and Alameda, California. The Commission refused to accept the unsubstantiated claim that the programming needs of all of these communities were generally the same, and held that the applicants' program proposals were not designed to serve the needs of Elizabeth and could not be expected to serve its needs.

"In essence, we are asked to grant an application prepared by individuals totally without knowledge of the area they seek to serve. We think the public deserves something more in the way of preparation for the responsibilities sought by applicant than was demonstrated on this record."¹⁰

In *City of Camden*, 18 F.C.C.2d 412 (1969), the FCC considered an application to transfer WCAM, a full-time AM facility, from its present licensee, the City of Camden, to the McLendon Corporation. Camden, New Jersey, was served by only one other local broadcast facility, a part-time AM station; Camden, however, was in the Philadelphia broadcasting area (immediately across the Delaware River) and was served by numerous Philadelphia stations. In preparing its application, a McLendon official interviewed 20 community leaders, 17 of them Camden residents and 3 Philadelphia residents. They included government representatives, some businessmen, two churchmen and a physician. Questions were asked about radio service generally, and specific program preferences were elicited. Twelve of the 17 Camden residents interviewed expressed a desire for a continuation or increase in WCAM's news emphasizing the south Jersey area. The majority of those interviewed also indicated a desire for less commercial interruptions.

McLendon proposed a middle-of-the road music format, identical to the type employed on McLendon's other stations. Compared to existing WCAM programming, the proposals were as follows: McLendon would operate WCAM continuously (168 hours a week) devoting 5-6 percent (8:25 hours) of broadcast time per week to news, 4-5

10. In *Herbert Muschel*, 33 F.C.C. 37 (1962), the Commission was confronted with several applicants for a New York FM outlet. Each proposed a specialized service. The two applicants remaining at the final stages proposed (1) a continuous news station, which would be carrying newscasts at very

frequent intervals; and (2) a station carrying programs especially designed for New York's Negro population. The Commission concluded that the second proposal met a substantial need while the first did not, and accordingly granted the proposal which emphasized programming for Negroes.

percent (6:50 hours) to public affairs, and 1 percent (1:30 hours) to other types of programming exclusive of sports and entertainment. WCAM was operating 146 hours per week and devoting 9.1 percent (13:19 hours) of broadcast time per week to news, 7.5 percent (10:58 hours) to public affairs, and 7.8 percent (11:24 hours) to other types of programming exclusive of entertainment and sports. McLendon proposed to devote 65 percent of total weekly news time to national news, 20 percent to State and regional news, and 15 percent (less than 1/2 hour weekly) to local news. WCAM was devoting 4.5 percent (3 hours) of its broadcast time to local news. WCAM was devoting 51-55 percent of its broadcast day to entertainment programming and 15 percent to Spanish, Italian and Greek programming. McLendon proposed 90 percent entertainment programming and no ethnic programming. WCAM had a maximum commercial content of nine percent. McLendon proposed maximum commercial content of 30 percent of the hours between 6:00 A.M. and 6:00 P.M. and 25 percent of all other hours.

McLendon stated that he disagreed with interviewees expressing a desire for more local news, because he felt that the other Camden station (daytime only) was providing excellent news coverage. McLendon's principal motivation appeared to be to bring his good-music programming format to the Philadelphia area, because he felt no existing full-time station in the area was providing such service. This was consistent with prior actions of McLendon in which he sought to acquire stations in larger markets for his particular format, relinquishing stations in smaller ones.

The FCC denied the transfer application because McLendon failed to establish that its proposed programming was realistically designed for Camden rather than Philadelphia. The FCC noted that 23.8 percent of Camden's 117,000 population was nonwhite and that 17.4 percent was of foreign parentage. McLendon was criticized for failing to do any research on the demographic composition of Camden, and for the limited spectrum of persons interviewed: only one woman, one Negro, no representatives of the poor or of labor, and no professional educators, students or young people. Further, there was no effort to canvass individual members of the general public or local ethnic groups. The FCC observed that, in referring to an applicant's ascertainment of needs and interests of the community to be served, it meant "that the applicant or licensee is expected to elicit information as to the community's needs, problems, and issues, not the audience's current broadcast programming preferences." Moreover, the applicant should "indicate, by cross-sectional survey, statistically reliable sampling, or other valid method, that the range of groups, leaders, and individuals consulted is truly representative of the economic, social, political, cultural and other elements of the community." The function of the survey is "not to secure approval of a preplanned broadcast format, but to find the actual needs of the community."

The FCC further observed that "some significant proportion" of the applicant's proposed programming "must be responsive to the community needs as determined by the applicant." Recognizing the status of WCAM as the only full-time broadcast facility in Camden, the Commission observed that the station "may well be of particular significance to the economically disadvantaged in Camden, and possibly the cheapest and most effective way of bringing to the attention of such groups matters of interest to them, such as job-training programs, education programs, bus schedules," and information about available social welfare programs. "When an applicant proposes to reduce the news, public affairs, and other nonentertainment programming presently received by a broadcast facility's audience, it must come forward with some strong and substantial showing that these reductions will not harm, but rather accord with the public interest. Listeners and viewers may come to depend upon, and even plan their lives around, the programming offered by broadcast facilities." McLendon's "unexplained program changes alone are prima facie not in the public interest and require denial of the application."

Finally, the Commission observed that there was a "clear possibility that substantially the bulk of the [advertising revenues for the station] will be sought . . . from Philadelphia." The FCC considered this also to be contrary to the interests of the residents of Camden. One Commissioner dissented.

The Commission's views on this type of issue were substantially codified in 1971 with the release of a "Primer [on] Ascertainment of Community Problems and Broadcast Matter to Deal With Those Problems," 27 F.C.C.2d 650, 21 R.R.2d 1507. The Primer required the submission of formal ascertainment studies, conducted within 6 months of the application, in conjunction with applications for: (a) a construction permit for a new broadcast station; (b) a construction permit for a change in authorized facilities encompassing within the station's service area a new area equal to or in excess of 50% of the total area; (c) a construction permit or modification of license to change station location; (d) a construction permit for a satellite television station; or (e) an assignment of broadcast license or transfer of control, except in *pro forma* cases. Educational noncommercial stations were exempt.¹¹

The ascertainment process consisted essentially of five parts.

1. *Composition study.* The applicant, based on census reports and other available studies, was required to "submit such data as is necessary to indicate the minority, racial, or ethnic breakdown of the community [of license], its economic activities, governmental activi-

11. In *Ascertainment by Noncommercial Educational Applicants*, 58 F.C.C.2d 526, 41 Fed.Reg. 12423, 36 R.R.2d 953 (1976), the FCC adopted ascertainment

requirements for noncommercial broadcasters, similar but not identical to those imposed on commercial broadcasters.

ties, public service organizations, and any other factors or activities that make the particular community distinctive." The applicant also could ascertain such information by special studies of its own.

2. *Consultation with community leaders.* Enlightened by the composition study, the applicant was required to consult with leaders of significant groups within the community about the community's problems, needs and interests. Such discussions were required to be held by principals of the applicant or management-level employees, with a view to opening a continuing dialogue between community leaders and policy-making officials of the station.

Groups to be included encompassed "population segments, such as racial and ethnic groups, and informal groups, as well as groups with formal organization." The Commission cautioned that: "Groups with the greatest problems may be the least organized and have the fewest recognized spokesmen. Therefore, additional efforts may be necessary to identify their leaders so as to better establish a dialogue with such groups and better ascertain their problems." Further: "The omission of consultations with leaders of a significant group would make the applicant's showing defective, since those consulted would not reflect the composition of the community."

While the applicant's principal obligation was recognized to be to the city of license, the Commission ruled that the applicant "should also ascertain the problems of the other communities that he undertakes to serve [as indicated in the application.] If an applicant chooses not to serve a major community that falls within his service contours [and is no more than 75 miles from the transmitter site] a showing must be made explaining why." Consultations with community leaders of such additional communities were required to be undertaken, although not with the degree of intensity required in respect of the city of license.

The Commission declined to specify how many community leaders must be consulted, except to require that "community leaders from each significant group must be consulted."

3. *Survey of the general public.* The survey of the general public, seeking the same information as consultations with community leaders, could be made either by employees of the station or by a professional research organization. No numbers were given to indicate the magnitude of the survey, but emphasis was placed on including a "sufficient number . . . to assure a generally random sample."

Questionnaires could be employed, to be collected by the applicant or returned to the applicant by mail. In the latter event, the applicant was required to show that "this method has resulted in responses from numbers of the general public who are generally distributed throughout the community to be served."

The survey of the general public was not required to extend beyond the city of license.

4. *Tabulation of problems.* The applicant was required to list "all ascertained community problems . . . , whether or not he proposes to treat them through his broadcast matter," except for "clearly frivolous" comments. Community leaders consulted were required to be listed by "name, position and/or organization of each." It was not required that the information elicited from a community leader be attributed to that leader.

5. *Responsive programming.* While program suggestions might be elicited in the course of the ascertainment process, the major objective was to identify problems to which the applicant would shape responsive programs. "Since an applicant will have a broader overview of community problems due to the ascertainment process, is more aware of the kinds of broadcast matter available from others, is more aware of his own resources for producing programs and announcements, we see little need to consult community leaders as to the kinds of broadcast matter presented to meet community problems."

The applicant was not required to "plan broadcast matter to meet all community problems disclosed by his consultations," but he was required to "determine in good faith which of such problems merit treatment by the station. In determining what kind of broadcast matter should be presented to meet those problems, the applicant may consider his program format and the composition of his audience, but bearing in mind that many problems affect and are pertinent to diverse groups of people." A specialized format was held not to excuse a station from treatment of community problems, and the Commission ruled that if an applicant, after listing a number of community problems, presented broadcast matter to meet only one or two of them, the proposal would be *prima facie* defective.

Programs and announcements were appropriate means of meeting community problems, but the Commission made clear that programs were required; a broadcaster could not limit its responses to community problems to announcements, editorials and news stories. The Commission declined to specify how much of a station's programming must be devoted to meeting community problems. "There is no single answer for all stations. The time required to deal with community problems can vary from community to community and from time to time within a community. Initially this is a matter that falls within the discretion of the applicant." The Commission similarly refused to specify the time when such programming should be presented: "The applicant is expected to schedule the time of presentation on a good faith judgment as to when it could reasonably be expected to be effective."¹²

12. In *SRD Broadcasting, Inc.*, 57 F.C.C.2d 354, 35 R.R.2d 1311 (1975), the FCC upheld a station in scheduling of most of its programming responsive to public needs in a block between

6:00 and 9:00 a. m. on Sunday morning.

In *SJR Communications, Inc.*, 67 F.C.C. 2d 1103, 42 R.R.2d 920 (1978), a renewal application for an FM station was

However, the broadcaster was required to specify which of its programming was designed to meet specific community problems. The Commission made clear that its concern in promulgating the Primer was primarily with non-entertainment programming, and that it was not seeking to direct applicants in the determination of program formats.

Initially, the 1971 Primer applied to applications for renewal of licenses. In 1976, a separate Primer was released applicable to renewal applications.

PRIMER ON ASCERTAINMENT OF COMMUNITY PROBLEMS BY BROADCAST RENEWAL APPLICANTS¹³

INTRODUCTION

The principal ingredient of a licensee's obligation to operate in the public interest is the diligent, positive and continuing effort by the licensee to discover and fulfill the problems, needs and interests of the public within the station's service area. Statement of Policy Re: Commission En Banc Programming Inquiry, 25 F.R. 7291, 20 R.R. 1901 (1960). In the fulfillment of this obligation, the licensee must consult with leaders who represent the interests of the community and members of the general public who receive the station's signal. 1960 Programming Policy Statement, *supra*. This Primer provides guidelines for the licensee of a commercial broadcast station to follow in conducting these consultations. The types of consultations required can best be summarized in a question and answer format.

A. GENERAL

Question 1. When must the community survey be conducted?

Answer. The licensee's obligation is to ascertain the problems, needs and interests of the public within the station's service area on a *continuing* basis. The licensee, therefore, must make reasonable and good faith efforts to ascertain community problems, needs and interests throughout the station's license term.

set for hearing to determine whether the licensee's non-entertainment programming was responsive to community needs. The only public affairs program was broadcast between 4:30 and 6:00 a. m. Saturday and Sunday mornings, and there appeared to be other questions as to the nature and total amount of non-entertainment programming.

In *Sonderling Broadcasting Corp.*, 43 R.R.2d 573 (1978), the FCC, in renewing the radio licenses of applicant, warned all licensees that it expected

that their non-entertainment programming will be presented at times when it "reasonably could be expected to be effective."

13. [Ed.] The Primer was adopted in *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418, 35 R.R.2d 1555 (1975), which also made revisions in 47 C.F.R. § 1.526 pertaining to renewal procedures. It was amended in minor respects in 61 F.C.C.2d 1, 38 R.R.2d 885 (1976).

Question 2. What area should the community survey encompass?

Answer. The licensee is obligated to provide service to the station's entire service area. As a practical matter, however, it is realized that the service contours of a station cover a substantial geographical area. Thus, the licensee is permitted to place primary emphasis on the station's city of license and secondary emphasis outside that area. In any event, no community located more than 75 miles from the city of license need be included in the licensee's survey. Further, if a licensee chooses not to serve a community within the station's contours, a brief statement should be placed in the station's public inspection file explaining the reason(s) therefor.

Question 3. What is the purpose of the community survey?

Answer. The purpose of the community survey is to discover the problems, needs and interests of the public as distinguished from its programming preferences. However, a licensee may, if it wishes, also seek to discover the public's programming preferences.

Question 4. Who must be consulted during the community survey?

Answer. The licensee must interview leaders who represent the interests of the service area and members of the general public.

Question 5. Must a compositional study of the community be conducted?

Answer. A special compositional study of the community need not be conducted. We have identified typical community institutions and elements normally present in most communities and we expect the licensee to utilize this listing in conducting its community leader survey. (See Question and Answer 7, below.) We recognize that all communities are not the same and that other significant institutions or elements may be indigenous to a particular community. However, if a licensee interviews a representative sample of leaders from among the elements in this listing that apply to its community, its coverage of all significant elements will not be open to question. The licensee may, at its option, interview leaders within elements not found on this list.

Question 6. Must the licensee obtain demographic data relating to its community of license?

Answer. A licensee should have on file information relating to the population characteristics of its city of license. The population data required can be extracted from the U.S. Census Bureau's County and City Data Book and General Population Characteristics (two separate publications), or similarly reliable reference material. The information needed relates to the total population of the city of license; the numbers and proportions of males and females, of minorities, of youths (age 17 and under), and of the elderly (age 65 or older). In-

clusion of data on portions of the station's service area outside the city of license is optional.

B. COMMUNITY LEADER SURVEY

Question 7. What community leaders should be consulted?

Answer. The community leaders consulted should constitute a representative cross-section of those who speak for the interests of the service area. This requirement may be met by interviews within the following institutions and elements commonly found in a community: (1) Agriculture; (2) Business; (3) Charities; (4) Civic, Neighborhood and Fraternal Organizations; (5) Consumer Services; (6) Culture; (7) Education; (8) Environment; (9) Government (local, county, state and federal); (10) Labor; (11) Military; (12) Minority and ethnic groups; (13) Organizations of and for the Elderly; (14) Organizations of and for Women; (15) Organizations of and for Youth (including children) and Students; (16) Professions; (17) Public Safety, Health and Welfare; (18) Recreation; and (19) Religion. A licensee is permitted to show that one or more of these institutions or elements is not present in its community. At its option it may also utilize the "other" category to interview leaders in elements not found on the checklist.

Question 8. If a licensee interviews in all of the above categories will the licensee be considered to have contacted all the significant groups in its community?

Answer. The Checklist is thorough enough for most communities and yet not overly detailed. Interviews in all of its elements will establish the requisite coverage of significant community groups. Whether this coverage is also representative will depend on such factors as number of interviews in each element, size and influence of that element in the community, etc. A licensee is permitted to show that one or more of these categories is not present in its community. It may also, at its option, interview leaders in other categories which may not be found on the Checklist.¹⁴

14. [Ed.] With respect to women and minority groups, the Commission observed that, if they "are significant, they should be represented in the survey But representativeness does not mean mathematically precise mirroring of the proportions of women and minorities in the community's population. . . . [I]t seems quite possible for a leader survey adequately to represent leadership by females and minority persons in an entire community without necessarily interviewing a woman or a minority individual in every Checklist element.

Females and minorities may predominate in certain areas of community leadership, but they may be absent from others."

The Commission further observed that it "is possible for one community leader to speak for more than one element from the Checklists," and, absent abuse of discretion, such person "may be included in all relevant categories."

Although the issue was being addressed formally in a notice of proposed rule-

Question 9. How many community leaders should be consulted?

Answer. A licensee should consult with leaders on a continuous basis. The Commission's concern, in this regard, is not one of numbers but of representativeness. The licensee's reasonable and good faith discretion as to how many community leaders should be interviewed to establish representativeness will be accorded great weight. However, we have established a reasonable number of interviews (see table below) that a licensee may conduct during the license term, if it wishes to remove any question as to the gross quantitative sufficiency of its community leader survey. Fewer interviews may be conducted if, in the exercise of its discretion, a licensee determines that a lesser number results in a leadership survey that is representative of its service area.

Population of City of License	Number of Consultations
Under 25,001	60
25,001 - 50,000	100
50,001 - 200,000	140
200,001 - 500,000	180
Over 500,000	220

Question 10. What leaders in each significant institution or element should be consulted?

Answer. There are many community leaders in each of the enumerated institutions and elements. Due to the physical impossibility of interviews with all community leaders, and the practical impossibility of requiring interviews with leaders based on some ratio to population of their constituencies, each licensee is accorded wide discretion in determining what leaders in each of the institutions or elements should be interviewed from time to time. The leadership of some institutions or elements (e. g., government) may remain relatively stable throughout the license term and, thus, interviews with such leaders on several occasions can be expected. In this respect, each consultation with a community leader constitutes a separate ascertainment interview. The licensee should, of course, make reasonable and good faith efforts to consult with various leaders in each significant institution or element and not limit the consultations to the same leaders throughout the license term.

Question 11. Who can conduct the community leader consultations?

Answer. Principals, management level and other employees of the station may conduct the community leader consultations. (See

making, the FCC indicated that broadcasters should consult with groups (like gay rights organizations and the handicapped) under the heading of "other," if such groups were signifi-

cant in the community but were not included in the specific categories on the checklist. Ascertainment of Community Problems, 69 F.C.C.2d 1815, 43 R.R.2d 1191 (1978).

Question and Answer 12, below.) When such interviews are conducted by non-management level employees, their efforts must be under the direction and supervision of a principal or management level employee. Also, the results of the interview must be reported to a principal or management level employee within a reasonable period of time after the consultation.

Question 12. Since non-management level employees may conduct community leader interviews, is it necessary for principals and management level employees to be involved in the consultations at all?

Answer. Yes. Community leader consultations may be conducted by any employee who the licensee believes is qualified for the assignment. However, a substantial degree of participation, as interviewers, by principals and management level employees is still necessary. Accordingly, 50 percent of all interviews must be conducted by management level employees.¹⁵

Question 13. Can a professional research firm conduct the community leader survey on behalf of the licensee?

Answer. No. The licensee is expected on its own behalf to consult with a cross-section of community leaders who represent the interests of the service area. Thus, a professional research firm cannot be used for this purpose.

Question 14. Must the community leader interviews take place in a formal meeting called for the specific purpose of inquiring about community problems, needs and interests?

Answer. The interview process allows for a multiplicity of dialogue techniques. Such interviews, for example, may take place during a meeting called for the specific purpose of discussing community problems, needs and interests, or in a business meeting with a community leader by a principal, management level or other employee of the licensee where community problems, needs and interests are also the subject of discussion. Additionally, such an interview may take place during community leader luncheons, joint consultations (see Question and Answer 15, below), on the air broadcasts (see Question and Answer 16, below), and during news interviews. In any event, appropriate documentation must be obtained (see Question 18, below).

15. [Ed.] The Commission stated that the "interviews conducted by management should be allocated in such a way as to bring the officials and principals of a station into contact

with a variety of leaders—particularly those who speak for the interests of racial and ethnic minorities and women."

Question 15. Are joint consultations between licensees and community leaders permitted?

Answer. Joint consultations between licensees and community leaders are permitted, provided: (i) each community leader who participates is on a roughly equivalent plane of interest or responsibility; (ii) each community leader is given ample opportunity to freely present his or her opinions as to community problems, needs and interests; and (iii) each licensee participating is given ample opportunity to question each leader.

Question 16. Can community leader interviews taking place during an on-the-air broadcast be used as evidence of a licensee's ascertainment process?

Answer. Ordinarily, a licensee should not rely on this method to ascertain community problems. When, however, such an on-the-air interview reveals a community problem, need or interest which results in the consideration of a future program concerning that problem, need or interest, the consultation may be used as evidence of the licensee's ascertainment efforts.

Question 17. Can community leaders be interviewed via telephone?

Answer. Face-to-face interviews should be the staple of the licensee's ascertainment process. The limited use of the telephone to conduct community leader interviews is permitted, particularly in areas outside the community of license, and other situations where reasons of convenience, efficiency or necessity might apply. However, a licensee should not, through over-reliance on ascertainment by telephone, abuse the flexibility that this medium gives the station.

Question 18. What documentation is required to be placed in the station's public inspection file regarding community leader interviews?

Answer. Within a reasonable time after completion of an interview, which we perceive ordinarily to be 30 to 45 days, the licensee must place in its public inspection file information identifying: (a) the name and address of the community leader consulted; (b) the institution or element in the community represented; (c) the date, time and place of the interview; (d) problems, needs or interests discussed during the interview (unless the leader requests that his comments be kept confidential); (e) the name of the licensee representative conducting the interview; and (f) where a non-manager performed the interview, the name of the principal or management level employee who reviewed the completed interview record. No credit will be given for interviews placed in the public file after the date on

which the licensee's renewal application is filed with the Commission.¹⁶

Question 19. What documentation relating to the community leader interviews must be submitted with the station's application for renewal of license?

Answer. Upon the filing of an application for renewal of license, the licensee must certify that the documentation noted in Question and Answer 18, above, has been placed in the station's public inspection file at the appropriate times. Additionally, the licensee must submit as part of its renewal application a checklist indicating the number of community leaders interviewed during the license term in the enumerated categories set forth at Question and Answer 7 above. If one or more of the institutions or elements is not present in the community, a brief explanation must be included with the checklist.

C. GENERAL PUBLIC SURVEY

Question 20. With what members of the general public should consultations be held?

Answer. A random sample of members of the general public should be consulted. For our purposes, a random sampling may be taken from a general city telephone directory or may be done on a geographical distribution basis by means of "man-in-the-street" interviews or questionnaires collected by the licensee. These techniques are illustrative, not exhaustive. Whatever survey technique is utilized by the licensee, there must be a full description of the methodology used to assure a roughly random sampling of the general public and an indication of the total number of general public interviews conducted by that survey technique.

Question 21. What is the purpose of the general public survey?

Answer. Here, again, the primary purpose of the general public survey is to discover the community problems, needs and interests of the public as distinguished from its programming preferences. (See Questions and Answers 3 and 4 above.)

Question 22. How many members of the general public should be surveyed?

Answer. No set number or formula has been adopted. A sufficient number of members of the general public should be consulted

16. [Ed.] The Commission expressed the view that requests for confidentiality by community leaders would be "rare" because such persons would "be accustomed to speaking to and

for the public." Moreover, since exact quotation is not required, paraphrase "may be the only protection needed in many situations."

to assure a generally random sample. The number, of course, will vary with the size of the community in question.

Question 23. When should the general public survey be conducted?

Answer. Either throughout the license term or within some specific period during the license term, at the licensee's option. In either event, appropriate documentation must be placed in the station's public file within a reasonable time after its completion, which we perceive ordinarily to be 30 to 45 days, but in no event later than the date on which its renewal application is filed with the Commission.¹⁷

Question 24. Who should consult with members of the general public?

Answer. Principals, station employees, or a professional research or survey service. If consultations are conducted by employees who are below the management level, the consultation process must be supervised by principals or management level employees.

Question 25. What documentation concerning the general public survey is required?

Answer. Each licensee must place in the station's public inspection file a narrative statement concerning the method used to conduct the general public survey, the number of people consulted, and the ascertainment results of the survey. (See also the reference to demographic data in Question and Answer 6.)

Question 26. What documentation relating to the general public survey must be filed with the station's application for renewal of license?

Answer. Upon the filing of an application for renewal of license, the licensee must certify that the documentation noted in Question and Answer 25, above, has been placed in the station's public inspection file. No other submission is necessary unless specifically requested by the Commission.

D. PROGRAMMING

Question 27. Must all community problems revealed by the licensee's consultations with community leaders and members of the general public be treated by the station?

Answer. In serving the needs of its community, a licensee is not required to program to meet all community problems ascertained.

17. [Ed.] In contrast to community leader contacts, which should be continuous, the general public survey may be conducted once during the license period in the interest of promoting

"randomness." But more frequent or periodic surveying is permitted "if rough randomness can be maintained."

There are a number of problems which may deserve attention by the broadcast media. The evaluation of the relative importance and immediacy of these many and varied problems, and the determination of how the station can devote its limited broadcast time to meeting the problems that merit treatment, is left to the good faith judgment of the licensee. In making this determination, the licensee may consider the programming offered by other stations in the area as well as its station's program format and the composition of its audience. With respect to the latter factor, however, it should be borne in mind that many problems affect and are pertinent to diverse groups within the community. All members of the public are entitled to some service from each station. While a station may focus relatively more attention on community problems affecting the audience to which it orients its program service, it cannot exclude all other members of the community from its ascertainment efforts and its non-entertainment programming. Indeed, many special interests may be adequately dealt with in programming which has a wide range of audience appeal.

Question 28. Must all community problems revealed by the ascertainment consultations be included in the licensee's showing placed in the public inspection file?

Answer. Yes. The purpose of the community leader and general public consultations is to elicit from those interviewed what they believe to be the community's problems, needs and interests. All ascertained community problems should, therefore, be reflected in the community leader contact reports and in the general public narrative retained in the station's public inspection file.

Question 29. In what form may matter be broadcast to treat ascertained community problems, needs and interests?

Answer. Programs, news and public service announcements. This includes station editorials, ordinary and special news inserts, program vignettes, and the like. (But see Question and Answer 33 below regarding the exclusion from the yearly problems-programs list of announcements and ordinary news inserts of breaking events.)

Question 30. Can a licensee use only news and public service announcements to treat community problems, needs and interests?

Answer. Not necessarily. It is the responsibility of the individual licensee to determine the appropriate amount, kind, and time period of broadcast matter which should be presented in response to the ascertained problems, needs and interests of its community and service area. Where the licensee, however, has chosen a brief and usually superficial manner of presentation, such as news and public service announcements, to the exclusion of all others, a

question could be raised as to the reasonableness of the licensee's action. The licensee would then be required to clearly demonstrate that its single type of presentation would be the most effective method for its station to respond to the community's ascertained problems.

Question 31. When should matter broadcast in response to the community's ascertained problems, needs and interests be presented?

Answer. The Commission does not prescribe the time of day at which specific program matter responsive to the community's ascertained problems should be broadcast. Rather, the licensee is expected to schedule the time of presentation based upon its good faith judgment as to when the broadcast reasonably could be expected to be effective.

Question 32. If a licensee utilizes a specialized program format—such as all-news, classical music, religious—must it present broadcast matter to meet community problems, needs and interests?

Answer. Yes. It is the responsibility of the licensee to be attentive and responsive to the problems, needs and interests of the public it is licensed to serve. The licensee's choice of a particular program format does not alter its obligation to meet community problems, needs and interests. The manner in which the licensee presents such responsive programming may, of course, be tailored to the particular format of the station. (See, however, Question and Answer 27, above.)¹⁸

Question 33. What documentation must be placed in the station's public inspection file regarding the licensee's efforts to program to meet ascertained community problems, need and interests?

Answer. Each year on the anniversary date of the filing of the station's application for renewal of license, the licensee must place in its public inspection file a list of no more than ten significant problems, needs and interests ascertained during the preceding twelve months. Concerning each problem, need or interest listed the licensee must also indicate typical and illustrative programs broad-

18. [Ed.] The FCC requires the following cases, involving grants, renewals and transfers of licenses, to be referred to the Commission by the Broadcast Bureau:

"Commercial AM and FM proposals for less than eight and six percent, respectively, of total non-entertainment programming; commercial TV proposals (except for those made by UHF

stations not affiliated with major networks) which project for the hours 6:00 a. m. to 12:00 midnight less than the indicated percentages in one or more of the following categories: five percent total local programming, five percent informational (news plus public affairs) programming, ten percent total non-entertainment programming." 47 C.F.R. § 0.281(a)(8)(i).

cast in response to those problems, needs and interests indicating the title of the program or program series, its source, type, a brief description thereof, time broadcast and duration. Such programs do not include announcements (such as PSAs) or news inserts of breaking events (the daily or ordinary news coverage of breaking newsworthy events).¹⁹

19. [Ed.] These annual lists must be submitted with the station's application for renewal.

The problems need not be the "most significant" encountered by the licensee. "'Significant' strikes the desirable balance between meaningful recording of service rendered and the licensee's discretion to evaluate not only the significance of a problem but its feasibility of treatment by the licensee's particular station."

The Commission exempted from formal ascertainment requirements stations licensed to communities with populations of 10,000 or fewer persons not located within any Standard Metropolitan Statistical Area. The basis for the exemption, described as experimental, was the hypothesis that the broadcaster in such a smaller community "knows his town thoroughly, not only its majorities but also its minority interests." The exemption would encompass about 25 percent of commercial broadcast licensees—some 1900 radio stations and 14 television stations.

A licensee thus exempted still must compile the annual lists of problems and

responsive programming and file such lists with its renewal application. The Commission also observed that the "exempt licensee who fails to program for [minorities] weakens [the] hypothesis [that he knows his community thoroughly], to the point which may cause us to inquire further into his trusteeship of a scarce broadcast frequency.

On the ascertainment process, see Foley, *Ascertaining Ascertainment: Impact of the FCC Primer on TV Renewal Applications*, 16 J. Broad. 387 (1972); Surlin, *Ascertainment of Community Needs by Black-Oriented Radio Stations*, 16 J. Broad. 421 (1972); Surlin & Bradley, *Ascertainment Through Community Leaders*, 18 J. Broad. 97 (1974); Volnar, *Is There Too Much "Public" in the "Public Interest"?* 43 U.Cinn.L.Rev. 267 (1974); Note, *Judicial Review of FCC Program Diversity Regulation*, 75 Colum.L.Rev. 401 (1975); Comment, *FCC Broadcast Standards for Ascertaining Community Needs*, 5 Ford.Urb.L.J. 55 (1976).

See also W. Lucas and K. Possner, *Television News and Local Awareness: A Retrospective Look* (Rand Corp. 1975).

SAMPLE - COMMUNITY LEADER ANNUAL CHECKLIST

Institution/Element	Number	Not Applicable (Explain briefly)
<ol style="list-style-type: none"> 1. Agriculture 2. Business 3. Charities 4. Civic, Neighborhood and Fraternal Organizations 5. Consumer Services 6. Culture 7. Education 8. Environment 9. Government (local, county, state & federal) 10. Labor 11. Military 12. Minority and ethnic groups 13. Organizations of and for the Elderly 14. Organizations of and for Women 15. Organizations of and for Youth (including children) and Students. 16. Professions 17. Public Safety, Health and Welfare 18. Recreation 19. Religion 20. Other 		
<p>While the following are not regarded as separate community elements for purposes of this survey, indicate the number of leaders interviewed in all elements above who are:</p> <ol style="list-style-type: none"> (a) Blacks (b) Hispanic, Spanish speaking or Spanish-surnamed Americans. (c) American Indians (d) Orientals (e) Women 		

[B3397]

Note on "Promise vs. Performance." In original, transfer and renewal applications, broadcasters submit statements of proposed programming. An issue may be presented if the programming actually broadcast differs substantially from that proposed. The problem is illustrated by KORD Inc., 31 F.C.C.2d 85, 21 R.R. 781 (1961). In its original application, this station proposed 6% local live programming; a program format that was 84% entertainment, 0.5% religious, 2% agriculture, 0.5% educational, 6% news, no discussion, 5% talks, 2% miscellaneous; and 700 commercial spot announcements per week. Its renewal application, however, showed that, dur-

ing the composite week, KORD had devoted no time to local live programs, or to educational, talks, or miscellaneous programming; it was carrying 87.5% entertainment, 11.3% news, 0.6% religious, and 0.6% agriculture, and it had made 1,631 commercial spot announcements during the week. After inquiry, the Commission set the renewal application for hearing "on the issue of substantial variation between programming representations and actual performance." KORD petitioned for rehearing, pointing out that it had brought its operation substantially into conformity with its original proposals, that it had promised in its renewal application additional programming in the minor categories, and that improvement along such lines had previously been acceptable to the Commission in granting renewal. Advancing various excuses for the discrepancies between its original proposals and its prior performance, KORD requested that the Commission rescind its hearing order.

The FCC, while rejecting KORD's excuses, granted the relief requested on the ground that its prior practice had been not to set renewal applications for hearing under the circumstances described. The Commission decided to apply its new policy prospectively and to give KORD a renewal for one year. The FCC took this occasion to announce to the broadcasting industry "the seriousness of the proposals made by them in the application form."

". . . The Commission relies upon these proposals in making the statutory finding that a grant of the application would be in the public interest. The proposals, we stress, cannot be disregarded by the licensee, without adequate and appropriate representations as to change in the needs of the community. In short, a licensee cannot disregard his proposals in the hope that he will simply be permitted to 'upgrade' when called to account. He does not have the right to one or any license period where he does not have to make a good-faith effort to deliver on his public service proposals.

"It is desirable that we make clear just what is the licensee's obligation in this respect. We repeat that the proposals made are not 'binding' to the last decimal point. . . . Further, we fully recognize that the public interest vis-a-vis a programming format in a particular community is not a fixed, immutable concept. On the contrary, we hope and expect the licensee to be responsive to the changing needs of the community. . . .

"But all this does not mean that the representations can be disregarded without adequate justification. They are serious representations as to the applicant's policy for program and commercial operation, and the Commission takes them seriously. It is one thing for a licensee to decide that its community has greater need for religious or educational programs than particular agriculture or talk or entertainment programs—or, indeed, for an essentially new format; this is a judgment peculiarly within the licensee's competence.

But it is quite another thing for the applicant to drastically curtail his proposed public service programming in education, religion, agriculture, discussion, local live, etc., and increase his advertising content and 'music-news,' without an appropriate and adequate finding of a change in the programming needs of his area. Nor can such an applicant mechanically recite, 'changing needs of the community'; he has a burden of demonstrating just why his community has less need for such public service programming than when he originally proposed it."

Where licensees depart from representations during the term of the license, they are expected to inform the Commission. See AM and FM Program Forms, 1 F.C.C.2d 439 (1965): "Because the proposals as to programming and commercial matter are representations relied upon by the Commission in determining whether grant of an application is in the public interest, licensees are given the responsibility to advise the Commission whenever substantial changes occur," such as a change in program format or an excess of commercial announcements (commercials exceeding proposed maximums more than 10% of the time).

In Application for Renewal of License, 37 R.R.2d 1 (1976), the FCC stated that an explanation is required if performance in the composite week is less than promised performance by 15% for News, for Public Affairs or for All Other, or if there is a reduction of 20% for the three categories combined.

CHILDREN'S TELEVISION REPORT AND POLICY STATEMENT, 50 F.C.C.2d 1, 31 R.R.2d 1228 (1974), reconsideration denied, 55 F.C.C.2d 691, 34 R.R.2d 1703 (1975). The FCC adopted a policy statement concerned with children's programming, but declined to adopt rules on the subject. Considering "children" as encompassing those under twelve years of age, the Commission affirmed:

" . . . [B]roadcasters have a duty to serve all substantial and important groups in their communities, and children obviously represent such a group. Further, because of their immaturity and special needs, children require programming designed specifically for them. Accordingly, we expect television broadcasters, as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience.

"In this regard, educational or informational programming for children is of particular importance. It seems to us that the use of television to further the educational and cultural development of America's children bears a direct relationship to

the licensee's obligation under the Communication Act to operate in the 'public interest' . . .

"While we are convinced that television must provide programs for children, and that a reasonable part of this programming should be educational in nature, we do not believe that it is necessary for the Commission to prescribe by rule the number of hours per week to be carried in each category. . . . [W]hile the amount of time devoted to a certain category of program service is an important indicator, we believe that this question can be handled appropriately on an ad hoc basis.

. . . .
 "We believe that, in the future, stations' license renewal applications should reflect a reasonable amount of programming which is designed to educate and inform—and not simply to entertain

. . . . [We] believe that some effort should be made for both pre-school and school aged children. Age-specificity is particularly important in the area of informational programming because pre-school children generally cannot read and otherwise differ markedly from older children in their level of intellectual development. . . .

"Evidence presented in this inquiry indicates that there is a tendency on the part of many stations to confine all or most of their children's programming to Saturday and Sunday mornings

" [W]e do not believe that it is a reasonable scheduling practice to relegate all of the programming for this important audience to one or two days. Although we are not prepared to adopt a specific scheduling rule, we do expect to see considerable improvement in scheduling practices in the future."

With respect to advertising on children's programs, the FCC indicated that responsibility for false and misleading advertising rested primarily with the FTC; that stations were expected to limit advertising in children's programs, in accordance with an industry-adopted standard, to 12 minutes per hour on weekdays and 9.5 minutes per hour on weekends; and that adequate measures must be taken to separate program material from commercial matter on children's programs, including the elimination of the practice of selling by program characters and the use of advertising promotions as part of the program. The Commission refused, however, to prohibit advertising on children's programs:

" Banning the sponsorship of programs designed for children could have a very damaging effect on the amount

and quality of such programming. Advertising is the basis for the commercial broadcast system, and revenues from the sale of commercial time provide the financing for program production. Eliminating the economic base and incentive for children's programs would inevitably result in some curtailment of broadcasters' efforts in this area. Moreover, it seems unrealistic, on the one hand, to expect licensees to improve significantly their program service to children and, on the other hand, to withdraw a major source of funding for this task."

In order to implement its programming and commercial policies on a case-by-case basis, the FCC adopted amendments to its renewal form. Children's Programming, 33 R.R.2d 1511 (1975). The policy statement was accompanied by several individual concurring and separate statements by individual commissioners.²¹

CITIZENS COMMITTEE v. FCC

Court of Appeals for the District of Columbia, 1970.
141 U.S.App.D.C. 109, 436 F.2d 263.

MCGOWAN, CIRCUIT JUDGE:

This proceeding to review an order of the Federal Communications Commission was initiated by a voluntary association of citizens of Atlanta, Georgia. Their concern is with a substantial alteration in the program format incident to a change in ownership of a licensee—a concern which they requested the Commission to explore in an evidentiary hearing before giving its final approval to the transfer. The Commission denied that request, and it is the propriety of that action alone which is presently before us. For the reasons herein-

21. The FCC's policy statement on children's television was sustained in *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C.Cir. 1977). Reliance on industry self-regulation was held to be reasonable, and the *Family Viewing* decision (*supra* at p. 300) was distinguished on the ground that no coercion was involved in the instant case.

The FCC refused to further reconsider the issues in *Children's Programming*, 63 F.C.C.2d 26, 39 R.R.2d 1032 (1977).

In *American Federation of Television and Radio Artists v. NAB*, 35 R.R.2d 1717 (S.D.N.Y. Jan. 12, 1976), a provision of the NAB Code, barring Code members from engaging in host selling on children's programs, was attacked as a violation of the antitrust laws. The challenge was re-

jected by the Court, which relied in part on the position taken by the FCC.

See Comment, *FCC as Fairy Godmother: Improving Children's Television*, 21 U.C.L.A.L.Rev. 1290 (1974); Murray, Nayman & Atkin, *Television and the Child: A Comprehensive Research Bibliography*, 16 J.Broad. 3 (1972); G. Comstock, *Effects of Television on Children: What is the Evidence?* (Rand Corp. 1975); Culley, Lazer and Atkin, *The Experts Look at Children's Television*, 20 J.Broad. 3 (1976).

See also Thain, *Suffer the Hucksters to Come Unto the Little Children? Possible Restrictions of Television Advertising to Children Under Section 5 of the Federal Trade Commission Act*, 56 B.U.L.Rev. 651 (1976); Note, *Unsafe for Little Ears? The Regulation of Broadcast Advertising to Children*, 25 UCLA L.Rev. 1131 (1978).

after appearing, we do not think the omission of a hearing in this instance was compatible with the applicable statutory standards.

I

On March 5, 1968, the intervenor, Strauss Broadcasting Company of Atlanta, a subsidiary of a Texas organization with radio stations in Dallas and Tucson, filed with the Commission an application for transfer of the operating rights of the Atlanta Stations WGKA-AM and WGKA-FM. The application was founded upon a proposed 100% transfer of the stock ownership of the licensee stations to Strauss from Glenkaren Associates, Inc. Under Glenkaren, the stations had for many years maintained a classical music format, duplicating FM transmissions on AM during the AM daytime operating period. Strauss proposed a format comprised of a "blend of popular favorites, Broadway hits, musical standards, and light classics." With the exception of news broadcasts, there was to be no duplication of AM and FM transmissions under the changed format.

Publication of notice of the transfer application provoked a public outcry against the change in format, including adverse comment in the columns of a leading Atlanta newspaper. More than 2000 persons, by individual letters and group petitions, informally protested the change to the Commission. . . .

On September 4, 1968, the Commission, without a hearing, granted the transfer application. The Commission recited as a fact that the necessity for the transfer was that the existing owner could not supply adequate capital for needed improvements. It also noted that opposition to the change was provoked by the newspaper comments, whereas interviews with community leaders had apparently evoked "nothing but support" for Strauss's proposals. The Commission concluded that the proposed programming was established by the surveys to be one that served the public interest, and that the "informal objections" raised no substantial question requiring a hearing. Commissioner Cox dissented without opinion.

On September 25, 1968, appellant filed a petition for reconsideration, which urged a stay of the September 4 ruling pending the holding of a hearing. Appellant challenged the significance of Strauss's surveys of 13 community leaders, questioning the representative nature of this sampling, and comparing it with the large number of protests actually received by the Commission before its approval order was entered. Perhaps the greatest stress was laid on the fact that of Atlanta's many AM and FM stations, only one (WGKA) was classical.

Strauss countered on October 9, 1968, . . . [and] said that "[r]ecognizing the expressed interest of the some 2000 persons

who advocated retention of the classical music format, Strauss will, at the outset, emphasize such music on WGKA-FM, particularly during evening hours, while still providing a mix of popular favorites and Broadway hits. . . .”

On March 4, 1969, the Commission requested Strauss to “undertake further efforts to ascertain by a more comprehensive survey” the tastes and needs of the community. In response, Strauss filed on April 30, 1969 a statistical survey of “program preferences” in Atlanta prepared by Marketing and Research Consultants of Dallas. As the Commission describes the matter in its opinion, the key question in this survey was framed in this way:

“Which of these two formats would you prefer to listen to daily?

- a. A blend of Broadway Show tunes like ‘Mame’ and ‘Cabaret,’ movie themes like ‘Dr. Zhivago’ or ‘Born Free’ and standards like ‘Moonglow’ and ‘Stardust’ plus hourly newscasts.
- b. A blend of Opera Symphonic pieces like ‘The Emperor Concerto’ or ‘The New World Symphony’ and Ballets such as ‘Petrouchka’ and ‘Swan Lake’ plus news approximately every hour.”

Out of 640 people asked, 73% preferred the first format, and 16% preferred the second. Four% gave no reply, and the remainder preferred neither. Appellant, on May 22, 1969, attacked in detail this submission by Strauss.

At this point, another factor entered the controversy, namely, the existence of a daytime-only 500 watt AM classical station in Decatur, Georgia, (WOMN), some 10 miles from Atlanta. Strauss asserted that this station adequately served the daytime needs of WGKA’s former audience. Appellant responded that WOMN’s signal reached few Atlanta listeners at an acceptable level of signal quality.

On August 25, 1969, the Commission entered a Memorandum Opinion and Order. The Commission reviewed its previous opinion and intervening events, and concluded that “[t]he case here comes down to a choice of program formats—a choice which in the circumstances is one for the judgment of the licensee.” *Inter alia*, the Commission accepted Strauss’s surveys, and stated as a fact that WOMN served “a large portion of the City of Atlanta.”²²

22. This latter circumstance was thought by the Commission to mitigate significantly Strauss’s conceded abandonment of classical music in the daytime and its restriction of its classical offerings to the evening hours on FM. Intervenor began operating the

stations on the new format on November 10, 1968; and the record indicates that there is controversy as to how faithfully it has adhered to this stated purpose for the FM channel. [Some footnotes have been omitted; others have been renumbered.]

In dissent, Commissioner Cox asserted that a hearing was required. He noted that the WGKA stations had been providing classical music for ten years, and had thereby afforded some measure of balance in the musical fare available to Atlanta listeners from the 20 existing aural facilities—a balance which was being destroyed, particularly for daytime listeners. He also noted that by intervenor's own surveys (which he also questioned) one-sixth of the Atlanta market, or about 100,000 people, would not be served despite the existence of multiple radio channels. He characterized the transaction as one promoting only the private interests of the transferor and transferee: Since classical music stations are less profitable than popular stations, Strauss could enter the popular market more cheaply by this means than by purchasing a popular station, and Glenkaren could sell at a higher price than if it were to sell to one intending to continue the classical format. Contrary to the Commission's initial finding, the dissenter characterized the Glenkaren operation as profitable, and said that no change of program format was necessary for financial reasons. He did not see how the requisite public interest finding could be made short of the illumination afforded by a hearing.

II

In this court appellant advances a number of grounds as invalidating the Commission's action. We think the substantial issue presented is that of the necessity for a hearing

To justify the omission of a hearing in this case, . . . it is necessary to demonstrate that there were no "material and substantial questions of fact" bearing significantly upon the exercise of the Commission's judgment. . . .

. . . .

The Commission's point of departure seems to be that, if the programming contemplated by intervenor is shown to be favored by a significant number of the residents of Atlanta, then a determination to use that format is a judgment for the broadcaster to make, and not the Commission. Thus, so the argument proceeds, since only some 16% of the residents of Atlanta appear to prefer classical music, there can be no question that the public interest is served if the much larger number remaining are given what they say they like best.

In a democracy like ours this might, of course, make perfect sense if there were only one radio channel available to Atlanta. Its rationality becomes less plain when it is remembered that there are some 20 such channels, all owned by the people as a whole, classics lovers and rock enthusiasts alike. The "public interest, convenience, and necessity" can be served in the one case in a way that it cannot be in the other, since it is surely in the public interest, as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the

commonly-owned public resources whenever that is technically and economically feasible.

We do not doubt that, at our present level of civilization, a 16% ratio between devotees of classical music and the rest of the population is about right, for Atlanta as well as other American cities . . . In Atlanta that 16% still represents a large number of people, and one which may well grow larger under the influence of the efforts and achievements of many distinguished local musical institutions and organizations. But, whether it grows or not, it is a not insignificant portion of the people who make up Atlanta; and their minority position does not exclude them from consideration in such matters as the allocation of radio channels for the greatest good of the greatest number. The Commission's judgmental function does not end simply upon a showing that a numerical majority prefer the Beatles to Beethoven, impressive as that fact may be in the eyes of the advertisers.

The Commission's response in this instance to the 16% figure was to abdicate. The slenderness of that figure was the fact it thought to be conclusive; and, since that fact alone was not seriously disputed by appellant, the Commission appeared to believe that no other disputes of fact justified a hearing. We find that approach untenable, and we turn to the circumstances which, in our view, brought into play the Congressional requirement of a hearing.

In the first place, there is the key assumption by the Commission that transfer of the station licenses was made necessary by the financial necessities of Glenkaren arising from the unprofitability of the existing operation. This assumption appears in the Commission's initial order of approval, without any supporting factual references. In its brief in this court, the Commission refers only to the circumstance that the financial reports of WGKA-AM and FM show that station *expenditures* exceeded *revenues* by a net figure of \$20,635 for the six years preceding the proposed transfer.

Appellant asserts, however, that this figure is no fair measure of profitability of operations, since it reflects what are said to have been very substantial capital expenditures in 1967 for the enlargement and improvement of the station's plant. Certainly no accountant would accept this figure alone as an index to operating profitability, and this is presumably what underlies the dissenting Commissioner's observation that the "stations were profitable, so it cannot be said that a change of format was necessary to keep them alive." The prospect that a change in programming might increase profits does not, as we have suggested above, conclude of its own force the question of who should be the licensee. We, of course, do not presume to know what a hearing might ultimately reveal with respect to Glenkaren's financial situation, but the Commission's flat assumptions about it need a closer look than they have yet had.

A second area of factual inquiry clamoring for the clarifying influence of direct testimony subject to cross-examination is that of the interviews of prominent citizens. When it entered its original order of approval, the Commission had before it, as evidence of community attitudes, only the summaries by the intervenor of its interviews with 13 community leaders. A substantial controversy later developed as to whether these summaries were accurate accounts of what had been said. Appellant, as a supplement to its petition for reconsideration, filed the affidavits of a number of the interviewees, which give a different picture of their position than do the summaries prepared by intervenor. This in turn prompted intervenor to secure and file unsworn letters from the original interviewees which purported to adopt the summaries as correct.

A third important issue which appears to be in dispute is the degree to which daytime listeners in Atlanta are provided with classical music from a non-Atlanta source. This is the question of the scope of the coverage of Atlanta by WOMN, the station located in Decatur, Georgia. The Commission disposed of this matter by saying in a footnote that "a large portion" of the City of Atlanta is reached by this station. Commissioner Cox in his dissent refers to WOMN as providing Atlanta with "some service." Appellant, however, in one of its representations to the Commission, asserted that WOMN broadcasting only on daytime AM and with a weak frequency reaches effectively only "a small portion of the Atlanta area." At the oral argument before us no one appeared to be familiar with the contour charts which would be highly relevant to a reasoned disposition of this question. Since the Commission appears to justify its action in some considerable part by the asserted availability to Atlanta listeners of at least a daytime classical format it is obviously important that this dispute of fact be explored and resolved.

It is, of course, true that a licensee has considerable latitude in the matter of programming; and it is not for the Commission arbitrarily to dictate what the programming content shall be. See *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475, 60 S.Ct. 693, 84 L.Ed. 869 (1940). But it is not true that the Commission is devoid of any responsibility whatsoever for programming, or that its concern with it stops whenever 51% of the people in the area are shown to favor a particular format.²³ Had Glenkaren remained the

23. The Commission refers in its brief to a number of pronouncements by it and by the courts of its incapacity to be a "national arbiter of taste." *Palmetto Broadcasting Co. (WDKD)*, 33 F.C.C. 250, 257 (1962), reconsideration denied, 34 F.C.C. 101 (1963), affirmed sub non. *Robinson v. F. C. C.*, 118 U.S.App.D.C. 144, 334 F.2d 534 (1964); and see *Buckley Jaeger Broadcasting*

Corp. v. F. C. C., 130 U.S.App.D.C. 90, 93, 397 F.2d 651, 654 (1968). But, as the Commission goes on quickly to acknowledge in these words, "[T]his is not so say that a transferee may make wholly indiscriminate program changes." The question is, as here, what are the community needs and will they be properly served by the proposed transfer? The Commission

licensee, it could have altered its programming format without the permission of the Commission during the license term, but it would have done so knowing that the change would have been a factor to be weighed when its application for renewal was filed. *See* Office of Communication of United Church of Christ v. F.C.C., 123 U.S.App. D.C. 328, 359 F.2d 994 (1966). The change proposed to be made by a transferee is similarly relevant to the consideration of a transfer application submitted during the license term. We hold that, in the posture which this record shows the matter to have stood before the Commission, the grant of this application without hearing fell outside the contemplation of the Act.

LAKWOOD BROADCASTING SERVICE, INC. v. FCC, 478 F.2d 919 (D.C.Cir. 1973). The FCC approved without hearing the assignment of the license of KBTR (AM), Denver, Colorado, from the estate of the former owner to Mission Denver Co. Charles A. Haskall, 36 F.C.C.2d 78 (1972). The assignee proposed to change the format of the station from "all news" to "country and western." Approval of the assignment was challenged by another Denver "country and western" station and by a citizens group. The Court of Appeals affirmed the FCC ruling that no hearing was necessary because no substantial and material facts were at issue. The FCC and the Court relied on undisputed evidence that (1) the "all news" format, despite heavy promotion, had resulted in losses exceeding \$500,000 in five years; and (2) there were two other "all news" stations in Denver and twenty Denver stations offered over 291 hours of radio news weekly. Further, there was no indication of strong community sentiment in favor of retention of the old format. Finally, the Court ruled that disputes concerning the assignee's ascertainment survey were not material to this proceeding, since the purpose of the survey was to elicit information about community problems, not program preferences. A "survey to determine the exact degree of support for the old format" was not deemed necessary in all cases.

CITIZENS COMMITTEE TO KEEP PROGRESSIVE ROCK v. FCC, 478 F.2d 926 (D.C.Cir. 1973). The FCC approved without hearing the assignment of the license of WGLN (FM), Sylvania, Ohio (a suburb of Toledo), from Twin States Broadcasting, Inc. to Midwestern Broadcasting Corp. The FCC acted despite submission of a petition with 11,000 signatures protesting the proposed change in WGLN's format from "progressive rock" to "middle of the road" or "top

is not dictating tastes when it seeks to discover what they presently are, and then to consider what assignment

of channels is feasible and fair in terms of their gratification.

forties" music. Twin States Broadcasting, Inc., 35 F.C.C.2d 969 (1972). The Court of Appeals reversed, holding that substantial and material factual questions were at issue and required a hearing.

The Court observed initially that the "majority of format changes do not diminish the diversity available, and are thus left to the give and take of each market environment and the business judgment of the licensee." Here, however, a significant public opposition developed, and there were factual issues in dispute: (1) whether the "progressive rock" format was economically viable (the station had lost money under other formats)? and (2) whether alternative sources of "progressive rock" were available in the area (in terms of format as contrasted to occasional selections)? A hearing was ordered on these issues. The Court further observed:

"If no objection is raised to a format change the Commission may properly assume that the format is acceptable and, so long as all else is in order, it may grant the application. When the public grumbling reaches significant proportions, as here and in *Citizens Committee*, the format change becomes an issue for resolution and hearing procedures are applicable if issues of fact are in dispute. Questions regarding the extent of support for the format themselves may be material, and if substantial then the proper procedure is either a survey of the area residents or a hearing on the issue. Once the factual disputes are exposed and a hearing held the Commission's decision regarding the public interest must be reasoned and based upon substantial evidence."²⁴

24. [Ed.] On remand, the FCC again considered the assignment of WGLN (renamed WXEZ), Sylvania, Ohio, from Twin States to Midwestern. A critical factor was the adoption of a progressive rock format by WIOT (FM), another station in the Toledo area. Subsequent to remand but prior to commencement of further Commission proceedings, the Citizens Committee to Keep Progressive Rock negotiated an agreement with Midwestern which acknowledged that WIOT (FM) currently met the needs of the area's progressive rock listeners but required Midwestern to undertake a program preference survey if, prior to the expiration date of the license of WXEZ (FM) (October 1, 1976), WIOT (FM) ceased to present an adequate source of progressive rock music. If, as a result of the survey, Midwestern found that (a) twenty percent or more of the population expressed a desire for progressive rock which was not otherwise fulfilled by a Toledo area station and (b) a progressive rock for-

mat would be economically feasible, "Midwestern shall change the format of Station WXEZ-FM to provide such progressive rock format."

The FCC rejected the agreement because it required fundamental programming changes to be made if certain circumstances arose, all of which were beyond Midwestern's control. "Midwestern will not have the opportunity, nor even the right, to exercise its own independent licensee judgment as to these programming matters; it will instead be irreversibly committed to programming which at the time it might not otherwise choose to present." The FCC found that under the agreement Midwestern improperly had relinquished its flexibility to make programming decisions during the upcoming license term, and that the agreement, therefore, must be disapproved. The record was held open to permit the Citizens Committee to re-submit objections it had withdrawn in light of the agreement. Twin States Broadcasting, Inc., 28 R.R.2d

CITIZENS COMMITTEE TO SAVE WEFM v. FCC, 165 U.S.App.D.C. 185, 506 F.2d 246 (1973 and 1974). Zenith, licensee of FM station WEFM in Chicago, sought to assign its license to GCC Communications of Chicago, Inc. The FCC approved the assignment without a hearing notwithstanding objections to the transfer based on the fact that GCC intended to change WEFM's long-time classical music format to a rock music format, precipitating substantial public protest. The FCC relied principally on the fact that two other Chicago stations provided classical music, ruling that the case was not one in which a unique format was being eliminated. The Commission stated that it "generally left entertainment programming decisions to the licensee or applicant's judgment and competitive marketplace forces," since "as a matter of public acceptance and of economic necessity [the broadcaster] will tend to program to meet the preferences of his area and fill whatever void is left by the programming of other stations." The FCC also stated that it was unwise to "lock" a broadcaster into a particular format which would have "the effect of lessening the likelihood that [program formats appealing to minority interests] will be attempted in the first place". The Court of Appeals reversed.

First, the Court ruled that the FCC had not established that this case did not involve the elimination of a unique program format. The FCC had relied on the existence of two other Chicago classical music stations, WNIB and WFMT. The Court ruled that WNIB was not a satisfactory alternative to WEFM because it did not serve all of WEFM's service area, and that WFMT was not a satisfactory alternative to WEFM because it was not shown to have a classical music format. The Court further observed that the "classical music"

145 (1973). A revised settlement was approved in *Twin States Broadcasting Co.*, 45 F.C.C.2d 230, 29 R.R.2d 490 (1974).

In *Agreements Between Broadcast Licensees and the Public*, 57 F.C.C.2d 42, 35 R.R.2d 1177 (1975), the FCC articulated its attitude toward agreements between broadcasters and citizen groups:

- (1) Apart from its participation in the ascertainment process, a broadcaster is not obliged to undertake negotiations or agreements with citizen groups.
- (2) An agreement which seeks to take responsibility for public interest determinations out of the hands of the licensee, or seeks to prevent the licensee from changing the way the station serves the public interest as the licensee's perceptions change, is improper and will be given no effect.
- (3) The Commission will review agreements brought before it to determine whether they contravene the above standard by improperly delegating non-delegable licensee responsibilities or by improperly binding future exercise of the licensee's non-delegable discretion. Where possible, the FCC will construe agreements in a manner favorable to their implementation.
- (4) If the agreement is proper and is included in an application submitted to the Commission, substantive terms constituting proposals for future performance will be treated as any other licensee proposals for future performance and standards applicable to "promise vs. performance" will govern.
- (5) Written agreements must be placed in the station's public file.
- (6) Oral agreements are permitted, but the Commission will not take cognizance of them.

rubric may be "used so broadly as to cover formats that do not substantially overlap. One station might not, for example, play music composed in this century, while another might concentrate on twentieth century works. In popular parlance, both would be termed 'classical music' stations, yet the loss of either would unquestionably lessen diversity in the area."

Second, although issues concerning the uniqueness of the program format might conceivably be resolved without a hearing, two other issues presented substantial questions of fact requiring a hearing: (1) whether the financial losses incurred by Zenith in the six years preceding the transfer application were attributable to the classical music format or were attributable to other causes; and (2) whether GCC had made misrepresentations concerning its survey of community leaders.

Finally, the Court expressed its general disagreement with the approach adopted by the Commission:

"There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time. More time may be sold, and at higher rates, by a station that has a larger or a demographically more desirable audience for advertisers. Broadcasters therefore find it to their interest to appeal, through their entertainment format, to the particular audience that will enable them to maximize advertising revenues. If advertisers on the whole prefer to reach an audience of a certain type, e. g., young adults with their larger discretionary incomes, then broadcasters, left entirely to themselves by the FCC, would shape their programming to the tastes of that segment of the public.

"This is inherently inconsistent with 'secur[ing] the maximum benefits of radio to all the people of the United States' We think it axiomatic that preservation of a format [that] would otherwise disappear, although economically and technically viable and preferred by a significant number of listeners, is generally in the public interest.²⁵ There may well be situations in which that is not the case for reasons within the discretion of the FCC to consider, but a policy of mechanistic deference to 'competition' in entertainment program format will not focus the FCC's attention on the necessity to

25. "It cannot be otherwise when it is remembered that the radio channels are priceless properties in limited supply, owned by all of the people but for the use of which the licensees pay nothing. If the marketplace alone is to determine programming format, then different tastes among the totali-

ty of the owners may go ungratified. Congress, having made the essential decision to license at no charge for private operation as distinct from putting the channels up for bids, can hardly be thought to have so limited a concept of the aims of regulation" [Footnote by the Court.]

discern such reasons before allowing diversity, serving the public interest because it serves more of the public, to disappear from the airwaves.”

There were several concurring and dissenting opinions.²⁶

Note on Commercial Advertising Practices of Broadcasters.

From the outset, the Federal Communications Commission has expressed concern about the commercial advertising practices of broadcasters. Wholly apart from the content of advertisements, which may give rise to other issues (see pp. 248–253 and 276–277 *supra*), the Commission has stated that “a limitation on the amount and character of advertising [is] one element of the ‘public interest.’” See *Public Service Responsibility of Broadcast Licensees* (1946). In addition to the general relation of time devoted to advertising matter to time devoted to program matter, the FCC discussed the length of individual commercials, the number of commercials, the piling up of commercials, and the paucity of program time between commercials.

In 1963, concerned with complaints of overcommercialization, the Commission issued a notice of proposed rulemaking in which it proposed to adopt, as Commission regulations, the advertising standards included in the Codes of Good Practice of the National Associa-

26. In *Post-Newsweek Stations*, 57 F.C.C.2d 326, 35 R.R.2d 1368 (1975), the FCC approved the transfer of an AM station license without a hearing notwithstanding objections that the station’s “beautiful music” format was unique in the Cincinnati area. The Commission relied on the existence of several FM stations with similar formats in the same area.

In *Changes in Entertainment Formats*, 60 F.C.C.2d 858 (1976), reconsideration denied, 66 F.C.C.2d 78 (1977), the FCC asserted its continuing disagreement with the Court of Appeals about the propriety and practicability of reviewing program format changes.

In *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917 (D.C.Cir. 1978), the FCC denied renewal of an FM license on various grounds normally sufficient to justify non-renewal. The FCC refused to depart from its normal criteria because the station broadcast in a foreign language. The Court of Appeals reversed, holding that special weight must be given to possible loss of a unique service and that further findings were required on this aspect of the case.

See Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcaster’s Format Changes*, 40 *Geo.Wash.L.Rev.* 933 (1972); Note, *Developing Standards for Diversification of Broadcasting Formats*, 52 *Texas L.Rev.* 558 (1974); Volmar, *Is There Too Much “Public” in the “Public Interest,”* 43 *U.Cinn.L.Rev.* 267 (1974); Note, *Federal Regulation of Radio Broadcasting—Standards and Procedures for Regulating Format Changes in the Public Interest*, 28 *Rutgers L.Rev.* 966 (1975); Note, *Judicial Review of FCC Program Diversity Regulation*, 75 *Colum.L.Rev.* 401 (1975); Casenotes, 9 *Ga.L.Rev.* 479 (1975), 53 *Texas L.Rev.* 1099 (1975); Comment, *Program Diversity in the Broadcast Media and the FCC*, 17 *B.C.Ind. & Com.L.Rev.* 25 (1975); Owen, *Regulating Diversity: The Case of Radio Formats*, 21 *J. Broad.* 305 (1977); Note, *Press Protections for Broadcasters; The Radio Format Cases Revisited*, 52 *N.Y.U.L.Rev.* 324 (1977); Brenner, *Government Regulation of Radio Program Format Changes*, 127 *U.Penn.L.Rev.* 56 (1978); Lull, Johnson and Sweeney, *Audiences for Contemporary Radio Formats*, 22 *J.Broad.* 439 (1978).

tion of Broadcasters, 28 Fed.Reg. 5158 (1963). In general, the Radio Code permitted commercial announcements to average 14 minutes per hour each week, and provided that no single hour could include more than 18 minutes and that no single 15-minute segment could include more than 5 minutes. The Television Code distinguished between "prime time" programs (usually between 6-11 p. m.) and programs during all other hours. During prime time, the limit was 10 minutes and 20 seconds (including station breaks), and, during all other hours, the limit was 15 minutes and 20 seconds (including station breaks). Both Codes contained additional provisions governing matters of detail and special situations.

In inviting comments on its proposal, the Commission recognized "that the provisions of the NAB Codes may not be appropriate for across-the-board application to all broadcast stations. For example, we can appreciate that there may be need for separate standards to be applied to certain special categories of stations, such as standard stations licensed to operate only during daytime hours, or stations licensed to sparsely settled communities, or stations located in communities with seasonal economy, etc." Comments were invited on how to deal with such cases as well as all other aspects of the regulations. The Commission further recognized "that there may be circumstances that may warrant that a waiver or exemption be accorded to certain broadcast stations."

Opposition to the FCC's rulemaking proceeding on station commercials led to the introduction of H.R. 8316, which proposed to amend the Communications Act by adding a provision "that the Commission may not by rule prescribe standards with respect to the length or frequency of advertisements which may be broadcast by all or any class of stations in the broadcast service." In reporting the bill favorably, the House Committee on Interstate and Foreign Commerce expressed the view that the rulemaking proceeding was initiated without statutory authority. In the opinion of the Committee, the Commission could pass on the commercial practices of station licensees only as part of its periodic appraisals of the total performance of licensees when they sought renewal of their licenses:²⁷

"Under the regulatory pattern of the act, . . . not one criterion or the other can be said to be generally applicable to all stations or classes of stations, nor can one criterion or the other determine whether a broadcaster performs in the public interest. That determination depends on the overall evaluation whether he serves the community which he is supposed to serve under the terms of his license. In the final analysis, it is the judgment of the community which determines whether a broadcaster meets community needs."

On January 15, 1964, the Commission voted to terminate its rulemaking proceeding, noting the almost unanimous opposition gen-

27. House Rep.No.1054, 88th Cong., 1st Sess. (1963).

erated by its proposal in the broadcasting industry and the rather limited support manifested by members of the public. The Commission concluded that it did not have sufficient information to prepare a sound set of standards at the time; observed that the National Association of Broadcasters was commencing a research project into various aspects of public acceptance of commercials; and proposed to revise its application and reporting requirements to provide more meaningful information on commercials. Meanwhile, the Commission affirmed its intention to give closer attention to station commercial practices on a case by case basis.²⁸

Notwithstanding the formal termination of the rulemaking proceeding, H.R. 8316 was brought to a vote in the House on February 27, 1964, and passed by a vote of 317 to 43.²⁹ There was no action in the Senate.³⁰

In 1965 and 1966, the Commission revised reporting forms for all broadcasters. AM-FM Program Forms, 30 Fed.Reg. 10195, 5 R.R.2d 1773 (1965); Television Program Forms, 31 Fed.Reg. 13228, 8 R.R.2d 1512 (1966). The forms implied that for AM and FM the normal maximum on commercial matter was 18 minutes per hour, and that for television the normal maximum was 16 minutes per hour. By public notice issued October 12, 1966, the Commission stated that, if a licensee proposes "a *normal* hourly maximum in excess of 18 minutes for radio (AM or FM) or 16 minutes for television," the licensee should set forth the basis for its conclusion that its commercial practices "will be consonant with the needs and interests of the community which the licensee serves." The FCC stated that it gave "great weight" to the time limits expressed "without denying the right of each broadcaster to make his own different judgment on any reasonable basis in terms of his particular situation."

These nominal standards appear to have continued unchanged. But implementation has varied from case to case. See Accomack-Northampton Broadcasting Co., 8 F.C.C.2d 357 (1967) (application granted); WHUT Broadcasting Co., 16 F.C.C.2d 777 (1969) (application set for hearing). In WNJU-TV Broadcasting Corp., 57 F.C.C.2d 394, 35 R.R.2d 1394 (1975), a television renewal application was granted on a short-term basis because of excessive commercialization (exceeding prior licensee representations). As to a proposed commercial limit of 16 minutes per hour, to increase to 20 minutes per hour no more than 10% of the time, the Commission observed that the proposal "comports fully with Commission policy." In the case of radio stations, the FCC has accepted proposals of 18 minutes of commercials per hour, to increase to 20 minutes per hour no more than

28. Termination of Rule-Making Proceeding, 1 R.R.2d 1606 (1964); cf. Commercial Practices of Broadcast Licensees, 2 R.R.2d 885 (1964) (dissenting opinion of Chairman Henry). See Ramey, *The Federal Communications*

Commission and Broadcast Advertising: An Analytical Review, 20 Fed. Com.B.J. 71 (1966).

29. 110 Cong.Rec. 3769 (1964).

30. 110 Cong.Rec. 3869 (1964).

10% of the time, with still additional commercials permitted to accommodate political advertising. See *Political Spot Announcements*, 59 F.C.C.2d 103, 36 R.R.2d 1633 (1976); 47 C.F.R. § 0.281(a)(7).³¹

The National Association of Broadcasters' Television Code limits "non-program material" to: 9½ minutes for network affiliates in prime time, 14 minutes for independent stations in prime time, 9½ minutes for weekend children's programs, 12 minutes for weekday children's programs, and 16 minutes for other times.³² There also is a Radio Code, expressing more expansive limits, but it has limited effectiveness.

31. See also *Program Length Commercials*, 39 F.C.C.2d 1062; 26 R.R.2d 1023 (1973). The FCC issued a Public Notice to all licensees that it considers the broadcast of "programs that interweave program content so closely with the commercial message that the entire program must be considered commercial" "to involve a serious dereliction of duty on the part of the licensee."

"Program length commercials raise three basic problems. Of primary concern is that such programs may exhibit a pattern of subordinating programming in the public interest to programming in the interest of salability. In addition, a program length commercial is almost always inconsistent with the licensee's representations to the Commission as to the maximum amount of commercial matter that will be broadcast in a given

clock hour. Finally, there are usually logging violations involved. For example, the entries in the logs may show a total of six minutes of commercial matter during a half-hour program when the entire 30 minutes should have been logged as commercial."

In addition to the examples and rulings cited in the Public Notice, see *WAUB, Inc.*, 26 R.R.2d 137 (1973); *Kaiser Broadcasting Co.*, 45 F.C.C.2d 344, 29 R.R.2d 460 (1974); *Applicability of Commission Policies on Program-Length Commercials*, 44 F.C.C.2d 985, 29 R.R.2d 469 (1974).

32. The TV Code restrictions have been challenged by the Department of Justice as a violation of the antitrust laws. *Television Digest*, June 18, 1979, p. 1.

Chapter IX

CABLE TELEVISION

A. DEVELOPMENT OF THE NEW MEDIUM¹

UNITED STATES v. SOUTHWESTERN CABLE CO.

Supreme Court of the United States, 1968.
392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001.

MR. JUSTICE HARLAN delivered the opinion of the Court.

These cases stem from proceedings conducted by the Federal Communications Commission after requests by Midwest Television

1. On cable television and its regulation, see Note, *The Wire Mire: The FCC and CATV*, 79 *Harv.L.Rev.* 366 (1965); Report of President's Task Force on Telecommunications Policy ch. 7 (1968); L. Johnson, *The Future of Cable Television: Some Problems of Federal Regulation* (Rand Corp. 1970); Note, *Regulation of Community Antenna Television*, 70 *Colum.L.Rev.* 837 (1970); Sloan Commission on Cable Television, *On the Cable: The Television of Abundance* (1971); Cabinet Committee on Cable Communications, *Report to the President* (1972); M. Alice & M. Phillips, *CATV—A History of Community Antenna Television* (1972); Rivkin, *The Changing Signals of Cable TV*, 60 *Geo.L.J.* 1475 (1972); Posner, *The Appropriate Scope of Regulation in the Cable Television Industry*, 3 *Bell J.Econ. & Mgt.Sci.* 98 (1972); D. LeDuc, *Cable Television and the FCC: A Crisis in Media Control* (1973); Levin, *Television's Second Chance: A Retrospective Look at the Sloan Cable Commission*, 4 *Bell J.Econ. & Mgt.Sci.* 343 (1973); Lapierre, *Cable Television and the Promise of Programming Diversity*, 42 *Ford.L.Rev.* 25 (1973); Note, *Proposed Cable Communication Act of 1975: A Recommendation for Comprehensive Regulation*, 1975 *Duke L.J.* 93 (1975); Committee for Economic Development, *Broadcasting and Cable Television: Policies for Diversity and*

Change (1975); *Cable Television: Promise vs. Regulatory Performance*, Staff Report to Subcommittee on Communications, House Committee on Interstate and Foreign Commerce, 84th Congress, 2d Sess. (1976).

On the technology of cable, see C. Pilnick & W. Baer, *Cable Television: A Guide to Technology* (Rand Corp. 1973); M. Gray et al., *Urban CATV Distribution Plant: Current Cost and Technology* (OT, Dept. of Commerce, 1977).

For varying estimates of the future prospects of cable, see Barnett & Greenberg, *A Proposal for Wired City Television*, 1968 *Wash.U.L.Q.* 1; Barnett & Greenberg, *CATV Systems: An Analysis of FCC Policy and an Alternative*, 34 *Law & Contemp.Probl.* 562 (1969); H. Land Associates, *Television and the Wired City* (1968); R. Smith, *The Wired Nation* (1972) (expanding on an article in *The Nation*, May 18, 1970); Comanor & Mitchell, *Cable Television and the Impact of Regulation*, 2 *Bell J.Econ. & Mgt.Sci.* 154 (Spring 1971); Mitchell & Smiley, *Cable, Cities and Copyrights*, 5 *Bell J.Econ. & Mgt.Sci.* 235 (1974); Crandall & Fray, *A Reexamination of the Prophecy of Doom for Cable Television*, 5 *Bell J.Econ. & Mgt.Sci.* 264 (1974); Branscomb, *The Cable Fable: Will It Come True?* 25 *J.Broad.* 44 (1975).

for relief under §§ 74.1107² and 74.1109³ of the rules promulgated by the Commission for the regulation of community antenna television (CATV) systems. Midwest averred that respondents' CATV systems transmitted the signals of Los Angeles broadcasting stations into the San Diego area, and thereby had, inconsistently with the public interest, adversely affected Midwest's San Diego station. Midwest sought an appropriate order limiting the carriage of such signals by respondents' systems. After consideration of the petition and of various responsive pleadings, the Commission restricted the expansion of respondents' service in areas in which they had not operated on February 15, 1966, pending hearings to be conducted on the merits of Midwest's complaints. 4 F.C.C.2d 612. On petitions for review, the Court of Appeals for the Ninth Circuit held that the Commission lacks authority under the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C.A. § 151 et seq., to issue such an order. 378 F.2d 118. We granted certiorari to consider this important question of regulatory authority. 389 U.S. 911, 88 S.Ct. 235, 19 L.Ed.2d 258. For reasons that follow, we reverse.

I.

CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers. CATV systems characteristically do not produce their own programming, and do not recompense producers or broadcasters for use of the programming which they receive and redistribute. Unlike ordinary broadcasting stations, CATV systems commonly charge their subscribers installation and other fees.

2. 47 C.F.R. § 74.1107(a) provides that "(n)o CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American

Research Bureau, on the basis of the net weekly circulation for the most recent year." San Diego is the Nation's 54th largest television market . . . [Some footnotes have been omitted; others have been renumbered.]

3. 47 C.F.R. § 74.1109 creates "procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes." It provides that petitions for special relief "may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted." . . .

The CATV industry has grown rapidly since the establishment of the first commercial system in 1950. . . . The statistical evidence is incomplete, but, as the Commission has observed, "whatever the estimate, CATV growth is clearly explosive in nature." Second Report and Order, 2 F.C.C.2d 725, 738, n. 15.

CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals.⁴ . . . There are evidently now plans "to carry the programing of New York City independent stations by cable to . . . upstate New York, to Philadelphia, and even as far as Dayton." Thus, "while the CATV industry originated in sparsely settled areas and areas of adverse terrain . . . it is now spreading to metropolitan centers. . . ." First Report and Order, *supra*, at 709. CATV systems, formerly no more than local auxiliaries to broadcasting, promise for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas throughout the country.

The Commission has on various occasions attempted to assess the relationship between community antenna television systems and its conceded regulatory functions. In 1959, it completed an extended investigation of several auxiliary broadcasting services, including CATV. CATV and TV Repeater Services, 26 F.C.C. 403. Although it found that CATV is "related to interstate transmission," the Commission reasoned that CATV systems are neither common carriers nor broadcasters, and therefore are within neither of the principal regulatory categories created by the Communications Act. *Id.*, at 427-428. The Commission declared that it had not been given plenary authority over "any and all enterprises which happen to be connected with one of the many aspects of communications." *Id.*, at 429. It refused to premise regulation of CATV upon assertedly adverse consequences for broadcasting, because it could not "determine where the impact takes effect, although we recognize that it may well exist." *Id.*, at 431.

The Commission instead declared that it would forthwith seek appropriate legislation "to clarify the situation." *Id.*, at 438. Such legislation was introduced in the Senate in 1959, favorably reported,

4. The term "distant signal" has been given a specialized definition by the Commission, as a signal "which is extended or received beyond the Grade B contour of that station." 47 C.F.R.

§ 74.1101(i). The Grade B contour is a line along which good reception may be expected 90% of the time at 50% of the locations. See 47 C.F.R. § 73.683(a).

and debated on the Senate floor. The bill was, however, ultimately returned to committee.

Despite its inability to obtain amendatory legislation, the Commission has, since 1960, gradually asserted jurisdiction over CATV. It first placed restrictions upon the activities of common carrier microwave facilities that serve CATV systems. See Carter Mountain Transmission Corp., 32 F.C.C. 459, *aff'd*, 116 U.S.App.D.C. 93, 321 F.2d 359. Finally, the Commission in 1962 conducted a rule-making proceeding in which it reevaluated the significance of CATV for its regulatory responsibilities. First Order and Report, *supra*. The proceeding was explicitly restricted to those systems that are served by microwave, but the Commission's conclusions plainly were more widely relevant. The Commission found that "the likelihood or probability of [CATV's] adverse impact upon potential and existing service has become too substantial to be dismissed." *Id.*, at 713-714. It reasoned that the importation of distant signals into the service areas of local stations necessarily creates "substantial competition" for local broadcasting. *Id.*, at 707. The Commission acknowledged that it could not "measure precisely the degree of . . . impact," but found that "CATV competition can have a substantial negative effect upon station audience and revenues. . . ." *Id.*, at 710-711.

The Commission attempted to "accommodat[e]" the interests of CATV and of local broadcasting by the imposition of two rules. *Id.*, at 713. First, CATV systems were required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals.⁵ Second, CATV systems were forbidden to duplicate the programming of such local stations for periods of 15 days before and after a local broadcast. See generally First Report and Order, *supra*, at 719-730. These carriage and nonduplication rules were expected to "insur[e] many stations' ability to maintain themselves as their areas' outlets for highly popular network and other programs. . . ." *Id.*, at 715.

The Commission in 1965 issued additional notices of inquiry and proposed rule-making, by which it sought to determine whether all forms of CATV, including those served only by cable, could properly be regulated under the Communications Act. 1 F.C.C.2d 453. After further hearings, the Commission held that the Act confers adequate regulatory authority over all CATV systems. Second Report and Order, *supra*, at 728-734. It promulgated revised rules, applicable both to cable and to microwave CATV systems, to govern the carriage

5. See generally First Report and Order, *supra*, at 716-719. The Commission held that a CATV system must, within the limits of its channel capacity, carry the signals of stations that place signals over the community served by the system. The stations are to be given priority according to

the strength of the signal available in the community, with the strongest signals given first priority. Exceptions are made for situations in which there would be substantial duplication or in which an independent or noncommercial station would be excluded. *Id.*, at 717.

of local signals and the nonduplication of local programming. Further, the Commission forbade the importation by CATV of distant signals into the 100 largest television markets, except insofar as such service was offered on February 15, 1966, unless the Commission has previously found that it "would be consistent with the public interest," *id.*, at 782; see generally *id.*, at 781-785, particularly the establishment and healthy maintenance of television broadcast service in the area," 47 C.F.R. § 74.1107(c). Finally, the Commission created "summary, nonhearing procedures" for the disposition of applications for separate or additional relief. 2 F.C.C.2d, at 764; 47 C.F.R. § 74.1109. Thirteen days after the Commission's adoption of the Second Report, Midwest initiated these proceedings by the submission of its petition for special relief.

II.

We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court. The issues in these cases are only two: whether the Commission has authority under the Communications Act to regulate CATV systems, and, if it has, whether it has, in addition, authority to issue the prohibitory order here in question.⁶

The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio" 47 U.S.C.A. § 152(a). The Commission's responsibilities are no more narrow: it is required to endeavor to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" 47 U.S.C.A. § 151. The Commission was expected to serve as the "single Government agency" with "unified jurisdiction" and "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." It was for this purpose given "broad authority." As this Court emphasized in an earlier case, the Act's terms, purposes, and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the [broadcasting] industry." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137, 60 S.Ct. 437, 439, 84 L.Ed. 656.

Respondents do not suggest that CATV systems are not within the term "communication by wire or radio." Indeed, such communications are defined by the Act so as to encompass "the transmission of . . . signals, pictures, and sounds of all kinds," whether by

6. It must also be noted that the CATV systems involved in these cases evidently do not employ microwave. We intimate no views on what differ-

ences, if any, there might be in the scope of the Commission's authority over microwave and nonmicrowave systems.

radio or cable, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C.A. §§ 153(a), (b). These very general terms amply suffice to reach respondents' activities.

Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that "is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 279, 53 S.Ct. 627, 634, 77 L.Ed. 1166.

Nonetheless, respondents urge that the Communications Act, properly understood, does not permit the regulation of CATV systems. First, they emphasize that the Commission in 1959 and again in 1966 sought legislation that would have explicitly authorized such regulation, and that its efforts were unsuccessful. In the circumstances here, however, this cannot be dispositive. The Commission's requests for legislation evidently reflected in each instance both its uncertainty as to the proper width of its authority and its understandable preference for more detailed policy guidance than the Communications Act now provides. We have recognized that administrative agencies should, in such situations, be encouraged to seek from Congress clarification of the pertinent statutory provisions. . . .

Second, respondents urge that § 152(a) does not independently confer regulatory authority upon the Commission, but instead merely prescribes the forms of communication to which the Act's other provisions may separately be made applicable. Respondents emphasize that the Commission does not contend either that CATV systems are common carriers, and thus within Title II of the Act, or that they are broadcasters, and thus within Title III. They conclude that CATV, with certain of the characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither, eludes altogether the Act's grasp.

We cannot construe the Act so restrictively. Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by

the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio" Similarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical communication. . . ." S.Rep. No. 781, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *F. C. C. v. Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 138, 60 S.Ct. at 439, that it conferred upon the Commission a "unified jurisdiction" and "broad authority." Thus, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *F. C. C. v. Pottsville Broadcasting Co.*, *supra*, at 138, 60 S.Ct. at 439. Congress in 1934 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers." *National Broadcasting Co. v. United States*, 319 U.S. 190, 219, 63 S.Ct. 997, 1010, 87 L.Ed. 1344. We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over "all interstate . . . communication by wire or radio."

Moreover, the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities. Congress has imposed upon the Commission the "obligation of providing a widely dispersed radio and television service," with a "fair, efficient, and equitable distribution" of service among the "several States and communities." 47 U.S.C.A. § 307(b). The Commission has, for this and other purposes, been granted authority to allocate broadcasting zones or areas, and to provide regulations "as it may deem necessary" to prevent interference among the various stations. 47 U.S.C.A. §§ 303(f), (h). The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that "all communities of appreciable size [will] have at least one television station as an outlet for local self-expression." In turn, the Commission has held that an appropriate system of local broadcasting may be created only if two subsidiary goals are realized. First, significantly wider use must be made of the available ultra-high-frequency channels. Second, communities must be encouraged "to launch sound and adequate programs to utilize the television channels now reserved for educational purposes." These subsidiary goals have received the endorsement of Congress.

The Commission has reasonably found that the achievement of each of these purposes is "placed in jeopardy by the unregulated explosive growth of CATV." H.R.Rep. No. 1635, 89th Cong., 2d Sess., 7. Although CATV may in some circumstances make possible "the realization of some of the [Commission's] most important goals," First Report and Order, *supra*, at 699, its importation of distant signals into the service areas of local stations may also "destroy or seriously degrade the service offered by a television broadcaster," *id.*, at 700, and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations. In particular, the Commission feared that CATV might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters. The Commission acknowledged that it could not predict with certainty the consequences of unregulated CATV, but reasoned that its statutory responsibilities demand that it "plan in advance of foreseeable events, instead of waiting to react to them." *Id.*, at 701. We are aware that these consequences have been variously estimated, but must conclude that there is substantial evidence that the Commission cannot "discharge its overall responsibilities without authority over this important aspect of television service." Staff of Senate Comm. on Interstate and Foreign Commerce, 85th Cong., 2d Sess., *The Television Inquiry: The Problem of Television Service for Smaller Communities* 19 (Comm.Print 1959).

The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems. . . . [We] hold that the Commission's authority over "all interstate . . . communication by wire or radio" permits the regulation of CATV systems.

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," as "public convenience, interest, or necessity requires." 47 U.S.C.A. § 303(r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.

[The Court further ruled that the FCC's order, limiting further expansion of respondents' service pending appropriate hearings, did not exceed its authority under the Communications Act.]⁷

Note on the Applicability of the Copyright Laws to Cable Television Operations. The impact of the copyright laws on cable television operations was adjudicated in two major Supreme Court decisions.

In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968), cable systems operated by Fortnightly in Clarksburg and Fairmount, West Virginia, were providing customers with signals of five television stations, three in Pittsburgh, Pennsylvania, one in Steubenville, Ohio, and one in Wheeling, West Virginia. These stations were 52 to 82 miles distant from Clarksburg and Fairmount, communities in which normal television reception was limited by hilly terrain. Fortnightly's cable systems consisted of antennas located on hills above each city, with connecting coaxial cables to each city, strung on utility poles, to carry signals received by the antennas to the home television sets of individual subscribers. The systems contained equipment to amplify and modulate the signals received, and to convert them to different frequencies, in order to transmit the signals efficiently while maintaining and improving their strength. Fortnightly did not edit the programs received nor originate any programs of its own. Subscribers were charged a flat monthly rate unrelated to the extent of usage.

United Artists held copyrights on motion pictures licensed for broadcast on the five television stations carried by Fortnightly's cable systems. Broadcasts of these motion pictures were carried by the cable systems, although Fortnightly had not obtained a license to do so either from United Artists or the originating broadcasting stations. United Artists sued Fortnightly for copyright infringement and the issue posed was whether the cable systems had "performed" the copyrighted works within the meaning of the Copyright Act. The Supreme Court held that they had not, and, accordingly, that no liability under the copyright laws had arisen.

" . . . Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a

7. [Ed.] Justice White concurred in a separate opinion; Justices Douglas and Marshall did not participate.

cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur."

Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 394, 94 S.Ct. 1129, 39 L.Ed.2d 415 (1974), also involved a suit by copyright owners against a cable television operator (Teleprompter) for the unlicensed retransmission of television broadcasts of copyrighted works. Teleprompter's systems in five representative communities were considered: New York City; Elmira, New York; Farmington, New Mexico; Rawlins, Wyoming; and Great Falls, Montana. Typically, broadcast beams were received by Teleprompter's special television antennae, transmitted by means of cable or a combination of cable and point-to-point microwave to the homes of subscribers, and converted into images and sounds by the subscribers' own television sets. "In some cases the distance between the point of original transmission and the ultimate viewer was relatively great—in one instance more than 450 miles—and reception of the signals of those stations by means of an ordinary rooftop antenna, even an extremely high one, would have been impossible because of the curvature of the earth and other topographical factors." In some other cases, original broadcast signals could have been received by standard television equipment (New York City and Elmira). In still others, original broadcast signals could have been received by the customers' own television antennae only intermittently, imperfectly and sporadically.

The Supreme Court rejected the copyright claims as to the New York City and Elmira systems, refusing to distinguish *Fortnightly* on the grounds that Teleprompter originated some of its programming; that it accepted advertising for some such programming; and that it was interconnected with other CATV systems in carrying certain programs. The Court held that these factors were not relevant to copyright liability in respect of programs which were *not* originations, *not* associated with CATV advertising and *not* the subject of interconnection. Nor was it significant that microwave was employed by Teleprompter in some instances for the retransmission of broadcast signals.

The Supreme Court also rejected copyright liability for distant signals: "By importing signals that could not normally be received with current technology in the community it serves, a CATV system does not, for copyright purposes, alter the function it performs for its subscribers. When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program. The privilege of receiving the broad-

cast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so. The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer."⁸

It was not until the Copyright Law Revision of 1976, 290 Stat. 2541, that copyright was made applicable to cable systems.

A "cable system" is defined as "a facility . . . that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee . . ., two or more cable systems in contiguous communities under common ownership or control or operating from one head-end shall be considered as one system" 17 U.S.C.A. § 117(f).

A "secondary transmission" is defined as "the further transmitting of a primary transmission simultaneously with the primary transmission," except that nonsimultaneous transmission is permitted in the case of certain offshore points. *Ibid.*

A "primary transmission" is "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted." *Ibid.*

The "local service area of a primary transmitter . . . comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations [of the FCC] in effect on April 15, 1976." *Ibid.*

A "distant signal equivalent" is "the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one to each independent station and a value of one-quarter to each network station and noncommercial educational station for the nonnetwork programming so carried pur-

8. See Note, CATV and Copyright Liability: On A Clear Day You Can See Forever, 52 Va.L.Rev. 1505 (1966); Note, CATV and Copyright Liability, 80 Harv.L.Rev. 1514 (1967); Note, Cable, Copyright, Communications: Controversy, 24 Clev.St.L.Rev. 107 (1975); Note, Cable Television and

Copyright: Can the States Protect the Broadcasters, 32 Wash. & Lee L.Rev. 163 (1975); Casenotes, 87 Harv.L.Rev. 665 (1974), 60 Va.L.Rev. 137 (1974), 83 Yale L.J. 554 (1974), 26 Vand.L.Rev. 1314 (1973), 25 Hastings L.J. 1507 (1974).

suant to the rules, regulations, and authorizations of the Federal Communications Commission." Special computations are provided for part-time carriage of distant signals and for certain substitutions of distant signals. *Ibid.*

A "network station" is defined as one "that is owned or operated by, or affiliated with, one or more of the television networks . . . providing nationwide transmissions, and transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast day." Commercial stations other than network stations are "independent stations." "Noncommercial educational station" is conventionally defined by reference to 47 U.S.C.A. § 397. *Ibid.*

The basic structure of the statute is to provide for compulsory copyright licenses for secondary transmissions by cable television systems, subject to the following qualifications, 17 U.S.C.A. § 111(c):

1. The carriage of the signals comprising the secondary transmission must be "permissible under the rules, regulations, or authorizations of the Federal Communications Commission."

2. The cable system must file the notice, statement and fee required by the royalty accounting provisions of the legislation.

3. There must be no alteration by the cable system, "through changes, deletions, or additions," of the content of the primary transmission, "or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program."

4. In the case of a "primary transmission not made for reception by the public at large but . . . controlled and limited to reception by particular members of the public," the cable system must proceed in accordance with FCC requirements and not alter or change the signal of the primary transmitter (which must be an FCC-licensed broadcaster).

5. There also are special limitations on cable carriage of Canadian and Mexican signals.

The normal royalty fee for a compulsory license is computed as "specified percentages of the gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows, 17 U.S.C.A. § 111(d):

"(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

"(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

“(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

“(iv) 0.2 of 1 per centum for the fifth distant signal equivalent and each additional signal equivalent thereafter.”

There are special provisions for computing fractional values, and for computing reduced royalties for small systems (those with semi-annual revenues of less than \$160,000).

The statute also establishes a Copyright Tribunal, which has two basic responsibilities:

First, to divide the royalty payments from cable systems among copyright owners in the event there is a controversy as to the proper share of each. 17 U.S.C.A. § 111(d)(5).

Second, to make adjustments in the royalty rates stipulated in the statute, subject to a number of limitations. 17 U.S.C.A. § 801(b)(2).

(1) The normal royalty rate may be adjusted to reflect national monetary inflation or deflation or the average charges made by cable systems to subscribers for basic service, provided that, if the average charges to cable subscribers increase at a rate faster than general inflation, no adjustment shall be made. No change is permitted based on any reduction in the average number of distant signal equivalents per subscriber.

(2) If the FCC by general regulation permits more distant signals to be carried by cable systems than were authorized on April 15, 1976, adjustments may be made to assure royalty rates reasonable in light of the changes made. Similar adjustments may be made in the event of FCC changes in syndicated and sports program exclusivity.

Royalty rates for small systems are not subject to either type of adjustment. As to the first type of adjustment, changes may be made no earlier than 1985 and no more often than at five-year intervals. As to the second type of adjustment, changes may be made when the triggering events occur, and they may be reconsidered at five-year intervals. 17 U.S.C.A. § 804(a) and (b).

The pertinent legislative history, House Rep. No. 94-1476, 94th Cong., 2d Sess. 89-101 (1976), explained:

“ . . . The Committee determined . . . that there was no evidence that the retransmission of ‘local’ broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programming, including network programming which is broadcast in ‘distant’ markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly. By contrast, their transmission of distant non-network programming by

cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market

“Based on current estimates supplied to the Committee, the total royalty fees paid under the initial schedule established in the bill should approximate \$8.7 million. Compared with the present number of cable television subscribers, calculated at 10.8 million, copyright payments under the bill would therefore approximate 81 cents per subscriber per year. The Committee believes that such payments are modest and will not retard the orderly development of the cable television industry or the service it provides to its subscribers.

“ . . . The compulsory license applies . . . to the carriage of over-the-air broadcast signals and is inapplicable to the secondary transmission of any nonbroadcast primary transmission such as a program originated by a cable system or a cable network. The latter would be subject to full copyright liability under other sections of the legislation.”⁹

Note on the Development and Configuration of the Cable Television Industry. The growth of the cable television industry is summarized in the following data:¹⁰

	<u>Operating Systems</u>	<u>Total Subscribers</u>
1952	70	14,000
1957	500	350,000
1962	800	850,000
1967	1,770	2,100,000
1972	2,841	6,000,000
1977	3,832	11,900,000
1979	4,150	14,100,000

Thus, at the beginning of 1979, cable systems were serving 19.1 percent of the country's 74 million television households.

9. On the new copyright legislation, see Meyer, *Feat of Houdini, or How the New Act Disentangles the CATV-Copyright Knot*, 22 N.Y.L.S.L.Rev. 545 (1977); Greene, *Cable Television Provisions of the Revised Copyright Act*, 27 Cath.U.L.Rev. 263 (1978); Besen, Manning and Mitchell, *Copyright Liability for Cable Television: Compul-*

sory Licensing and the Coase Theorem, 21 J.Law and Econ. 67 (1978).

10. Data are from *Television Factbook (Services Volume)* 83-a, 84-a, 90-a (1979); *Television Digest*, Mar. 5, 1979, p. 2; *Television Digest, NCTA Convention Supp.*, May 20-23, 1979, pp. 1-3.

For 3,997 systems operating in September 1978, the following characteristics were present:

Channel Capacity

Over 20	556
13-20	482
6-12	2,791
5 only	139
Less than 5	17
Not available	12

System Size (number of subscribers)

50,000 and over	12
20,000-49,999	89
10,000-19,999	227
5,000-9,999	390
3,500-4,999	261
1,000-3,499	1,210
999 and less	1,783
Not available	25

Originations

Automatic originations only (time, weather, news, ticker, etc.)	1,615
Local live, tape, film or cable network (with or without automatic originations)	1,035
No originations	1,347

System Ownership (system may be included in more than one category)

	<u>Systems</u>	<u>Percent of Total</u>
Broadcaster	1,216	30.4
Newspaper	506	12.7
Other Publisher	431	10.8
Program Producer or Distributor	701	17.5
Theater	162	4.1
Telephone Company	74	1.9
Equipment Manufacturer	213	5.3
Community or Subscriber	101	2.5

The shares of the industry accounted for by the top cable operators in early 1979 were as follows:

	<u>Number of Subscribers</u>	<u>Percent of Cable Subscribers</u>	<u>Percent of Television Households</u>
Top 4	3,391,000	24.0	4.6
Top 10	5,153,000	36.5	7.0
Top 25	8,235,000	58.4	11.2

B. CABLE SYSTEM CARRIAGE OF BROADCAST SIGNALS

CABLE TELEVISION SERVICE

Federal Communications Commission, 1972.

37 Fed.Reg. 3252, 36 F.C.C.2d 143, 24 R.R.2d 1501, on reconsideration,
36 F.C.C.2d 326, 25 R.R.2d 1501.

. . . .

9. Our initial rule making proposals were issued in December 1968 [Following further rule making proposals, submission of comments and several public proceedings,] the Commission formulated a cable program designed to allow for fulfillment of the technological promise of cable and, at the same time, to maintain the existing structure of broadcast television. The framework of the new program was described to the Congress in testimony before the Senate Communications Subcommittee on June 15, 1971, and before the House Communications and Power Subcommittee on July 22, 1971. In order to permit the committees and the Congress ample opportunity to consider its proposals prior to final adoption, the Commission on August 5, 1971 adopted a "Letter of Intent" in which it described in detail the course it planned to adopt.

10. Following release of our letter of intent further negotiations were undertaken, and agreement was reached on a proposal that was supported by the National Cable Television Association, the National Association of Broadcasters, the Association of Maximum Service Telecasters, and a major group of program suppliers. This consensus agreement is fully discussed later in this report and it, too, has had significant impact on the direction of our settlement of the complex questions having to do with distant signals/copyright.

. . . .

1966 RULES

13. Under the rules adopted in March 1966, local broadcasters and the Commission had to be notified before any cable system could

undertake to carry a television broadcast signal (Sec. 74.1105). A distant signal (that is, a signal carried beyond its Grade B contour) could not be carried into one of the 100 largest television markets without prior Commission authorization after evidentiary hearing (Sec. 74.1107). Carriage of local signals and carriage of distant signals in smaller markets could commence 30 days after notice, provided no objection had been filed (Sec. 74.1105(c)). If objected to, carriage could not be commenced until the Commission ruled on the merits of the objection (Secs. 74.1105(c) and 74.1109). In every instance where the Commission was called on to judge whether a cable system should be permitted to carry distant or local signals, the test was the general public interest standard of the Communications Act, and more specifically the consistency of the carriage with "the establishment and healthy maintenance of television broadcast service in the area" (see Sec. 74.1107). The 100 largest television markets were singled out for special attention because it was felt that the potential for independent television station growth, particularly for UHF stations, was most favorable in those areas. Additionally, all local stations on request had to be carried by cable systems within the stations' Grade B service areas and, again on request, systems generally were not to duplicate the programming of a higher priority station by carrying the same programming from a lower priority station during the same 24-hour period (Sec. 74.1103). The priority of a station for purposes of obtaining program exclusivity was based on the strength of its signal in the area, with stations of higher signal strength having higher priority (Sec. 74.1103(a)).

60. The approach we are adopting is to extend existing exclusivity rules so that they cover nonnetwork as well as network programming, and to restrict the number of distant signals that a system may carry based on the size of the market in which it is located and the estimated ability of that market to absorb additional competition. In so regulating distant signal carriage, we hope to give cable impetus to develop in the larger markets without creating an unacceptable risk of adverse impact on local television broadcast service. At the same time, these limits should serve to create an incentive for the development of those nonbroadcast services that represent the long term promise of cable television and are critical to the public interest judgment we have made.

THE CONSENSUS AGREEMENT

61. In the course of developing a regulatory program, and because of Congressional concern over these important matters, the Commission in its letter of August 5, 1971 outlined to Congress the rules on which there was Commission agreement. We noted there

(p. 2) the recent efforts of the principal industries to reach agreement on the major issues at controversy and expressed the hope that these efforts would be successful. Following the letter's release, intensive efforts were made to achieve a consensus, and agreement has now been reached. . . .

62. The agreement . . . deals solely with . . . television broadcast signal carriage. . . .

65. We believe that adoption of the consensus agreement will markedly serve the public interest:

(i) First, the agreement will facilitate the passage of cable copyright legislation. It is essential that cable be brought within the television programing distribution market. There have been several attempts to do so, but all have foundered on the opposition of one or more of the three industries involved. It is for this reason that Congress and the Commission have long urged the parties to compromise their differences.

(ii) Passage of copyright legislation will in turn erase an uncertainty that now impairs cable's ability to attract the capital investment needed for substantial growth. The development of the industry, at least with respect to assessing copyright costs, would be settled by the new copyright legislation and its future no longer tied to the outcome of pending litigation.

(iii) Finally, the enactment of cable copyright legislation by Congress—with the Commission's program before it—would in effect reaffirm the Commission's jurisdiction to carry out that program, including such important features as access to television facilities.

It is important to emphasize that for full effectiveness the consensus agreement requires Congressional approval, not just that of the Commission. The rules will, of course, be put into effect promptly. Without Congressional validation, however, we would have to re-examine some aspects of the program. Congress, we believe, will share our conclusion—that implementation of the agreement clearly serves the public interest. . . .

IMPACT CONSIDERATIONS

68. Before proceeding to the specific provisions of the rules, some discussion would be useful on the judgments we have made as to: (a) The amount of distant signal competition that can be introduced into particular types of markets without having adverse impact on local television service, and (b) the effect of distant signal carriage on the supply of television programing. The answers rest in the complex economics of, and interrelationships between, the three

industries involved as well as on expectations of future developments in the industries and in the economy generally.

69. With respect to the question of impact of distant signal carriage on local television broadcast service, a number of studies were undertaken to test our proposals in Docket 18397-A. These proposals would have permitted carriage of four distant independent signals in each of the top 100 markets. A study was undertaken by the Commission's staff, several studies were produced by the Rand Corp. under grants from the Ford and Markle Foundations, and studies and critical appraisals of the staff and Rand reports were submitted by various broadcast interests. In all of these it was assumed that four distant signals, including among them the strongest independents in the country, would be carried. There was no consensus as to the range of likely impact. The Rand studies concluded generally that carriage of four distant signals would not have significant adverse impact on local television broadcast service and that, in the short run at least, increased cable penetration would have a beneficial effect on local UHF stations because cable carriage eliminates the technical edge of VHF over UHF. The broadcast studies pointed out a number of alleged defects in the Commission staff and Rand studies and concluded that carriage of four distant signals as proposed would have a seriously detrimental impact on local broadcast service. The Commission staff study was somewhat less optimistic than the Rand studies but less pessimistic than those of the broadcasters.

70. The conflicting conclusions of these studies make abundantly clear the difficulties involved in attempting to predict the future where there are so many variables and unknowns. While the reports and studies have been useful in illuminating the various elements of our policy decision, we cannot rely on any particular report or study as a sure barometer of the future. We would simply point out there is no consensus, and we do not pretend that we can now forecast precisely how cable will evolve in major markets. There is inherent uncertainty. But this does not mean that we should stand still and block all possibility of new and diverse communications benefits. Rather, it means that we should act in a conservative, pragmatic fashion—in the sense of maintaining the present system and adding to it in a significant way, taking a sound and realistic first step and then evaluating our experience. That is the approach we have taken. We have authorized not four distant signals, as proposed, but a more limited number (particularly in the smaller markets), and provided the added protection of nonnetwork program exclusivity (particularly in the larger markets where independent stations generally operate).

71. Based on our experience and on our study of the comments, we do not believe that this approach will have impact adverse to the public interest. On the contrary, it is our judgment that it would be

wholly wrong to halt cable development on the basis of conjecture, for example, as to its impact on UHF stations. We believe the improvements that cable will make in clearer UHF pictures and wider UHF coverage will offset the inroads on UHF audiences made by the limited number of distant signals that our rules would permit. As to similar arguments concerning cable's impact on VHF in the smaller markets, it is our judgment—considering such factors as cable's rate of penetration and the growth of broadcast revenues—that our approach will not undermine these stations in their ability to serve the public. As with any general policy, there may well be exceptional cases—as to a particular market or, more likely, a particular station in that market. In such an event, we would be prepared to take appropriate action under the special relief provisions of the rules (Sec. 76.7).

72. The viewing patterns in cable and noncable homes will soon become apparent and serve as a measure of cable's possible impact on local broadcast service. We intend to obtain continuing reports from representative communities, and broadcasters will be free to submit such reports at any time. If these reports and the financial data from operating stations were to show the need for remedial action, we could and would act promptly. The range of possibilities here is broad. More extensive nonnetwork programing protection might be afforded to affected stations in markets below the top 50. Or, we might consider halting cable's growth with distant signals at discrete areas within the community—something we have done on occasion in the past.

73. The additional program exclusivity rules are designed both to protect local broadcasters and to insure the continued supply of television programing. The latter, of course, is fundamental to the continued functioning of broadcast and cable television alike. As with the basic signal carriage rules, the types of exclusivity incorporated into the rules vary according to market size: The most extensive protection is in the top 50 markets from which the bulk of program supplier revenue is derived and where these restrictions are consequently most needed to insure the continued health of the television programing industry. This protection will also assist independent stations (including many UHF's) that are very largely concentrated in these markets. In markets 51–100 the rules afford additional, although limited, protection to local broadcasters. It has been necessary to find a middle ground: The stations are very largely network affiliated, and generally only two distant signals will be permitted; but these markets are mostly underserved, lacking independent stations, and thus there is a particular need for cable. No syndicated programing exclusivity is added in markets below 100 because the number of distant signals is very strictly limited under the rules. That limitation along with network programing protection, is, we believe, adequate to preserve local service, and no addi-

tional impediment should be placed on cable operations in these underserved markets.

SIGNAL CARRIAGE RULES

74. The following chart will give an overview of signals that will be permitted:

GENERAL OUTLINE OF THE RULES PERTAINING TO BROADCAST SIGNAL CARRIAGE

The television signal carriage rules divide all signals into three classifications:

First, signals that a cable system, upon request of the appropriate station, must carry.

Second, signals that, taking television market size into account, a cable system may carry.

Third, signals that some systems may carry in addition to those required or permitted in the two above categories.

These three classifications of signals are used in various market situations as outlined below:

CABLE SYSTEMS LOCATED OUTSIDE ALL TELEVISION MARKETS PRIORITIES

First:

The following signals are required, upon request, to be carried:

- (1) All Grade B signals.
- (2) All translator stations in the cable community with 100 watts or higher power.
- (3) All educational television stations within 35 miles.
- (4) Television stations significantly viewed in the cable community.

Second:

The cable television system may carry any other additional signals.

CABLE SYSTEMS LOCATED IN SMALLER TELEVISION MARKETS

First:

The following signals are required, upon request, to be carried:

- (1) All market signals (those within 35 miles and those located in other communities that are generally considered part of the same market).
- (2) Grade B signals of educational television stations.

- (3) Grade B signals from stations in other smaller markets.
- (4) All translator stations in the cable community with 100 watts or higher power.
- (5) Television stations significantly viewed in the cable community.

Second:

A cable system may carry additional signals so that, including the signals required to be carried under the First priority, the following total may be provided.

- (1) Three full network stations
- (2) One independent station

Third:

Generally, the cable system may carry additional educational stations and one or more stations programed in non-English languages.

CABLE SYSTEMS LOCATED IN THE FIRST 50 MAJOR MARKETS

First:

The following signals are required, upon request, to be carried:

- (1) All market signals (see smaller markets above) ¹²
- (2) Grade B signals of educational television stations.
- (3) All translator stations in the cable community with 100 watts or higher power.
- (4) Television stations significantly viewed in the cable community.

Second:

A cable system may carry additional signals so that, including the signals required to be carried under the First priority, the following total may be provided:

- (1) Three full network stations
- (2) Three independent stations

Third:

Generally, the cable system may carry educational and non-English language stations as described for smaller markets above.

The cable system may carry two additional independent stations: *Provided, however,* That the number of additional signals permitted under this priority is reduced by the number of signals added to the system under the second priority.

12. In the major markets, where a cable television system is located in the designated community of such a mar-

ket, it shall not carry as a local signal the signal of a station licensed to a designated community in another

CABLE SYSTEMS LOCATED IN THE SECOND 50 MAJOR MARKETS

First:

The same requirements apply as for the First 50 Markets.

Second:

The cable system may carry additional signals so that, including the signals required to be carried under the first priority, the following total may be provided:

- (1) Three full network stations
- (2) Two independent stations

Third:

The same requirements apply as for the First 50 Markets.

Note: Cable systems located in overlapping markets where differing amounts of service are provided for under the rules, e. g., in the overlap of a smaller market and one of the first 50 markets, must operate in accordance with the rules for the larger market.

75. The signal carriage rules are tailored to markets of varying size in accordance with the estimated ability of these markets to withstand additional distant signal competition. The rules vary according to whether the cable system is in the first 50 television markets, in markets 51-100, in a market below 100, or not in any television market. A list of the major markets (first 100) and their designated communities is made part of the rules (Sec. 76.51). The list is derived largely from the American Research Bureau's 1970 prime-time households ranking. The list will not be revised each time new rankings are issued; there must be stability in this area, so that plans and investment can go forward with confidence. A contrary approach would be disruptive to the viewing public. . . .

76. We have delineated the areas to which particular rules will be applicable. We define the basic area as a zone of 35-mile radius surrounding a specified reference point in each designated community in a market. A set of reference points fixing the center of the community to which each station is licensed is made part of the rules (Sec. 76.53). For new television stations where reference points have not been specified, the 35-mile zone will be drawn from the main post office in the television station community. The purpose of drawing these zones is to permit generally unrestricted cable operation in those outer areas where such operation would have insignificant effect on the revenues of local television stations.¹³

major market, unless the designated community of the cable system is wholly within 35 miles of the reference point of the other community or unless the station meets the significant viewing standard. [Some foot-

notes have been omitted; others have been renumbered.]

13. The 35-mile zone was first proposed in our proceeding in Docket 18397. It was based on experience and on

77. Cable systems in communities partially within a 35-mile zone are treated as if they are entirely within the zone. There is, however, one exception to this rule: A cable system in a major market designated community is treated as within the zone of a station licensed to a designated community in another major market only if the 35-mile zone of the station covers the entire community of the cable system. In those instances where there is an overlapping of zones to which different carriage rules are applicable, the rules governing the larger market will be followed. Authorized stations with construction permits, but which have not yet commenced broadcasting, are treated as having a zone and as operational under the rules for a period of 18 months following initial grant of permit. However, the emergence of new stations will not require displacement of existing signals because that would cause disruption of service to the public. Such new stations are likely only in the major markets where new systems will in any event have large channel capacity.

SIGNALS REQUIRED TO BE CARRIED

78. Our objective in approaching the signal carriage issue has been generally twofold: (1) To assure that "local" stations are carried on cable television systems and are not denied access to the audience they are licensed to serve; and (2) to gage and, where appropriate, to ameliorate the competitive impact of "distant" signal carriage. Because market patterns vary and there is only gradual deterioration in a station's receivability as the distance from its transmitter increases, there is no necessarily clear dividing line between "distant" and "local" signals. Nevertheless, a line must be drawn somewhere.

79. Under prior rules, Grade B signals were generally considered to be local and, on request, cable systems were required to carry all Grade B signals covering their communities. Signals carried beyond their Grade B contours were considered to be distant. While the Grade B carriage rule has been a part of the Commission's cable television rules from the beginning, its operation has been complicated in practice as a result of footnote 69 to the Second Report and Order in Docket 15971. This footnote indicated that there might in rare instances be a question whether all local signals could be car-

analysis of a number of representative markets. In that proceeding the comments directed toward the size of the zone were predictably split: Cable interests desired smaller zones; broadcasters, larger ones. We are not convinced that our proposal for a 35-mile zone should be changed in either direction. The zone is particularly effective for UHF stations that generally have significantly smaller service

areas than VHF stations. The comments filed by AMST indicated that it is the UHF stations—no matter where located—that have the substantial share of their audience within the 35-mile zone. In addition, as we stated in our proposal, a fixed mileage standard has the advantage of administrative ease and provides certainty to the affected industries.

ried if the cable system were identified primarily with one market and some of the local signals came from an overlapping market.

81. We have now decided that the following classes of signals should be treated as local: Signals of stations within 35 miles of the cable system, signals meeting a significant viewing test, market signals in hyphenated markets, and in some cases Grade B signals.

82. **35-Mile and Grade B signals.** All cable systems must carry, on request, the signals of all stations licensed to communities within 35 miles of the cable system's community. This requirement, based on policy considerations similar to those underlying existing carriage rules, is intended to aid stations—generally UHF—whose Grade B contours are limited. In this manner less powerful stations will be able to compete with more powerful stations in the same market more effectively than they could under our old carriage rules; they will be capable of extending their coverage into the area that we have determined is generally necessary for the development of broadcasting stations. With respect to cable systems located wholly outside the specified zones of all stations, all Grade B signals must be carried. This, of course, maintains the earlier carriage rule and assures that all stations whose Grade B contours extend beyond 35-mile zones will be carried by systems located outside such zones.

83. **Overlapping market signals.** A more significant departure from our earlier carriage rules involves the overlapping market or footnote 69 situation. Audience measurements frequently show that stations from one market coming into another market do not receive audience shares of significant size in the latter even though they are of predicted Grade B strength. Such stations with no significant audience in a market may logically be treated as distant signals. The problem then is to draw a line between those stations that have sufficient audience to be considered local and those that do not. Cable development is not likely to be advanced if television choices on the cable are more limited than choices over the air, nor is it reasonable that signals significantly viewed over the air be excluded from carriage on cable systems. Thus, our rule permits and, on appropriate request, requires carriage of a signal from one major market into another if that signal—without regard to distance or contour—has a significant over-the-air audience in the cable system's community. Because the same rationale is applicable, the rule is also applicable to overlaps between major and smaller markets. In sum, cable systems in a smaller or major market may carry a signal from a major market as a local signal only if the system's community is wholly or partially within 35 miles of that market or if the signal in question is significantly viewed in the cable system community. However, where a cable system is located in the designated

community of a major television market, it may carry the signal of a television station licensed to a designated community in another major television market only if the designated community in which the cable system is located is wholly within the specified 35-mile zone of the station. There will continue to be no restriction on carriage of Grade B signals or those significantly viewed from one smaller market into another, and network exclusivity will be applicable.

84. A significant viewing standard can reasonably be drawn at several points. We have concluded that an out-of-market network affiliate should be considered to be significantly viewed if it obtains at least a 3-percent share of the viewing hours in television homes in the community and has a net weekly circulation of at least 25 percent. For independent stations, the test is a share of at least 2-percent viewing hours and a net weekly circulation of at least 5 percent. The two criteria reflect distinct concepts. Net weekly circulation reflects the extent to which signals are of any interest to television viewers but tends largely to reflect the availability or viewability of a signal as a technical matter. Audience share indicates the intensity of viewer interest. The combination of these two criteria provides greater assurance that the signal meeting the test is in fact significantly-viewed. The lower figures for independent stations are intended to reflect the smaller audiences that these stations generally attract even in their home markets.

85. For purposes of establishing that a station meets the significant viewing standard we are using the 1971 American Research Bureau "Television Circulation Share of Hours" survey information Because this data is provided on a county-wide basis only, we recognize that it may not account for variations in viewing levels among communities within the county. There may be other drawbacks in using these surveys, such as rounding of percentages and sampling errors. We nevertheless propose to accept this county-wide information to establish viewing levels for signals in all communities within these counties. In doing so, we note that survey information of this type is generally used by the television industry without differentiating among communities within counties, and that it gives a useable indication of viewing. But the most important consideration in our decision to accept these figures as conclusive is the strong desirability of certainty, both from a cable and a broadcast point of view.¹⁴ Otherwise, rather than permitting cable to get moving, we believe there would be controversy in virtually every case. By proceeding in this fashion, we hope to reduce controversy, to provide a base of signals that cable systems will be assured they may carry, and to define areas in which stations will have rights to carriage. This approach strikes an appropriate balance—in 1966 we selected

14. To avoid disruption of viewing and to promote the needed certainty, we stress that the signals specified in

the 1971 sweeps are not subject to deletion on the basis of some special showing or later survey.

the Grade B contour, and in 1968 the 35-mile zone, neither of which was specifically geared to actual viewing, while we now select a precise standard that is much more likely to reflect such viewing.

. . .

87. **Hyphenated markets.** In such markets, characterized by more than one major population center supporting all stations in the market but with competing stations licensed to different cities within the market area, we will permit and, on request of the station involved, require carriage of all stations licensed to designated communities in the market. Because of the structure of these markets, including the terrain and the population distribution, portions of the market are occasionally located beyond the Grade B contours of some market stations. Consequently, we are adopting this rule in order to help equalize competition between stations in markets of this type, and to assure that stations will have access to cable subscribers in the market and that cable subscribers will have access to all stations in the market.

ADDITIONAL SERVICE

88. . . . Clearly, cable service can provide greater diversity—can, if permitted, provide the full television complement of a New York or a Los Angeles to all areas of the country. Although that would be a desirable achievement, it would pose a threat to broadcast television's ability to perform the obligations required in our system of television service. We believe, however, that those who are not accommodated as are New York or Los Angeles viewers should be entitled to the degree of choice that will afford them a substantial amount of diversity and the public services rendered by local stations.

89. Cable television can and should help in achieving the diversification sought by our allocations policies. It would, of course, be desirable to adopt one nationwide standard. However, because we seek to minimize possible impact on local broadcasting, we have decided to establish standards of television service that vary with market size. (Non-commercial educational and non-English language stations are not included in these standards and are discussed separately below.) It is our determination that the public interest will be served by allowing cable systems to make available the following complement of signals:

- (1) In television markets 1–50:
 - Three full network stations.
 - Three independent stations.
- (2) In television markets 51–100:
 - Three full network stations.
 - Two independent stations.

(3) In smaller television markets (below 100) :

Three full network stations.

One independent station.

If after carriage of stations within 35 miles, those from the same market, and those meeting the viewing test, the service authorized above is not available, distant signals are permitted to be carried to make up the defined level of service.

90. Cable systems in major markets are in any case permitted to carry two signals beyond those whose carriage is required under the mandatory carriage rules. If the service standards set out in the preceding paragraph are met by the carriage of all stations required to be carried, two additional independent stations will be authorized. . . . The rationale for permitting at least two additional signals in all major markets is simply this: It appears that two signals not available in the community is the minimum amount of new service needed to attract large amounts of investment capital for the construction of new systems and to open the way for the full development of cable's potential. We will, therefore, permit this complement of signals in the larger markets because it is necessary in terms of cable's requirements and because it is acceptable in terms of impact on broadcasting.

91. Cable systems in communities entirely outside the zone of any commercial television station may carry television signals without restriction as to number and must carry all Grade B signals, all educational television stations within 35 miles, and all 100 watts or higher power translator stations licensed to the cable community. We have, however, given particular attention to the arguments of small market broadcasters that continuing cable penetration will adversely affect their ability to serve the public interest. Because these smaller stations serve sparsely populated areas, we agree that some relief is warranted. Accordingly, we are going beyond our August letter by requiring that these smaller market signals, where significantly viewed, must be carried on all new cable systems and on all existing systems with sufficient channel capacity—even if the cable community is beyond Grade B contours—and, as to new systems, must be afforded simultaneous nonduplication protection. (Secs. 76.57(a)(4) and 76.91(c)). Smaller market broadcasters, particularly in the Rocky Mountain region, argue against 35-mile zones and contend that, in their case, an effective zone must be much greater (e. g., Grade B contour) to take into account audiences important to their operations. We recognize the validity of the contention that there is audience beyond the 35-mile zones. But our economic analysis—taking into account such factors as where cable can be feasibly constructed, the impact of existing cable penetration, and the revenues of such stations—simply does not bear out the need for any general rule that would have unpredictable consequences in other parts of

the country. . . . New cable systems must give notice before commencing operations, and broadcasters—with knowledge of their own situations—will thus have a full opportunity to make a case for additional relief. We will give these showings most careful scrutiny. . . . We intend to keep a close watch on future developments in the Rocky Mountain and other regions involving smaller station operations—in rural areas generally—and have directed our staff to prepare reports annually. We will be alert to any emerging trend and in position to adjust our program accordingly.

EDUCATIONAL STATIONS

94. The principal concern of noncommercial educational broadcasters with signal importation is not reduction in audience size but possible erosion of local support among cable television subscribers. The rule we are adopting will permit carriage of distant educational stations in the absence of objection from local educational stations or educational television authorities.

95. Educational television interests are concerned about such a rule only to the extent that it might involve them in difficult and expensive process. We recognize the difficulties that educational interests face if forced to spend time and money in protracted litigation before the Commission and will accordingly attempt to settle any questions that may arise through informal procedures. We will give their objections careful consideration, and will endeavor to work out accommodations that serve the public interest. In the absence of objection, however, the widest possible dissemination of educational and public television programming is clearly of public benefit and should not be restricted. The rules require cable systems to carry, on request, all educational stations within 35 miles and those placing a Grade B contour over the cable community. We are continuing to require that local educational stations and local and State educational authorities receive direct notification of proposals by cable television systems to carry educational stations. While all objections will be carefully considered, we do not ordinarily anticipate precluding carriage of State-operated educational stations in the same State as the cable community.

FOREIGN LANGUAGE STATIONS

96. Except in a very few markets, all U.S. stations broadcast in the English language. Although there are areas of the country, especially along the Canadian and Mexican borders, with significant populations whose first or only language is French or Spanish, the economics of television broadcasting generally precludes providing these areas with other than English language programming. Cable systems, however, have the capability of overcoming this problem,

and we believe this capability should be encouraged. We will, accordingly, permit cable systems to carry non-English language programming without limitation. Where there is a local station broadcasting predominantly in a foreign language the added diversity provided by the carriage of distant foreign language stations broadcasting in the same language will be permitted unless the local station demonstrates that such importation will adversely affect its ability to serve the public. In order to encourage this carriage, distant foreign language stations will not be counted as part of the additional signal quota discussed above and we will not impose any restriction as to which stations, either foreign or domestic, may be carried. As with educational stations, foreign language stations fulfill an important need for what generally is an audience limited in number. As a consequence, we do not anticipate that their carriage will have significant impact on the totality of local television service.

PROGRAM EXCLUSIVITY

97. Our solution to the problem of distant signal carriage involves an extension of our existing program exclusivity rules to provide more effective protection to syndicated programming. Additionally, we believe a change is appropriate in the same-day exclusivity rule that applied as a practical matter only to network programming.

98. The previous exclusivity rule (Sec. 74.1103) was based on a system of priorities that generally protected a station of higher priority against having its programming duplicated on the same day by cable carriage of a lower priority station. From highest to lowest, the signal strength priorities are Principal Community, Grade A, and Grade B. With respect to network television programming, we are retaining this system of priorities but will only require cable systems, on request of a higher priority station, to refrain from simultaneous duplication of the higher priority station's network programming. Except for this change from same-day to simultaneous protection, we retain the precedents and policies evolved under the prior rule.

99. The change, while serving effectively to protect an affiliate's all-important network programming (except in the time zone situation),¹⁵ facilitates cable operation, particularly in the smaller markets. The new provision is also complementary to the changes in our signal carriage rules that permit new cable systems in both smaller and major markets to carry duplicate sets of network stations only if the signals are available under the significant viewing standard. Because these signals are generally available even without cable, it is appropriate that cable subscribers not be denied such time diversity as is available over the air.

15. We will, on appropriate petition, grant additional exclusivity relief in

those situations where a signal is carried from one time zone into another.

100. Syndicated programing will now be effectively protected in the major markets. In markets 1-50—cable systems, on receipt of appropriate notification, will be required to refrain from carrying syndicated programing on a distant signal as follows: (1) During a preclearance period of 1 year, syndicated programs sold for the first time anywhere in the United States for television broadcast exhibition; (2) during the run of the contract, programs under exclusive contract to a station licensed to a designated community in the market. In markets 51-100—cable systems, on receipt of appropriate notification, will be required to refrain from distant signal carriage of syndicated programs under exclusive contract to a station licensed to a designated community in the market, except in the following circumstances:

(1) For off-network series programs:

(A) Prior to the first nonnetwork broadcast in the market of an episode in the series;

(B) After a first nonnetwork run of the series in the market or after 1 year from the date of the first nonnetwork broadcast in the market of an episode in the series, whichever occurs first;

(2) For first-run series programs:

(A) Prior to the first broadcast in the market of an episode in the series;

(B) After 2 years from the first broadcast in the market of an episode in the series;

(3) For first-run, nonseries programs:

(A) Prior to the date the program is available for broadcast in the market under the provisions of any contract or license of a television broadcast station in the market;

(B) After 2 years from the date of such first availability;

(4) For feature films:

(A) Prior to the date such film is available for non-network broadcast in the market under the provisions of any contract or license of a television broadcast station in the market;

(B) Two years after the date of such first availability;

(5) For other programs: One day after the first nonnetwork broadcast in the market or 1 year from the date of purchase of the program for nonnetwork broadcast in the market, whichever occurs first.

Additionally, and with respect to each of these categories of programing, a cable system in markets 51-100 may carry any distant signal syndicated program during prime time unless the station asserting exclusivity has both an exclusive contract for that program and will broadcast that program during prime time hours.

101. The rules governing syndicated program exclusivity will be administered in the following manner. While contracts entered into before the effective date of these rules will be presumed to be exclusive, subsequent contracts must specifically provide for broadcast exclusivity (both over-the-air and by cable) before a program can be protected under the rules. At a minimum a television licensee seeking exclusivity protection must obtain (a) exclusivity against other television stations licensed to its designated community in the market and (b) exclusivity against cable dissemination of the program, within the 35-mile zone¹⁶ via a distant signal. We think that this is a reasonable requirement. A broadcast station may now purchase the exclusive right to broadcast a television program in its market. Cable represents another way to distribute the program. The station may bargain for the exclusive right as to any cable television presentation (e. g., cable origination, pay-cable, or other leased channel presentation). But what it must obtain in order to be entitled to protection, is the exclusive right with respect to broadcast exhibition—whether the broadcast exhibition stems from another station in the market or from a cable system in the market that is bringing in distant broadcast signals. This is reasonable market exclusivity which the broadcaster is entitled to seek and which he must obtain to claim exclusivity rights under Sec. 76.151.

102. Because this is a complex subject, it may be helpful to give examples, using the Baltimore-Washington situation. A Washington station, even if significantly viewed in Baltimore, would have no right to preclude carriage of its syndicated programs on a distant signal (e. g., from Philadelphia) carried on a Baltimore cable system, because Baltimore is a designated major market community that does not fall wholly within 35 miles of Washington. A Washington station could preclude carriage of a protected program on a distant signal being carried on a Washington cable system and on other cable systems located within 35 miles of Washington (except on a cable system in Baltimore). In Laurel, Md., which lies between Washington and Baltimore, a cable system could carry both Wash-

16. A station located in a designated community of a major market is not entitled to exclusivity protection in a designated community located in another major market unless the latter community lies wholly within 35 miles of the station's community. This provision parallels Sec. 76.61(a)(1) of the carriage rules. Further, stations from

other markets carried by a cable system pursuant to the significant viewing test will not be entitled to syndicated program exclusivity on such systems. Nor will any of their programing have to be deleted to protect stations licensed to designated cities in the market in which the system is located.

ington and Baltimore signals, would protect the programing of neither against the other, and would protect the programing of both Baltimore and Washington signals against distant signals. Assuming that a smaller television market community were located wholly or partially within the 35-mile zone of Washington, a Washington station would be entitled to top 50 market exclusivity protection in that community. If a community fell wholly or partially within 35 miles of both a top 50 station and a second 50 station, the 1 year preclearance period would be applicable, and the cable system could be called on to protect the programing of stations from both markets in accordance with the requirements respectively applicable to those markets.

103. In markets 1-50, preclearance protection is complementary to the way in which syndicated programs are sold—i. e., they are sold in the largest markets first and, without a preclearance period, cable carriage of signals from these larger markets into other markets in the first 50 could dilute exclusivity and the value of the product. We are also protecting exclusivity for the full term contracts in these markets, but we note that the duration of contracts is a matter that we have under consideration in Docket 18179 where we stated:

“The issue is somewhat analogous to that in the motion picture field where the courts have held that clearances are reasonable only ‘when not unduly extended in area or duration’ and are not reasonable if ‘in excess of what is reasonably necessary to protect the licensee in the run granted’. *U. S. v. Paramount Pictures, Inc.*, 66 F.Supp. 323, 70 F.Supp. 53 (S.D.N.Y., 1947), noted with approval by the Supreme Court, 334 U.S. 131, 145, 147 (1948).”

104. With respect to exclusivity in markets 51-100, a number of distinctions have been drawn among the types of programs involved and the length of protection each is afforded. In general, off-network programing (formerly on the network, now in syndication) is protected for a shorter period because it receives its initial protection under network exclusivity rules and because, with respect to series, a year is sufficient to establish viewer loyalty for the local station. We have also been attempting to encourage the production of first-run, nonnetwork syndicated programing through our prime time access rules, and the exclusivity afforded here will give additional encouragement to the production of that kind of programing.

105. With respect to series programs, all episodes are to be treated as a unit—i. e., for the period in which exclusivity protection is afforded, the whole series rather than individual episodes will be protected, and during that period a cable system will not only have to refrain from carrying on a distant signal the same episodes under contract in the market but all other episodes as well, regardless of whether any station in the market has an exclusive contract to broad-

cast the episodes against which exclusivity is sought. Similarly, a station's exclusivity rights expire as a unit so that, for example, protection ends for a first-run series 2 years after any station in the market first broadcasts an episode in the series. Thereafter, any episode of the series may be brought in by cable regardless of whether it has ever been shown by a station in the market or is under exclusive contract to a station in the market. Finally, in the first 50 markets preclearance applies only to series or packages of programs consisting wholly of newly created material.

106. The rules governing program protection specify that appropriate notification be given to cable systems when exclusivity rights are asserted. The preclearance rule for the first 50 markets is designed principally for the benefit of copyright holders. The burden is therefore placed on copyright holders or their designated agents to notify cable systems in these markets when a sale has been made and that the preclearance period is running. With respect to other requests for exclusivity, the burden is also placed on the party seeking protection, in these cases the broadcaster. But when program deletion on regularly carried distant signals is required, the burden of identifying substitute programing that may be carried shifts to the cable system. . . .

GRANDFATHERING

107. In light of the difficulty of withdrawing signals to which the public has become accustomed and in deference to the equities of existing system operators, we are not applying the new carriage rules to any signals that a cable system was authorized by the Commission to carry or was lawfully carrying prior to March 31, 1972. If carriage of signals has been limited by Commission order to a discrete area of a community, any extension of service outside the discrete area will be subject to the new carriage rules. A cable television system currently operating with authorized signals, and not the subject of such an order, may freely expand in its community with such signals. Grandfathered cable systems may add signals of a class permitted by the rules (e. g., independent signal(s) if none is presently carried). . . .

With respect to exclusivity, existing carriage is grandfathered so that an operating system need not comply with the syndicated exclusivity rules except for new signals added or if the system extends operations into a new community or beyond the discrete area to which it has been specifically limited by Commission order.

PROCEDURAL MATTERS

110. New service may not begin until a certificate of compliance is issued. . . .

111. In issuing certificates, and for purposes of these new rules generally, we will continue the policy of treating cable operations, even if served by the same head end, as separate systems in each community served. Thus, when applications are filed for certificates of compliance, a separate application should be filed for each community in which the system will operate. . . .

112. . . . Absent special situations or showings, requests consistent with our rules will receive prompt certification. The rules will operate on a "go, no-go" basis—i. e., the carriage rules reflect our determination of what is, at this time, in the public interest with respect to cable carriage of local and distant signals. We will, of course, consider objections to signal carriage applications, and have retained special relief rules, but those seeking signal carriage restrictions on otherwise permitted signals have a substantial burden. Before restrictions are imposed in such cases, there will have to be a clear showing that the proposed service is not consistent with the orderly integration of cable television service into the national communications structure and that the results would be inimical to the public interest. We have during the course of this proceeding fully considered the question of impact on local television service and we do not expect to reevaluate that general question in individual cases. And, for the same reason, we have no intention of reevaluating on request of cable systems in individual proceedings the general questions settled in our carriage and exclusivity rules. Rather, we strongly believe that cable systems must generally operate under these rules and that, only after meaningful experience, will we be in position for a general reassessment. . . .¹⁷

17. On the 1972 rules and the industry consensus upon which they were based, see Barrow, *The CATV Rules: Proceed on Delayed Yellow*, 25 *Vand.L. Rev.* 681 (1972); Jassen, *The Selling of the Cable TV Compromise*, 17 *J. Broad.* 427 (1973); R. Park (ed.), *The Role of Analysis in Regulatory Decision-Making: The Case of Cable Television* (1973); Besen, *Economics of the Cable Television "Consensus,"* 17 *J. Law & Econ.* 39 (1974); Popham, *The 1971 Consensus Agreement: The Perils of Unkept Promises*, 24 *Cath.U.L. Rev.* 813 (1975); Price, *Requiem for the Wired Nation: Cable Rulemaking at the FCC*, 61 *Va.L.Rev.* 541 (1975); R. Berner, *Constraints on the Regulatory Process: A Case Study of Regulation of Cable Television* (1976).

On distant signals and exclusivity, see Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 *Harv.L.Rev.* 1820 (1970); Comanor

& Mitchell, *The Costs of Planning: The FCC and Cable Television*, 15 *J. Law & Econ.* 177 (1972); Park, *Cable Television, UHF Broadcasting, and FCC Regulatory Policy*, 15 *J. Law & Econ.* 207 (1972); Park, *Prospects for Cable Television in the 100 Largest Television Markets*, 3 *Bell J. Econ. & Mgt. Sci.* 130 (1972); Park, *The Exclusivity Provisions of the Federal Communications Commission's Cable Television Regulations* (Rand Corp. 1972); Kahn, *Cable, Competition and the Commission*, 24 *Cath.U.L.Rev.* 854 (1975); Hagelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy*, 44 *U.Cinn.L. Rev.* 427 (1975); P. MacAvoy, *Deregulation of Cable Television* (1977); Simon, *Local Television Versus Cable: A Copyright Theory of Protection*, 31 *Fed.Com.L.J.* 51 (1978). See also note 1 *supra*.

Note on the Evolution of the FCC's Signal Carriage Regulations. Following their promulgation in 1972, the FCC's signal carriage regulations have been amended in a number of respects. The most significant changes are as follows:

Leapfrogging. The 1972 regulations contained provisions requiring that proximate distant signals be carried in preference to more remote distant signals. The restrictions were largely eliminated in Cable Television Leapfrogging Rules, 57 F.C.C.2d 625, 35 R.R.2d 1673 (1975), reconsideration denied, 59 F.C.C.2d 934, 37 R.R.2d 711 (1976). The requirement of § 76.61(b)(1) (relating to the inclusion of a UHF signal where three distant independent stations are permitted to be carried) is all that remains.

Network Exclusivity in Smaller Markets. In markets ranked below 100, television stations have been accorded a secondary zone of priority and protection, out to 55 miles, as against the duplicating network signals of stations beyond the secondary zone. See CATV Non-Duplication Rules, 52 F.C.C.2d 519, 33 R.R.2d 527 (1975), on reconsideration, 56 F.C.C.2d 210, 35 R.R.2d 363 (1975). The result is reflected in § 76.92.¹⁸

Additional Signals Permitted to be Imported. To the distant signals permitted to be carried under the 1972 regulations, the FCC has added the following:

(1) Late-night programs (in the absence of local late-night programming). See §§ 76.57(c), 76.59(d)(3), 76.61(e)(3), added by Late-Night CATV Programming, 48 F.C.C.2d 699, 31 R.R.2d 344 (1974), on reconsideration, 54 F.C.C.2d 1182, 34 R.R.2d 1267 (1975).

(2) Network news (in the absence of conflict with local news). See §§ 76.59(d)(4), 76.61(e)(4), added by CATV—Network News Programs, 57 F.C.C.2d 68, 35 R.R.2d 1445 (1975).

(3) Specialty stations and specialty programming. See §§ 76.5 (kk), 76.57(d), 76.59(d)(1), 76.61(e)(1), added by Cable TV Service, Specialty Stations, 58 F.C.C.2d 442, 36 R.R.2d 781 (1976), on reconsideration, 60 F.C.C.2d 661, 37 R.R.2d 1381 (1976). The original exemption for foreign language programs has been expanded to encompass religious and automated programs.

(4) All UHF Grade B signals (which are now classified as "local"). See §§ 76.59(d)(5), 76.61(e)(5), added by Cable Carriage of TV Signals, 65 F.C.C.2d 218, 41 R.R.2d 121 (1977), reconsideration denied, 43 R.R.2d 1553 (1978).

Exclusivity for Certain Sports Events. Section 76.67 was added by Cable Television Service—Sports Programs, 54 F.C.C.2d 265, 34 R.R.2d 683 (1975), on reconsideration, 56 F.C.C.2d 561, 35 R.R.2d 807 (1975).

18. The amendment of the network non-duplication regulation was sustained in CBS Television Network Affiliates

Ass'n v. FCC, 555 F.2d 985 (D.C.Cir. 1977).

Exemptions for Smaller Systems. Systems with less than 1,000 subscribers have been exempted from most distant signal carriage regulation.

(1) As to network program nonduplication, see § 76.95(b), originating in CATV—Program Exclusivity, 46 F.C.C.2d 94, 29 R.R.2d 1359 (1974) (systems with fewer than 500 subscribers), and extended in CATV Non-Duplication Rules, 52 F.C.C.2d 519, 33 R.R.2d 527 (1975), on reconsideration, 56 F.C.C.2d 210, 35 R.R.2d 363 (1975) (systems with fewer than 1,000 subscribers).

(2) As to syndicated program exclusivity, see § 76.161, added by CATV—Syndicated Program Exclusivity, 55 F.C.C.2d 529, 34 R.R.2d 1653 (1975) (systems with fewer than 1,000 subscribers).

(3) As to limitations on carriage of distant signals, see §§ 76.59 (b), 76.61(b)(1), amended by Cable Television Service Rules, 63 F.C.C.2d 956, 40 R.R.2d 571 (1977), reconsideration denied, 67 F.C.C.2d 716, 42 R.R.2d 507 (1978) (exempting systems with fewer than 500 subscribers) and by Cable Television Rules, 68 F.C.C.2d 18, 42 R.R.2d 1623 (1978) (exempting systems with fewer than 1,000 subscribers).

Revision of the Cable System Definition. The definition of a cable system has been revised to include all integrated units, in contrast to the original conception that each community was to be considered a separate system. However, the scope and effect of the signal carriage rules is largely unaffected because the terms “system community unit” and “system unit” are now employed to define the scope of protection. See Cable Television Service Rules, 63 F.C.C.2d 956, 40 R.R.2d 571 (1977), reconsideration denied, 67 F.C.C.2d 716, 42 R.R.2d 507 (1978).

Elimination of Network Exclusivity as regards Significantly Viewed Signals. The addition of § 76.92(g) has eliminated network exclusivity as against network signals from other markets significantly viewed in the local market. Cable Television Service, 67 F.C.C.2d 1703, 42 R.R.2d 1273 (1978), reconsideration denied, 43 R.R.2d 1521 (1978).

Elimination of Certification Requirement. Section 76.12 substitutes a registration requirement for the original certification requirement. See Cable Television Service—Registration Statements, 69 F.C.C.2d 697, 44 R.R.2d 513 (1978). The FCC earlier had dispensed with certification of smaller systems. See Cable Television Service Rules, 63 F.C.C.2d 956, 40 R.R.2d 571 (1977), reconsideration denied, 67 F.C.C.2d 716, 42 R.R.2d 507 (1978) (systems with fewer than 500 subscribers); Cable Television Rules, 68 F.C.C.2d 18, 42 R.R.2d 1623 (1978) (systems with fewer than 1,000 subscribers).¹⁹

19. In Cable Television Service—Carriage of Radio Signals, 67 F.C.C.2d 491, 42 R.R.2d 311 (1978), the FCC

concluded that there was no need to regulate cable carriage of AM or FM radio signals.

CODE OF FEDERAL REGULATIONS

Title 47

SUBPART A—GENERAL

§ 76.5 Definitions.

(a) Cable television system. A nonbroadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control or management. . . .

(d) Principal community contour. The signal contour that a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(e) Grade A and Grade B contours. The field intensity contours defined in § 73.683(a) of this chapter.

(f) Specified zone of a television broadcast station. The area extending 35 air miles from the reference point in the community to which that station is licensed or authorized by the Commission. A list of reference points is contained in § 76.53. A television broadcast station that is authorized but not operating has a specified zone that terminates eighteen (18) months after the initial grant of its construction permit.

(g) Major television market. The specified zone of a commercial television station licensed to a community listed § 76.51, or a combination of such specified zones where more than one community is listed.

(h) Designated community in a major television market. A community listed in § 76.51.

(i) Smaller television market. The specified zone of a commercial television station licensed to a community that is not listed in § 76.51.

(j) Substantially duplicated. Regularly duplicated by the network programming of one or more stations in a week during the hours of 6 to 11 p. m., local time, for a total of 14 or more hours.

(k) Significantly viewed. Viewed in other than cable television households as follows: (1) for a full or partial network station—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station—a share of viewing hours of at least 2 percent (total

week hours), and a net weekly circulation of at least 5 percent. See § 76.54.

NOTE: As used in this paragraph, "share of viewing hours" means the total hours that non-cable television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and "net weekly circulation" means the number of non-cable television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total non-cable television households in the survey area.

(l) Full network station. A commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programming offered by one of the three major national television networks with which it has a primary affiliation (i. e., right of first refusal or first call).

(m) Partial network station. A commercial television broadcast station that generally carries in prime time more than 10 hours of programming per week offered by the three major national television networks, but less than the amount specified in paragraph (l) above.

(n) Independent station. A commercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the three major national television networks.

(o) Network programming. The programming supplied by a national or regional television network, commercial or noncommercial.

(p) Syndicated program. Any program sold, licensed, distributed, or offered to television station licensees in more than one market within the United States for non-interconnected (i. e., non-network) television broadcast exhibition, but not including live presentations.

(q) Series. A group of two or more works which are centered around, and dominated by the same individual, or which have the same, or substantially the same, cast of principal characters or a continuous theme or plot.

(r) Off-network series. A series whose episodes have had a national network television exhibition in the United States or a regional network exhibition in the relevant market.

(s) First-run series. A series whose episodes have had no national network television exhibition in the United States and no regional network exhibition in the relevant market.

(t) First-run, non-series programs. Programs, other than series, that have had no national network television exhibition in the United States and no regional network exhibition in the relevant market.

(u) Prime time. The five-hour period from 6 to 11 p. m., local time, except that in the Central Time Zone the relevant period shall be between the hours of 5 and 10 p. m., and in the Mountain Time Zone each station shall elect whether the period shall be 6 to 11 p. m. or 5 to 10 p. m.

(ii) Network news program. Network programming which (1) includes reports dealing with current events, stock market reports, commentary, analysis, and sports news; and (2) is offered by one of the three major national television networks to its affiliated stations on a daily or weekly basis at a regularly scheduled time or times.

(jj) Local news program. Local programming originated or produced by a station, or for the production of which the station is primarily responsible, employing live talent more than 50 percent of the time, which includes reports dealing with current local events, including weather and stock market reports.

(kk) Specialty station. A commercial television broadcast station that generally carries foreign-language, religious, and/or automated programming in one-third of the hours of an average broadcast week and one-third of weekly prime time hours.

(ll) Cable television system operator or operator. That local business entity, be it natural person, partnership, corporation, or association, which offers for sale services of a cable television system in the system community.

(mm) System community unit; community unit. A cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

(nn) Subscriber. A member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it.

§ 76.7 Special relief.

(a) On petition by a cable television system operator a franchising authority, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

**SUBPART B—SIGNAL REGISTRATION AND
CERTIFICATE OF COMPLIANCE**

§ 76.12 Registration statement required.

A system community unit shall be authorized to commence operation or add a television broadcast signal to existing operations only after filing with the Commission the following information:

(a) The legal name of the operator, Entity Identification or Social Security number, and whether the operator is an individual, private association, partnership, or corporation. . . .

(b) The assumed name (if any) used for doing business in the community;

(c) The mail address, including zip code, and the telephone number to which all communications are to be directed;

(d) The date the system provided service to 50 subscribers;

(e) The name of each separate community or area served and the county in which it is located;

(f) The television broadcast signals to be carried which previously have not been certified or registered; and

(g) A statement of the proposed community unit's equal employment opportunity program, as described in § 76.311

**SUBPART D—CARRIAGE OF TELEVISION
BROADCAST SIGNALS**

§ 76.51 Major television markets.

For purposes of the cable television rules, the following is a list of the major television markets and their designated communities:

(a) First fifty major television markets:

- (1) New York, N. Y.—Linden—Paterson—Newark, N.J.
- (2) Los Angeles—San Bernardino—Corona—Fontana, Cal.
- (3) Chicago, Ill.
- (4) Philadelphia, Pa.—Burlington, N. J.
- (5) Detroit, Mich.
- (6) Boston—Cambridge—Worcester, Mass.
- (7) San Francisco—Oakland—San Jose, Cal.
- (8) Cleveland—Lorain—Akron, Ohio
- (9) Washington, D. C.
- (10) Pittsburgh, Pa.
- (11) St. Louis, Mo.
- (12) Dallas—Fort Worth, Tex.
- (13) Minneapolis—St. Paul, Minn.
- (14) Baltimore, Md.

- (15) Houston, Tex.
- (16) Indianapolis—Bloomington, Ind.
- (17) Cincinnati, Ohio—Newport, Ky.
- (18) Atlanta, Ga.
- (19) Hartford—New Haven—New Britain—Waterbury, Conn.
- (20) Seattle—Tacoma, Wash.
- (21) Miami, Fla.
- (22) Kansas City, Mo.
- (23) Milwaukee, Wis.
- (24) Buffalo, N. Y.
- (25) Sacramento—Stockton—Modesto, Cal.
- (26) Memphis, Tenn.
- (27) Columbus, Ohio
- (28) Tampa—St. Petersburg, Fla.
- (29) Portland, Ore.
- (30) Nashville, Tenn.
- (31) New Orleans, La.
- (32) Denver, Colo.
- (33) Providence, R. I.—New Bedford, Mass.
- (34) Albany—Schenectady—Troy, N. Y.
- (35) Syracuse, N. Y.
- (36) Charleston—Huntington, W. Va.
- (37) Kalamazoo—Grand Rapids—Battle Creek, Mich.
- (38) Louisville, Ky.
- (39) Oklahoma City, Oklahoma
- (40) Birmingham, Ala.
- (41) Dayton—Kettering, Ohio
- (42) Charlotte, N. C.
- (43) Phoenix—Mesa, Ariz.
- (44) Norfolk—Newport News—Portsmouth—Hampton, Va.
- (45) San Antonio, Tex.
- (46) Greenville—Spartanburg—Anderson, S. C.—Asheville, N. C.
- (47) Greensboro—High Point—Winston-Salem, N. C.
- (48) Salt Lake City, Utah
- (49) Wilkes Barre—Scranton, Pa.
- (50) Little Rock, Ark.

(b) Second fifty major television markets:

- (51) San Diego, Cal.
- (52) Toledo, Ohio
- (53) Omaha, Neb.
- (54) Tulsa, Okla.
- (55) Orlando—Daytona Beach, Fla.
- (56) Rochester, N. Y.
- (57) Harrisburg—Lancaster—York, Pa.

- (58) Texarkana, Tex.—Shreveport, La.
- (59) Mobile, Ala.—Pensacola, Fla.
- (60) Davenport, Iowa—Rock Island—Moline, Ill.
- (61) Flint—Bay City—Saginaw, Mich.
- (62) Green Bay, Wis.
- (63) Richmond—Petersburg, Va.
- (64) Springfield—Decatur—Champaign, Ill.
- (65) Cedar Rapids—Waterloo, Iowa
- (66) Des Moines—Ames, Iowa
- (67) Wichita—Hutchinson, Kan.
- (68) Jacksonville, Fla.
- (69) Cape Girardeau, Mo.—Paducah, Ky.—Harrisburg, Ill.
- (70) Roanoke—Lynchburg, Va.
- (71) Knoxville, Tenn.
- (72) Fresno, Cal.
- (73) Raleigh—Durham, N. C.
- (74) Johnstown—Altoona, Pa.
- (75) Portland—Poland Spring, Me.
- (76) Spokane, Wash.
- (77) Jackson, Miss.
- (78) Chattanooga, Tenn.
- (79) Youngstown, Ohio
- (80) South Bend—Elkhart, Ind.
- (81) Albuquerque, N. Mex.
- (82) Fort Wayne—Roanoke, Ind.
- (83) Peoria, Ill.
- (84) Greenville—Washington—New Bern, N. C.
- (85) Sioux Falls—Mitchell, S. D.
- (86) Evansville, Ind.
- (87) Baton Rouge, La.
- (88) Beaumont—Port Arthur, Texas
- (89) Duluth, Minn.—Superior, Wis.
- (90) Wheeling, W. Va.—Steubenville, Ohio
- (91) Lincoln—Hastings—Kearney, Neb.
- (92) Lansing—Onondaga, Mich.
- (93) Madison, Wis.
- (94) Columbus, Ga.
- (95) Amarillo, Tex.
- (96) Huntsville—Decatur, Ala.
- (97) Rockford—Freeport, Ill.
- (98) Fargo—Valley City, N. D.
- (99) Monroe, La.—El Dorado, Ark.
- (100) Columbia, S. C.

§ 76.53 Reference points.

To determine the boundaries of the major and smaller television markets (defined in § 76.5), the following list of reference points for

communities having licensed television broadcast stations and/or outstanding construction permits shall be used. Where a community's reference point is not given, the geographic coordinates of the main post office in the community shall be used.

§ 76.54 Significantly viewed signals; method to be followed for special showings.

(a) Signals that are significantly viewed in a county (and thus are deemed to be significantly viewed within all communities within the county) are those that are listed in Appendix B of the Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order. . . .

(b) Significant viewing in a cable television community for signals not shown as significantly viewed under paragraphs (a) or (d) of this section may be demonstrated by an independent professional audience survey of noncable television homes [in accordance with specified procedures.]

(d) Signals of television broadcast stations not encompassed by the surveys (for the periods May 1970, November 1970 and February/March 1971) used in establishing Appendix B of the Memorandum Opinion and Order on Reconsideration of Cable Television Report and Order, FCC 72-530, 36 FCC 2d 326 [25 R.R.2d 1501] (1972), may be demonstrated as significantly viewed on a county-wide basis by independent professional audience surveys [in accordance with specified procedures.]

§ 76.55 Manner of carriage.

(a) Where a television broadcast signal is required to be carried by a community unit, pursuant to the rules in this subpart:

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art), and, where applicable, in accordance with the technical standards of Subpart K of this part;

(2) The signal shall, on request of the station licensee or permittee, be carried on the community unit on the channel number on which the station is transmitting, except where technically infeasible;

(3) The signal shall, on request of the station licensee or permittee, be carried on the community unit on no more than one channel, provided however, that this provision shall not apply to a signal protected pursuant to §§ 76.92 and 76.94, during periods when network program nonduplication protection is provided.

(b) Where a television broadcast signal is carried by a community unit, pursuant to the rules in this subpart, the programs broadcast shall be carried in full, without deletion or alteration of any portion except as required by this part.

(c) A community unit need not carry the signal of any television translator station if (1) the community unit is carrying the signal of the originating station, or (2) the community of the community unit is located, in whole or in part, within the Grade B contour of a station carried on the community unit whose programming is substantially duplicated by the translator station.

(d) If the community of a community unit is located, in whole or in part, within the Grade B contour of both a satellite and its parent television station, and if the community unit would otherwise be required to carry both of them pursuant to the rules in this subpart, the community unit need carry only one of these signals, and may select between them.

§ 76.57 Provisions for systems operating in communities located outside of all major and smaller television markets.

A community unit operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5, shall carry television broadcast signals in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(2) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station;

(3) Noncommercial educational television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(4) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry any additional television signal.

(c) In addition to the television broadcast signals carried pursuant to paragraphs (a) and (b) of this section, any television broadcast station during the period from sign-off of the last television broadcast station which the community unit must carry pursuant to § 76.57(a), or from 12:00 a. m. in the Central and Mountain Time Zones and 1:00 a. m. in the Eastern and Pacific Time Zones, whichever occurs first, to the sign-on of the first station which the community unit must carry pursuant to § 76.57(a); provided however: that a community unit may carry a program to its completion; and provided further: that this subsection does not authorize carriage in the manner described above whenever a television broadcast station that the community unit must carry pursuant to § 76.57(a) broadcasts continuously and does not sign-off during the hours from 12:00 a. m. to 6:00 a. m. Carriage of such additional television signals shall not require prior registration with the Commission and shall be consistent with the network nonduplication protection and syndicated exclusivity rules of Subpart F of this part.

(d) In addition to the television broadcast signals carried pursuant to paragraphs (a), (b) and (c) of this section, any television station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior registration with the Commission.

§ 76.59 Provisions for smaller television markets.

A community unit operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(3) Commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community of the community unit is located, in whole or in part;

(4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vermont-Plattsburgh, New York television market);

(5) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station;

(6) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit constituting all or part of a system having fewer than 1000 subscribers may carry any additional television signals. Any such community unit constituting all or part of a system having 1000 or more subscribers may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of one independent television station: provided, however, that, in determining how many additional signals may be carried, any authorized but not operating television broadcast station that, if operational, would be required to be carried pursuant to paragraph (a)(1) of this section, shall be considered to be operational for a period terminating 18 months after grant of its initial construction permit.

(c) In addition to the noncommercial educational television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry the signals of any noncommercial educational stations that are operated by an agency of the state within which the community unit is located. Such community unit may also carry any other noncommercial educational signals, in the absence of objection filed pursuant to § 76.7 by any local noncommercial educational station or state or local educational television authority.

(d) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (c) of this section, any such community unit may carry:

(1) Any specialty station and any station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior Commission notification or approval in the certificating process.

(2) Any television station broadcasting a network program that will not be carried by a station normally carried on

the community unit. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior Commission notification or approval in the certificating process.²⁰

(3) Any television broadcast station during the period from sign-off of the last television broadcast station which the community unit must carry pursuant to § 76.59(a), or from 12:00 a. m. in the Central and Mountain Time Zones and 1:00 a. m. in the Eastern and Pacific Time Zones, whichever occurs first, to the sign-on of the first station which the community unit must carry pursuant to § 76.59(a): provided, however: that a community unit may carry a program to its completion; and provided further: that this subsection does not authorize carriage in the manner described above whenever a television broadcast station that the community unit must carry pursuant to § 76.59(a) broadcasts continuously and does not sign-off during the hours from 12:00 a. m. to 6:00 a. m. Carriage of such additional television signals shall not require prior registration with the Commission and shall be consistent with the network nonduplication protection and syndicated exclusivity rules of Subpart F of this part.

(4) Any television station broadcasting a network news program at any time when no station regularly carried is broadcasting the same program and when no station licensed to the market in which the community unit is located is broadcasting a local news program. Carriage of such additional stations shall be for the duration of the news program only and shall not require prior Commission notification or approval in the certificating process.

(5) Any commercial UHF television station within whose Grade B contours the community of the system is located, in whole or in part.

(e) Where the community of a community unit is wholly or partially within both one of the first fifty major television markets and a smaller television market, the carriage provisions for the first fifty major markets shall apply. Where the community of a community unit is wholly or partially within both one of the second fifty major television markets and a smaller television market, the carriage provisions for the second fifty major markets shall apply.

20. In a declaratory ruling, the FCC held that a cable system could not carry a network signal, otherwise unauthorized, where the local network station decided not to carry the network programs in issue at the time of original broadcast but did carry them within three days. Section 76.61(c)(2),

identical to § 76.59(d)(2), was held to cover only those instances in which the local station did not carry the network program at all. *Metro Cable Co.*, 49 F.C.C.2d 376, 31 R.R.2d 1018 (1974). *Accord, Henderson All-Channel Cablevision*, 49 F.C.C.2d 502, 31 R.R.2d 1283 (1974).

§ 76.61 Provisions for first fifty major television markets.

A community unit operating in a community located in whole or in part within one of the first fifty major television markets listed in § 76.51(a) shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry, or on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part: provided, however, that where a community unit is located in the designated community of a major television market, it shall not carry the signal of a television station licensed to a designated community in another major television market, unless the designated community in which the community unit is located is wholly within the specified zone (see § 76.5(f)) of the station, except as otherwise provided in this section;

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(3) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station;

(4) Television broadcast stations licensed to other designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Kentucky television market);

(5) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit constituting all or part of a system having fewer than 1000 subscribers may carry any additional television signals. Any such community unit constituting all or part of a system having 1000 or more subscribers may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of three independent television stations: provided, however, that in determining how many additional signals may be carried, any authorized but not operating television broadcast station that, if operational, would be

required to be carried pursuant to paragraph (a)(1) of this section, shall be considered to be operational for a period terminating 18 months after grant of its initial construction permit.²¹

(1) Whenever, pursuant to this section, a community unit is permitted to carry three additional independent signals, one of these signals must be that of a UHF television broadcast station.

(2) Whenever, pursuant to Subpart F of this part, a community unit is required to delete a television program on an independent signal carried pursuant to this section, or a program on such a signal is primarily of local interest to the distant community (e. g., a local news or public affairs program), such community unit may, consistent with the program exclusivity rules of Subpart F of this part, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the community unit need not return to its regularly carried signal until it can do so without interrupting a program already in progress.

(c) After the service standards specified in paragraph (b) of this section have been satisfied, a community unit may carry two additional independent television broadcast signals: provided, however, that the number of additional signals permitted under this paragraph shall be reduced by the number of signals added to the community unit pursuant to paragraph (b) of this section.

(d) In addition to the noncommercial educational television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry the signals of any noncommercial educational stations that are operated by an agency of the state within which the community unit is located. Such community unit may also carry any other noncommercial educational signals, in the absence of objection filed pursuant to § 76.7 by any local noncommercial educational station or state or local educational television authority.

(e) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (d) of this section, any such community unit may carry:

(1) Any specialty station and any station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the dura-

21. In *Battlefield Cablevision*, 61 F.C.C. 2d 345, 38 R.R.2d 1087 (1976), on reconsideration, 62 F.C.C.2d 178 (1977), the FCC announced the following policy for stations unable to import any independent distant signal: "If such a cable system serves 1,000 or more

subscribers, it may carry the nonnetwork programming of no more than two distant network signals as a substitute for the unavailable distant independent signal . . . subject to our network nonduplication rules."

tion of the programs and shall not require prior registration with the Commission.

(2) Any television station broadcasting a network program that will not be carried by a station normally carried on the community unit. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior registration with the Commission.

(3) Any television broadcast station during the period from sign-off of the last television broadcast station which the community unit must carry pursuant to § 76.61(a), or from 12:00 a. m. in the Central and Mountain Time Zones and 1:00 a. m. in the Eastern and Pacific Time Zones, whichever occurs first, to the sign-on of the first station which the community unit must carry pursuant to § 76.61(a); provided, however: that a community unit may carry a program to its completion, and provided further: that this subsection does not authorize carriage in the manner described above whenever a television broadcast station that the community unit must carry pursuant to § 76.61(a) broadcasts continuously and does not sign-off during the hours from 12:00 a. m. to 6:00 a. m. Carriage of such additional television signals shall not require prior registration with the Commission and shall be consistent with the network nonduplication protection and syndicated exclusivity rules of Subpart F of this part.

(4) Any television station broadcasting a network news program at any time when no station regularly carried is broadcasting the same program and when no station licensed to the market in which the community unit is located is broadcasting a local news program. Carriage of such additional stations shall be for the duration of the news program only and shall not require prior registration with the Commission.

(5) Any commercial UHF television station within whose Grade B contours the community of the system is located, in whole or in part.

(f) Where the community of a community unit is wholly or partially within both one of the first fifty major television markets and another television market, the provisions of this section shall apply.

§ 76.63 Provisions for second fifty major television markets.

(a) A community unit operating in a community located in whole or in part within one of the second fifty major television markets listed in § 76.51(b) shall carry television broadcast signals only in accordance with the provisions of § 76.61, except that in paragraph (b) of § 76.61, the number of additional independent television signals that may be carried is two (2).

(b) Where the community of a community unit is wholly or partially within both one of the second fifty major television markets and one of the first fifty major television markets, the carriage provisions for the first fifty major markets shall apply. Where the community of a community unit is wholly or partially within both one of the second fifty major television markets and a smaller television market, the provisions of this section shall apply.

§ 76.65 Grandfathering provisions.

(a) The provisions of §§ 76.57, 76.59, 76.61, and 76.63 shall not require the deletion of any television broadcast or translator signals which a community unit was authorized to carry or was lawfully carrying prior to March 31, 1972: provided, however, that if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of this subpart. If a community unit is authorized to carry signals, either by virtue of specific Commission authorization or otherwise, any other community unit already operating or subsequently commencing operations in the same community may carry the same signals. (Any such new community unit shall, before instituting service, register with the Commission if otherwise required by § 76.12.)

§ 76.67 Sports broadcasts.

(a) No community unit located in whole or in part within the specified zone of a television broadcast station licensed to a community in which a sports event is taking place, shall, on request of the holder of the broadcast rights to that event, or its agent, carry the live television broadcast of that event if the event is not available live on a television broadcast signal carried by the community unit pursuant to the mandatory signal carriage rules of this part. For the purposes of this section, if there is no television station licensed to the community in which the sports event is taking place, the applicable specified zone shall be that of the television station licensed to the community with which the sports event or local team is identified, or, if the event or local team is not identified with any particular community, the nearest community to which a television station is licensed.

(d) Whenever, pursuant to this section, a community unit is required to delete a television program on a signal regularly carried by the community unit, such community unit may, consistent with the rules contained in Subpart F of this part, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the community unit need not

return to its regularly carried signal until it can do so without interrupting a program already in progress.

(e) The provisions of this section shall not be deemed to require the deletion of any portion of a television signal which a community unit was lawfully carrying prior to March 31, 1972.

(f) The provisions of this section shall not apply to any cable television system having fewer than 1000 subscribers.

SUBPART F—NONDUPLICATION PROTECTION AND SYNDICATED EXCLUSIVITY

§ 76.92 Stations entitled to network program nonduplication protection.

(a) Any community unit which operates in a community located in whole or in part within the 35-mile specified zone of any commercial television broadcast station or within the secondary zone which extends 20 miles beyond the specified zone of a smaller market television broadcast station (55 miles altogether) and which carries the signal of such station shall, except as provided in paragraphs (e) and (f), delete, upon request of the station licensee or permittee, the duplicating network programming of lower priority signals in the manner and to the extent specified in §§ 76.94 and 76.95.

(b) For purposes of this section, the order of nonduplication priority of television signals carried by a community unit is as follows:

(1) First, all television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(2) Second, all smaller market television broadcast stations within whose secondary zone the community of the community unit is located, in whole or in part.

(c) For purposes of this section, all noncommercial educational television broadcast stations licensed to a community located in whole or in part within a major television market as specified in § 76.51 shall be treated in the same manner as a major market commercial television broadcast station, and all noncommercial educational television broadcast stations not licensed to a community located in whole or in part within a major television market shall be treated in the same manner as a smaller market television broadcast station.

(d) Any community unit operating in a community to which a 100-watt or higher power translator station is licensed, which translator is located within the predicted Grade B signal contour of the television broadcast station that the translator station retransmits, and which translator is carried by the community unit, shall, upon the request of such translator station licensee or permittee, delete the

duplicating network programming of any television broadcast station whose reference point (see § 76.53) is more than 55 miles from the community of the community unit.

(e) Any community unit which operates in a community located in whole or in part within the specified zone of any television broadcast station or within the secondary zone of a smaller market television broadcast station is not required to delete the duplicating network programming of any 100-watt or higher power television translator station which is licensed to the community of the community unit.

(f) Any community unit which operates in a community located in whole or in part within the secondary zone of a smaller market television broadcast station is not required to delete the duplicating network programming of any major market television broadcast station whose reference point (see § 76.53) is also within 55 miles of the community of the community unit.

(g) A community unit is not required to delete the duplicating network programming of any television broadcast station which is significantly viewed in the cable television community pursuant to § 76.54.²²

§ 76.95 Exceptions.

(a) Notwithstanding the requirements of §§ 76.92 and 76.94, a community unit need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(b) The provisions of §§ 76.92 and 76.94 shall not apply to a cable television system having fewer than 1000 subscribers. Within 60 days following the provision of service to 1000 subscribers, each such system shall file a notice to that effect with the Commission and shall send a copy thereof to all television broadcast and translator stations carried by the system.

(c) Network nonduplication protection need not be extended to a higher priority station for one hour following the scheduled time for completion of the broadcast of a live sports event by that station or by a lower priority station against which a community unit would otherwise be required to provide nonduplication protection following the scheduled time of completion.

22. Network program nonduplication is afforded under 47 C.F.R. § 76.92 for regional as well as national network programming. See Valley TV Cable Co., 36 R.R.2d 315 (1976) and cases there cited.

Television stations receiving tape or films of shows to be broadcast from its own studios are not entitled to network nonduplication protection by cable systems. Networking implies interconnection, as in the sports regional networks. Sweetwater Television Co., 42 R.R.2d 897 (1978).

(d) The Commission will give full effect to private agreements between operators of community units and local television stations which provide for a type or degree of network program nonduplication protection which differs from the requirements of §§ 76.92 and 76.94. A copy of any such private agreement entered into after August 22, 1975, shall be filed with the Commission and a copy shall also be placed in the system's public inspection file (see § 76.305) and retained in such file for as long as the contract remains in force.

§ 76.151 Syndicated program exclusivity; extent of protection.

Upon receiving notification pursuant to § 76.155:

(a) No community unit, operating in a community in whole or in part within one of the first fifty major television markets, shall carry a syndicated program, pursuant to § 76.61(b), (c), (d) or (e)(1)–(e)(4), for a period of one year from the date that program is first licensed or sold as a syndicated program to a television station in the United States for television broadcast exhibition.

(b) No community unit, operating in a community in whole or in part within a major television market, shall carry a syndicated program, pursuant to §§ 76.61(b), (c), (d) or (e)(1)–(e)(4), or 76.63(a) (as it refers to § 76.61(b), (c), (d) or (e)(1)–(e)(4), while a commercial television station licensed to a designated community in that market has exclusive broadcast exhibition rights (both over-the-air and by cable) to that program: provided, however, that if a commercial station licensed to a designated community in one of the second fifty major television markets has such exclusive rights, a community unit located in whole or in part within the market of such station may carry such syndicated programs in the following circumstances:

(1) If the program is carried by the community unit in prime time and will not also be broadcast by a commercial market station in prime time during the period for which there is exclusivity for the program;

(2) For off-network series programs:

(i) Prior to the first non-network broadcast in the market of an episode in the series;

(ii) After a non-network first-run of the series in the market or after one year from the date of the first non-network broadcast in the market of an episode in the series, whichever occurs first;

(3) For first-run series programs:

(i) Prior to the first broadcast in the market of an episode in the series;

(ii) After two (2) years from the first broadcast in the market of an episode in the series;

(4) For first-run, non-series programs:

(i) Prior to the date the program is available for broadcast in the market under the provision of any contract or license of a television broadcast station in the market;

(ii) After two (2) years from the date of such first availability;

(5) For feature films:

(i) Prior to the date such film is available for non-network broadcast in the market under the provisions of any contract or license of a television broadcast station in the market;

(ii) Two (2) years after the date of such first availability;

(6) For other programs: one day after the first non-network broadcast in the market or one year from the date of purchase of the program for non-network broadcast in the market, whichever occurs first.

NOTE 1: For purposes of § 76.151, a series will be treated as a unit, that is:

(i) No episode of a series (including an episode in a different package of programs in the same series) may be carried by a community unit, pursuant to §§ 76.61(b), (c), (d) or (e)(1)–(e)(4) or 76.63(a) (as it refers to §§ 76.61(b), (c), (d) or (e)(1)–(e)(4) while any episodes of the series are subject to exclusivity protection.

(ii) In the second fifty major television markets, no exclusivity will be afforded a different package of programs in the same series after the initial exclusivity period has terminated.

NOTE 2: As used in this section, the phrase “broadcast in the market” or “broadcast by a market station” refers to a broadcast by a television station licensed to a designated community in the market.

§ 76.153 Parties entitled to exclusivity.

(a) Copyright holders of syndicated programs shall be entitled to the exclusivity provided by § 76.151(a). In order to receive such exclusivity, the copyright holder shall notify each cable television system operator of the exclusivity sought in accordance with the requirements of § 76.155.

(b) Television broadcast stations licensed to designated communities in the major television markets shall be entitled to the exclusivity provided by § 76.151(b). In order to receive such exclusivity, such television stations shall notify each cable television sys-

tem operator of the exclusivity sought in accordance with the requirements of § 76.155.

(c) In order to be entitled to exclusivity for a program under § 76.151(b), a television station must have an exclusive right to broadcast that program against all other television stations licensed to the same designated community and against broadcast signal cable carriage of that program in the cable community: provided, however, that such exclusivity will not be recognized in a designated community of another major television market unless such community is wholly within the television market of the station seeking exclusivity. In hyphenated markets, exclusivity will be recognized beyond the specified zone of a station only to the extent the station has exclusivity against other stations in the designated communities of the market. In such instances, exclusivity to the extent a station has obtained it will be recognized within the specified zones of such other stations. It shall be presumed that broadcast rights acquired prior to March 31, 1972 are exclusive for the specified zones of all stations in the market in which the station is located.

§ 76.159 Grandfathering.

The provisions of § 76.151 shall not be deemed to require a cable television system to delete programming from any signal that was carried prior to March 31, 1972, or that any other cable television system in the same community was carrying prior to March 31, 1972: provided, however, that if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of the subpart.

§ 76.161 Exception.

The provisions of §§ 76.99 and 76.151 shall not apply to a cable television system having fewer than 1000 subscribers. Within sixty (60) days following the provision of service to 1000 subscribers each such system operator shall file a notice to that effect with the Commission and shall send a copy thereof to all television broadcast stations carried by the cable television system.

ARLINGTON TELECOMMUNICATIONS CORP. (ARTEC)

Federal Communications Commission, 1978.
696 F.C.C.2d 1923, 44 R.R.2d 1007, further reconsideration denied,
45 R.R.2d 363 (1979).

[ARTEC, operator of a cable television system in Arlington County, Virginia (adjacent to Washington, D. C.), sought a waiver of the FCC's distant signal rule, 47 C.F.R. § 76.61, to enable it to carry the signals of the three Baltimore network affiliates (WMAR-TV, WBAL-TV, and WJZ-TV). Over the opposition of the Washington television stations, the FCC granted the waiver request, 65 F.C.C.2d 469, 41 R.R.2d 461 (1977). The FCC relied on the follow-

ing factors: (1) the heavy penetration of Arlington County by master antenna television (MATV) systems; (2) the relatively low shares of the Arlington County audience received by the Baltimore signals; (3) evidence suggesting that Arlington County MATV systems delivered the Baltimore signals in viewable form; and (4) the absence of any apparent impact upon Washington, D. C., stations from MATV carriage of the Baltimore signals. This satisfied the two-part standard under which the FCC normally granted waivers—upon a showing, first, that some anomalous condition existed which supported carriage of the distant signals by the cable system, and, second, that such carriage would not have significant adverse impact on local television stations. On reconsideration, the FCC decided to revise its general approach to waiver requests seeking permission to carry distant signals inconsistent with the FCC's regulations.]

9. Our initial decision was premised, in part, on the belief that the carriage of inconsistent signals would not adversely affect market stations under the peculiar circumstances presented here, i. e., when the signals in question have been available to a significant percentage of the potential cable subscribers for some time without attracting more than a minimal share of the viewing audience. The record indicated that MATV systems provide approximately one-third of the 72,000 Arlington County television households with the Baltimore network affiliates. While it now appears that this estimate of MATV penetration was somewhat excessive, both the ARTEC and the Metromedia signal reception surveys make it clear that MATV systems provide each of the Baltimore network affiliates to a significant percentage of ARTEC's potential subscribers. In addition, uncontroverted evidence indicates that the Arlington network affiliates receive extremely small shares of the Arlington County viewing audience.²³ These shares are so low in comparison to the shares which would be expected to result from the extensive MATV carriage of WMAR-TV, WBAL-TV, and WJZ-TV that we reaffirm our conclusion that a waiver permitting ARTEC to carry the Baltimore network affiliates would create only a minimal potential for adverse impact upon the Washington, D. C. stations.

11. . . . [T]he evidence concerning delivered signal quality constitutes a prima facie case that carriage of those signals will have little or no impact upon the Washington, D. C. stations, especially since those stations apparently have long since absorbed the impact, if any, which may have resulted from the current Arlington County MATV carriage of the Baltimore affiliates.²⁴

23. A viewing survey submitted by ARTEC reveals that WMAR-TV, WBAL-TV, and WJZ-TV each receive approximately one percent of the Arlington County viewing audience. [Some footnotes have been omitted; others have been renumbered.]

24. . . . The network nonduplication and syndicated exclusivity rules will cause much of the duplicating programming televised by the Baltimore network affiliates to be deleted.

12. In the course of our extensive deliberations on this matter, the relevance to our regulatory policies of the remaining factor in our waiver standard, i. e., that the waiver applicant show unique or anomalous circumstances, has caused us the most concern. Our cable rules have been in effect for more than five years. We now believe we have enough experience with them to come to the conclusion that this requirement is an unnecessary adjunct to the waiver process in the context of the signal carriage rules. Consequently, we are now explicitly eliminating this "second prong" of our waiver standard.

. . . We have also concluded that the requirement that waiver applicants show lack of impact sufficient to reduce the local broadcasters' ability to serve the public continues to serve the purpose of our current regulatory process and therefore it will be continued. The showing we require of parties seeking waivers with respect to the question of impact is essentially unchanged . . .

16. The operative waiver standards themselves have evolved in the context of particular adjudications. Normally, we have required a showing beyond that of no impact. See, e. g., *Treasure Valley CATV Committee*, [562 F.2d 1182 (9th Cir. 1977)]; *Central Plains Cable TV, Inc.*, 64 F.C.C.2d 548 (1977); *Warner Cable of Fox River Valley*, 65 F.C.C.2d 251 [40 R.R.2d 1375] (1977) Para. 16; *Karlen Communications, Inc.*, 49 F.C.C.2d 77 [31 R.R.2d 986] (1974); *Valley Telecasting Co.*, 48 F.C.C.2d 1109 [31 R.R.2d 744] (1974). See also *First Report and Order in Docket No. 20561*, 63 F.C.C.2d 956, 967-969 [40 R.R.2d 571] (1977).

17. That has not always been the case, however, as on occasion we have granted signal carriage waivers based on what was essentially a showing of no impact to the broadcaster resulting therefrom. In a few instances, such a decision has been explained by reference to a *de minimis* theory, see, e. g., *Harbor-Vue Cable TV, Inc.*, 42 F.C.C.2d 1067 [28 R.R.2d 717] (1973); *Diversified Communications Investors, Inc.*, 37 F.C.C.2d 981 [25 R.R.2d 775] (1972). In other instances acquiescence in the waiver by the local broadcaster, who presumably was in the best position to evaluate impact (but no more) was the ground for the action, see, e. g., *Phil Campbell Service, Inc.*, 53 F.C.C.2d 1205 [34 R.R.2d 198] (1975).

18. It is difficult to identify the thread which ties these cases into a consistent whole. Moreover, we have been unable to find a satisfactory explanation for the way in which any requirement beyond an examination of a waiver grant's impact on the local broadcaster's ability to serve the public furthers our policies as enunciated in the *Cable Television Report and Order*, [37 Reg. 3252 (1972)]. Those policies are predicated on a critical assumption, i. e., that unlimited cable service offerings will cause a diminution of local broadcasters' ability to serve the public. . . . [We] see no justifiable

way in which our expressed desire to protect local broadcasting is served by requiring evidence on any factor other than a particularized showing as to the validity of our assumption of deleterious impact on the broadcaster and its service to the public.

23. The policy alteration we have decided upon today is not a drastic one. No cable system in the country will be empowered to carry an inconsistent signal as a result of this decision. Waiver applicants will continue to be required to show that a grant of the waiver will not result in a deleterious impact on local broadcasters' service to the public. Parties seeking waivers will, as heretofore, be expected to provide the Commission with particularized evidence, rather than speculation, in support of their case. See, *WAIT Radio v. FCC*, 418 F.2d 1153 at 1157 [16 R.R.2d 2107] (D.C.Cir. 1969). At the outset, the burden of proof remains with the waiver applicant and continues to amount to a "high hurdle even at the starting gate." *Id.* The evidence required to make out—or rebut—a waiver case will not be limited to any particular form at this time. For example, we will accept analyses of the effect of a waiver on station and market audience and revenues as indicated by use of the "Impact Formula" set forth in the Notice of Inquiry in Docket No. 21284, 65 F.C.C.2d 9 (1977).^{24a} As we stated in that decision itself, however, we do not claim that the "Impact Formula" is either perfectly accurate or encompasses each and every relevant factor in different markets. Therefore, we will also accept relevant evidence of other factors which either party believes bolster its case. As one example of such a showing we would cite ARTEC's reliance on the significant penetration of MATV delivered signals to its potential market with no apparent impact on the Washington, D. C. broadcast licensees. Another factor which may be significant in some cases is the likelihood of growth in either cable subscribership or broadcast audience, or both.

24a. [Ed.] See 65 F.C.C.2d 9, 14, for the formula used to predict the impact of an additional identical network signal on a broadcast station.

$$\begin{array}{r}
 \begin{array}{l}
 (1) \text{ No. of cable} \\
 \text{homes in relevant} \\
 \text{area}
 \end{array}
 \times
 \begin{array}{l}
 (2) \text{ \% of ADI house-} \\
 \text{holds watching} \\
 \text{TV during given} \\
 \text{time period}
 \end{array}
 \times
 \begin{array}{l}
 (3) \text{ Station's audi-} \\
 \text{ence share on} \\
 \text{cable in county} \\
 \text{of system during} \\
 \text{given time} \\
 \text{period}
 \end{array}
 \times
 \begin{array}{l}
 (4) \text{ 50\%}
 \end{array}
 \\
 \hline
 \begin{array}{l}
 (5) \text{ Total station audience during given time period.}
 \end{array}
 \qquad =
 \end{array}$$

$$\begin{array}{r}
 \begin{array}{l}
 (6) \text{ \% of predicted au-} \\
 \text{dience loss during} \\
 \text{given time period}
 \end{array}
 =
 \begin{array}{l}
 (7) \text{ \% of predicted} \\
 \text{station revenue} \\
 \text{loss during given} \\
 \text{time period}
 \end{array}
 \times
 \begin{array}{l}
 (8) \text{ \% of station's} \\
 \text{revenues during} \\
 \text{given time pe-} \\
 \text{riod}
 \end{array}
 =
 \begin{array}{l}
 (9) \text{ \% of} \\
 \text{total} \\
 \text{revenue} \\
 \text{loss.}
 \end{array}
 \end{array}$$

For examples of the application of the formula, see *Warner Cable Corp.*, 45 R.R.2d 568 (1979); *Cablecom of Kirksville*, 45 R.R.2d 782 (1979). Element (4) is varied to reflect the relation of the imported signal to market signals.

24. We will continue to evaluate parties' showing on this issue as we have in the past. That is, we do not contemplate at this time promulgating a hard and fast "percentage of impact" above which no waiver will be granted. We will continue to determine the importance of the likely impact based on the facts of the particular markets and stations involved in each case.²⁵

25. As indicated in paragraph 23, the waiver applicant necessarily has the overall burden of proof in securing a waiver of our rules. However, the burden of going forward with the evidence shifts once the applicant establishes a prima facie case of entitlement to a waiver. Where such a prima facie showing is made, we envision that opponents to the waiver will have, at least, two opportunities to rebut the applicant's case. As contemplated in our rules, opponents may comment on the waiver applicant's initial filing. 47 C.F.R. § 76.7(d). The opponents may challenge the applicant's filing in various ways, for instance, by demonstrating the invalidity of the applicant's surveys; but the opponents at this stage need not place their own financial circumstances in issue. Due to the sensitivity of the latter type of information, we believe it inappropriate to effectively require broadcasters to disclose that information at this stage; however, they may do so at their election. Thereafter, and subsequent to the applicant's reply, see 47 C.F.R. § 76.7(e), the Commission may reject the application or may decide that the applicant has established a prima facie case for a waiver. If the Commission rules that a prima facie case is made out, the burden of going forward will shift to the opponents of the waiver. At that stage, the opponents must demonstrate that a waiver is substantially likely to impact adversely on the public. A principal means of attempting such a demonstration may be to place one or more broadcaster's financial circumstances in issue. The waiver applicant will be entitled to reply to whatever rebuttal the opponents offer. If the Commission does not believe that the prima facie case has been rebutted, the Commission will authorize a waiver, subject, of course, to the opponents' opportunity to seek reconsideration pursuant to 47 U.S.C.A. § 405 and 47 C.F.R. § 1.106.²⁶

25. While we cannot at this time foresee the whole range of waiver requests that may be presented, we would anticipate that prima facie showings of little or no impact could be made in the larger markets.

26. [Ed.] Two Commissioners dissented and one abstained.

In Motion Picture Ass'n of America, 68 F.C.C.2d 57, 42 R.R.2d 1441 (1978), the FCC rejected a petition to limit satellite distribution of distant signals to cable systems because some originating stations were evolving into "super stations." See, also, Southern Satellite Systems, Inc., 62 F.C.C.2d

153, 39 R.R.2d 525 (1976), approving satellite arrangements for distribution of the signals of an Atlanta television station to numerous cable systems. Satellite distribution of Chicago, Los Angeles and New York signals also has been approved. Television Digest, May 28, 1979, p. 5.

On April 25, 1979, the FCC released three reports, indicating its tentative decision to delete rules (i) restricting distant signal imports by cable systems and (ii) providing protection for syndicated programming. See 45 R.R. 2d 817, 853 and 44 Fed.Reg. 28347 (1979).

C. CABLE SYSTEM PROGRAM ORIGINATION AND THIRD PARTY ACCESS ²⁷

CODE OF FEDERAL REGULATIONS

Title 47

SUBPART A—GENERAL

§ 76.5 Definitions

(v) Cablecasting. Programming (exclusive of broadcast signals) carried on a cable television system. . . .

(w) Origination cablecasting. Programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator.

27. See Note, Cablecasting: A Myth or Reality, 26 Rutgers L.Rev. 804 (1973); Note, United States v. Midwest Video Corp.—Cable Television and the Program Origination Rule, 22 De Paul L.Rev. 461 (1972); Gerlach, Toward the Wired Society: Prospects, Problems and Proposals for a National Policy on Cable Technology, 25 Maine L.Rev. 193 (1973); Botein, Access to Cable Television, 57 Corn.L.Rev. 419 (1972); The Wired Island: The First Two Years of Public Access to Cable Television in Manhattan (Fund for the City of New York 1973); Center for Analysis of Public Issues, Public Access Channels: The New York Experience (1972); Verrill, CATV's Emerging Role: Cablecaster or Common Carrier? 34 Law & Contemp.Prob. 586 (1969); Note, Common Carrier CATV: Problems and Proposals, 37 Bklyn.L.Rev. 533 (1971); Mitre Corporation, Urban Cable Systems (1972); Shapiro, Epstein & Cass, Cable-Satellite Networks: Structures and Problems, 24 Cath.U.L.Rev. 692 (1975); G. Gillespie, Public Access Television in the United States and Canada (1975); K. Kalba, Separating Content from Conduit? Market Realities and Policy Options in Non-Broadcast Cable Communications (1977); Moss, Cable Television: A Technology for Citizens, 55 U.Det.J.Urb.L. 699 (1978); Midwest Video Corp. v. FCC: The First Amendment Implications of Cable Television Access, 54 Ind.L.J. 109 (1978). Questions of system configuration and access are also discussed in

the materials on franchising (infra note 37).

See also Barrow, Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience, 61 Va.L.Rev. 515 (1975); Note, Cable Television and the First Amendment, 71 Colum.L.Rev. 1030 (1971); Simmons, Fairness Doctrine and Cable TV, 11 Harv.J.Legis. 629 (1975); Collins, The Future of Cable Communications and the Fairness Doctrine, 24 Cath.U.L.Rev. 833 (1975); Powe, Cable and Obscenity, 24 Cath.U.L.Rev. 719 (1975); Comment, Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper, 51 N.Y.U.L.Rev. 133 (1976); Note, The FCC's Cable Television Jurisdiction: Deregulation by Judicial Fiat, 30 U.Fla.L.Rev. 718 (1978); Note, FCC Regulation of Cable Television Content, 31 Rut.L.Rev. 238 (1978).

The Rand Corporation has done a number of studies of cable system configuration, of which the most extensive is Cable Communications in the Dayton Miami Valley (1972). See also N. Feldman, Cable Television: Opportunities and Problems in Program Origination (Rand Corp.1970); L. Johnson, Cable Television and Higher Education: Two Contrasting Experiences (Rand Corp.1971); W. S. Baer, Interactive Television: Prospects for Two-Way Services on Cable (Rand Corp.1971); P. Carpenter-Huffman, R. Kletter and R. Yin, Cable Television: Developing Community Services (Rand

SUBPART G—CABLECASTING

§ 76.205 Origination cablecasts by candidates for public office.

(a) General requirements. If a cable television system operator shall permit any legally qualified candidate for public office to use the system's origination channel(s) and facilities therefor, the system operator shall afford equal opportunities to all other such candidates for that office: . . .

[Further provisions of § 76.205 parallel those applicable to § 315 of the Communications Act.]

§ 76.209 Fairness doctrine; personal attacks; political editorials.

(a) A cable television system operator engaging in origination cablecasting shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

[Further provisions of § 76.209 incorporate the "personal attack" and "political endorsement" rules applicable to broadcasters.]

§ 76.213 Lotteries.

(a) No cable television system operator . . . when engaged in origination cablecasting shall transmit or permit to be transmitted on the origination cablecasting channel or channels any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.

[Further provisions of § 76.213 parallel those applicable to the dissemination of lottery information by broadcasters.]

§ 76.215 Obscenity.

No cable television system operator when engaged in origination cablecasting shall transmit or permit to be transmitted on the origination cablecasting channel or channels material that is obscene or indecent.

§ 76.221 Sponsorship identification; list retention; related requirements.

(a) When a cable television system operator engaged in origination cablecasting presents any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such cable system operator, the cable television operator at the time of the cablecast, shall an-

nounce (i) that such matter is sponsored, paid for, or furnished, either in whole or in part, and (ii) by whom or on whose behalf such consideration was supplied. . . .

[Further provisions of § 76.221 parallel those applicable to broadcasters in respect of sponsorship identification.]

Note on Commission Policies Pertaining to Origination of Programming by Cable Systems. In 1969, the FCC concluded that origination of programming by cable systems was in the public interest. Described as "cablecasting," such origination programming was defined to encompass "programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system," and was considered to include programs produced by the cable operator, films and tapes produced by others, and cable network programming. The FCC declined to prohibit such programming because it might divert audiences from over-the-air television stations; it emphasized that such programming could be provided by means of a cable television network using communications satellites or other communications modes for interconnection; and it permitted cable systems to carry advertising in connection with such programming, while imposing a limitation that advertising messages be presented only at "natural breaks" in the programming. See First Report and Order (Cablecasting), 20 F.C.C.2d 201 (1969); Memorandum Order and Opinion (Cablecasting), 23 F.C.C.2d 825 (1970).

The Commission went further and adopted a rule that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services." The latter requirement encompassed "some kind of video cablecasting system for the production of local live and delayed programming (e. g., a camera and a video tape recorder, etc.)." The Commission justified the requirement as furthering "the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." The requirement also would permit "more effective performance of the Commission's duty to provide a fair, efficient and equitable distribution of television service to each of the several States and communities (sec. 307(b)), in areas where we have been unable to accomplish this through broadcast media."

The Supreme Court sustained this FCC requirement of mandatory origination by cable system operators. *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972).

That local cablecasts may not be in interstate commerce was held to be immaterial, because "CATV operators, have, by virtue of their carriage of broadcast signals, necessarily subjected themselves to the Commission's comprehensive jurisdiction. . . . The devotion of CATV systems to broadcast transmission—together with the interdependencies between that service and cablecasts, and the necessity for unified regulation—plainly suffices to bring cablecasts within the Commission's Sec. 2(a) jurisdiction." The Court also held, relying largely on the reasoning of the Commission, that the disputed requirement was reasonably ancillary to the regulation of broadcasting. "[T]he regulatory authority asserted by the Commission in 1966 and generally sustained by this Court in *Southwestern* was authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." Even though the required cablecasts "may be transmitted without use of the broadcast spectrum," the effect of the regulation "is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming." Only four Justices joined in this opinion. Chief Justice Burger concurred in the result, observing that the FCC's "position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the Courts." Four Justices dissented, contending that compulsory origination by CATV systems required Congressional action.

In imposing the mandatory origination requirement, the Commission was concerned about its financial impact upon cable systems. Accordingly, it limited the requirement to larger systems; provided some 18 months lead time for such systems to acquire equipment; and established a waiver procedure under which cable systems subject to the requirement could seek exemption on the basis of limited financial resources. As a result of the *Midwest Video* litigation, during which the effect of the FCC regulation was stayed, the mandatory origination requirement was in effect only for a brief period when in 1974 it was revoked by the FCC. The Commission concluded that unwilling originators probably would do a poor job and that greater reliance should be placed on programming by others seeking access to cable facilities (access requirements, imposed in 1972, are discussed hereafter, pp. 435-451). The industry's experience with originations had proved disappointing, with high costs, small revenues and little advertising support. The Commission substituted a requirement that systems with more than 3,500 subscribers have equipment available for local production and presentation of cablecast programs and permit production and presentation of programs by others. Voluntary cablecasting by system operators was permitted, and local regulatory authorities were authorized to require cable system origination (but not the manner in which the origination channel was programmed). The earlier limitation of advertising on origination channels to "natural breaks"

in programming was deleted. Cablecasting Rules, 49 F.C.C.2d 1090, 32 R.R.2d 123 (1974), on reconsideration, 53 F.C.C.2d 1104, 34 R.R.2d 383 (1975).

In the original cablecasting decisions of 1969 and 1970, the Commission imposed a number of limitations on programming originated by cable systems operators. Restrictions pertaining to equal time, the fairness doctrine, sponsorship identification, and lotteries, were imposed in terms paralleling the restrictions applicable to over-the-air broadcasting. (A provision on obscenity was added in 1972.) The FCC's rationale was cryptically stated, to the general effect that failure to impose such requirements on cable systems would permit circumvention of the restrictions applicable to broadcasters.

CABLE TELEVISION SERVICE ²⁸

Federal Communications Commission, 1972.

37 Fed.Reg. 3252, 36 F.C.C.2d 143, 24 R.R.2d 1501, on reconsideration,
36 F.C.C.2d 326, 25 R.R.2d 1501.

117. In its notice of proposed rule making in Docket 18894, the Commission stated that:

Cable television offers the technological and economic potential of an economy of abundance.

On the basis of the record now assembled, we believe the time has come for cable television to realize some of that potential within a national communications structure. We recognize that in any matter involving future projections, there are necessarily certain imponderables. These access rules constitute not a complete body of detailed regulations but a basic framework within which we may measure cable's technological promise, assess its role in our nationwide scheme of communications, and learn how to adapt its potential for energetic growth to serve the public.

CHANNEL CAPACITY

118. Confronted with the need for more outlets for community expression on the one hand and, on the other, with cable television's capacity to provide an abundance of channels, we asserted in our second further notice of proposed rule making in Docket 18397-A the principle that the Commission ". . . must make an effort to ensure the development of sufficient channel availability on all new CATV systems to serve specific recognized functions."

28. [Ed.] Footnotes have been omitted.

119. Most cable system operators and many others argue against the proposed establishment of a fixed minimum channel capacity. Some comments in Docket 18894 went further and suggested that the entire matter of channel capacity be left to experimentation. While it is true that many existing cable systems have large channel capacities and seem at least technologically prepared to meet foreseeable demand, there are many systems apparently content to provide only broadcast signal carriage with no plans to expand service capabilities.

120. We envision a future for cable in which the principal services, channel uses, and potential sources of income will be from other than over-the-air signals. We note 40, 50, and 60 channel systems are currently being installed in some communities. The cost difference between building a 12 channel system and a 20 channel system would not appear to be substantial. We urge cable operators and franchising authorities to consider that future demand may significantly exceed current projections, and we put them on notice that it is our intention to insist on the expansion of cable systems to accommodate all reasonable demands. We wish to proceed conservatively, however, to avoid imposing unreasonable economic burdens on cable operators. Accordingly, we will not require a minimum channel capacity in any except the top 100 markets. In these markets, we believe that 20 channel capacity (actual or potential) is the minimum consistent with the public interest. . . .

DESIGNATED CHANNELS

121. Broadcast signals are being used as a basic component in the establishment of cable systems, and it is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable—the opening of new outlets for local expression, the promotion of diversity in television programing, the advancement of educational and instructional television, and increased informational services of local governments. Accordingly, cable television systems will have to provide one dedicated, noncommercial public access channel available without charge at all times on a first-come, first-served nondiscriminatory basis and, without charge during a developmental period, one channel for educational use and another channel for local government use. We have already imposed an obligation on systems with 3,500 or more subscribers to originate programing and are now requiring that the origination channels be specifically designated.

122. **Public access channel.** It has long been a Commission objective to foster local service in broadcasting. To this end we have encouraged the growth of UHF television, and have looked to all broadcast stations to provide community-oriented programing. We expect no less of cable. In our July 1, 1970 notice we stated:

The structure and operation of our system of radio and television broadcasting affects, among other things, the sense of

“community” of those within the signal area of the station involved. Recently governmental programs have been directed toward increasing citizen involvement in community affairs. Cable television has the potential to be a vehicle to much needed community expression.

We believe there is increasing need for channels for community expression, and the steps we are taking are designed to serve that need. The public access channel will offer a practical opportunity to participate in community dialogue through a mass medium. A system operator will be obliged to provide only use of the channel without charge, but production cost (aside from live studio presentations not exceeding 5 minutes in length) may be charged to users.

123. **Educational access channel.** It is our intention that local educational authorities have access to one designated channel for instructional programing and other educational purposes. Use of the educational channel will be without charge from the time subscriber service is inaugurated until 5 years after the completion of the cable system's basic trunk line. After this developmental period—designed to encourage innovation in the educational uses of television—we will be in a more informed position to determine in consultation with State and local authorities whether to expand or curtail the free use of channels for such purposes or to continue the developmental period. The potential uses of the educational channel are varied. An important benefit promises to be greater community involvement in school affairs. It is apparent, for instance, that combined with two-way capability, the quality of instructional programing can be greatly enhanced. Similarly, some envision significant advances in the educational field by the linking of computers to cable systems with two-way capability. For the present, we are only requiring that systems provide an educational channel and, as noted below, some return communication capability, and will allow experiments in this field to proceed apace.

124. **Government access channel.** The Government access channel is designed to give maximum latitude for use by local governments. The suggestions for use range across a broad spectrum and it is premature to establish precise requirements. As with the educational channel, use of the Government channel will be free from the time subscriber service is inaugurated until 5 years after the completion of the cable system's basic trunk line, at which time we will consider whether to expand or curtail such free use or to continue the developmental period.

LEASED ACCESS CHANNELS

125. In addition to the designated channels and broadcast channels, cable systems shall make available for leased use the remainder

of the required bandwidth and any other available bandwidth (e. g., if a channel carrying broadcast programming is required to be blacked out because of our exclusivity rules or is otherwise not in use, that channel also may be used for leased access purposes). Additionally, to the extent that the public, education, and Government access channels are not being used, these channels may also be used for leased operation. But such operations may only be undertaken on the express condition that they are subject to immediate displacement if there is demand to use the channel for the dedicated purpose.

EXPANSION OF CAPACITY

126. Our basic goal is to encourage cable television use that will lead to constantly expanding channel capacity. Cable systems are therefore required to make additional bandwidth available as the demand arises. There are a number of ways to meet this general objective. Initially, we intend to use the following formula to determine when a new channel must be made operational: whenever all operational channels are in use during 80 percent of the weekdays (Monday-Friday), for 80 percent of the time during any consecutive 3-hour period for 6 weeks running, the system will then have 6 months in which to make a new channel available. This requirement should encourage use of the system with the knowledge that channel space will always be available, and also encourage the cable operator continually to expand and update his system. On at least one of the leased channels part-time users must be given priority. We plan at a later date to institute a proceeding with a view to assuring that our requirement of capacity expansion is not frustrated through rate manipulation or by any other means. This proceeding will also deal with such open questions as rates charged for leased channel operations.

127. We are aware of the possibility that the formula may impose undue burdens on system operations. If it were necessary to rebuild or add extensive new plant, this could not reasonably be expected within a 6-month period. The requirement for activating new capacity within 6 months is based on our understanding that only relatively modest effort is involved in converting existing potential to actual capacity. These considerations, however, point up the necessity for building now with a potential that takes the future into account. Because this part of our program is a relatively uncharted area, we will make it a matter for continuing regulatory concern.

TWO-WAY CAPACITY

128. On review of the comments received and our own engineering estimates, we have decided to require that there be built into cable systems the capacity for return communication on at least a non-

voice basis. Such construction is now demonstrably feasible. Two-way communication, even rudimentary in nature, can be useful in a number of ways—for surveys, marketing services, burglar alarm devices, educational feedback, to name a few.

129. We are not now requiring cable systems to install necessary return communication devices at each subscriber terminal. Such a requirement is premature in this early stage of cable's evolution. It will be sufficient for now that each cable system be constructed with the potential of eventually providing return communication without having to engage in time-consuming and costly system rebuilding. This requirement will be met if a new system is constructed either with the necessary auxiliary equipment (amplifiers and passive devices) or with equipment that could easily be altered to provide return service. When offered, activation of the return service must always be at the subscriber's option.

REGULATIONS APPLICABLE TO CHANNELS PRESENTING NONBROADCAST PROGRAMING

130. We now turn to the question of the regulation of access channels presenting nonbroadcast programing. We believe that such regulation is properly the concern of this Commission. These channels fulfill Communications Act purposes and, in the context of our total program, are integrally bound up with the broadcast signals being carried by cable. It is by no means clear that the viewing public will be able to distinguish between a broadcast program and an access program; rather, the subscriber will simply turn the dial from broadcast to access programing, much as he now selects television fare. Moreover, leased channels will undoubtedly carry interconnected programing via satellite or interstate terrestrial facilities, matters that are clearly within the Commission's jurisdiction. Finally, it is this Commission that must make the decisions as to conditions to be imposed on the operation of pay cable channels, and we have already taken steps in that direction. . . . Federal regulation is thus clearly called for.

131. There remains the issue of whether also to permit State or local regulation of these channels where not inconsistent with Federal purposes. We think that in this area a dual form of regulation would be confusing and impracticable. Our objective of allowing a period for experimentation might be jeopardized if, for example, a local entity were to specify more restrictive regulations than we have prescribed. Thus, except for the Government channel, local regulation of access channels is precluded. If experience and further proceedings indicate its need or desirability, we can then delineate an appropriate local role.

132. Because of the Federal concern, local entities will not be permitted, absent a special showing, to require that channels be assigned for purposes other than those specified above. We stress again that we are entering into an experimental or developmental period. Thus, where the cable operator and franchising authority wish to experiment by providing additional channel capacity for such purposes as public, educational, and Government access—on a free basis or at reduced charges—we will entertain petitions and consider the appropriateness of authorizing such experiments, to gain further insight and to guide future courses of action. In communities outside the top 100 markets where access channels are not required by the Commission, we will permit local authorities to require access services, so long as they are not in excess of what we require for the major markets.

133. The question of what regulations we should impose at this time is most difficult. Our judgments on how these access services will evolve are at best intuitive. We believe that the best course is to proceed with only minimal regulation in order to obtain experience. We emphasize, therefore, that the regulatory pattern is interim in nature—that we may alter the program as we gain the necessary insights.

134. We are requiring that cable systems promulgate rules to apply to access services, and that these rules be kept on public file at the system's local headquarters and with the Commission. What matters during this experimental period is not form but substance, and we are specifying the guidelines that we believe are appropriate at this time. We believe we have full discretion to act in this fashion.

135. With respect to the public access channel, the rules to be promulgated by the system must specify nondiscriminatory access without charge on a first-come, first-served basis. These rules shall also proscribe for all designated access channels (except the Government access channel when it is being used for its designated purpose) the presentation of: Any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office); lottery information and obscene or indecent matter (modeled after the prohibitions in §§ 76.213 and 76.215 respectively). The regulations shall also specify that persons or groups seeking access be identified, and their addresses obtained; this information should be publicly available and must be retained by the system for at least 2 years. The cable operator must not in any other way censor or exercise program content control of any kind over the material presented on the public access channel.

136. We recognize that open access carries with it certain risks. But some amount of risk is inherent in a democracy committed to fostering "uninhibited, robust, and wide-open" debate on public issues (*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). In any event, further regulation in this sensitive area should await experience. For example, we intend to explore whether it would be feasible or desirable to provide a locked switch to cut off the public access or leased channels, should subscribers wish to control channel selection.

137. In short, we recognize that the regulation of public access channels may result in many problems for the cable operator, especially during the break-in period. Effective operational procedures can evolve only from trial and error, and it is probable that systems will have different problems that do not lend themselves to uniform regulation. We note, for example, the need to decide how applications for access time are to be made, what overall time limitations might be desirable, how copyrighted material will be protected, how production facilities will be provided, how the public can obtain advance notice of presentations, and so on. All these questions will probably be answered in a number of different ways. We will require that the rules adopted by cable systems in these respects be filed with us and made available to the public. But experimentation appears to be the best way to determine what will be workable for the long run.

138. The cable operator similarly must not censor or exercise program content control of any kind over the material presented on the leased access channels. Specifically, his rules shall provide for nondiscriminatory access on a first-come, first-served basis with the appropriate rate schedule specified. Again, he shall obtain the names and addresses of those leasing the channel, and shall adopt rules proscribing the presentation of: lottery information; obscene or indecent matter; and advertising material not containing sponsorship identification. . . . We will continue to monitor developments in this area with a view to assuring that the public interest is served, particularly regarding such issues as false and misleading advertising.

29

FCC v. MIDWEST VIDEO CORP.

Supreme Court of the United States, 1979.

— U.S. —, 99 S.Ct. 1435, 59 L.Ed.2d 692.

MR. JUSTICE WHITE delivered the opinion of the Court.³⁰

In May 1976, the Federal Communications Commission promulgated rules requiring cable television systems that have 3,500 sub-

29. [Ed.] In *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975), the ACLU challenged the FCC's cable regulations on the grounds that they did not impose common carrier obligations on cable access channels and did not limit cable operators to cablecasting on a single channel.

While recognizing some merit in the ACLU position, the Court of Appeals held that the FCC's determinations were within the scope of its authority.

30. [Some footnotes have been omitted; others have been renumbered.]

scribers and carry broadcast signals to develop, at a minimum, a 20-channel capacity by 1986, to make available certain channels for access by third parties, and to furnish equipment and facilities for access purposes. Report and Order in Docket No. 20528, 59 F.C.C.2d 294 (1976) (*1976 Order*). The issue here is whether these rules are “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting,” *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001 (1968), and hence within the Commission’s statutory authority.

I

The regulations now under review had their genesis in rules prescribed by the Commission in 1972 requiring all cable operators in the top 100 television markets to design their systems to include at least 20 channels and to dedicate four of those channels for public, governmental, educational, and leased access. The rules were reassessed in the course of further rulemaking proceedings. As a result, the Commission modified a compliance deadline, Report and Order in Docket No. 20363, 54 F.C.C.2d 207 (1975), effected certain substantive changes, and extended the rules to all cable systems having 3,500 or more subscribers, *1976 Order*, *supra*. In its *1976 Order*, the Commission reaffirmed its view that there was “a definite societal good” in preserving access channels, though it acknowledged that the “overall impact that use of these channels can have may have been exaggerated in the past.” 59 F.C.C.2d, at 296.

As ultimately adopted, the rules prescribe a series of interrelated obligations ensuring public access to cable systems of a designated size and regulate the manner in which access is to be afforded and the charges that may be levied for providing it. Under the rules, cable systems must possess a minimum capacity of 20 channels as well as the technical capability for accomplishing two-way, nonvoice communication. 47 CFR § 76.252 (1976). Moreover, to the extent of their available activated channel capacity,^{30a} cable systems must

30a. Activated channel capacity consists of the number of usable channels that the system actually provides to the subscriber’s home or that it could provide by making certain modifications to its facilities. Report and Order in Docket No. 20528, 59 F.C.C.2d 294, 315 (1976). The great majority of systems constructed in the major markets from 1962 to 1972 were designed with a 12-channel capacity. Often additional channels may be activated by installing converters on subscribers’ home sets, albeit at substantial cost. See Notice of Proposed Rule Making, 53 F.C.C.2d 782, 785 (1975).

In determining the number of activated channels available for access use, channels already programmed by the cable operator for which a separate charge is made are excluded. Similarly, channels utilized for transmission of television broadcast signals are subtracted. The remaining channels deemed available for access use include channels provided to the subscriber but not programmed and channels carrying other nonbroadcast programming—such as programming originated by the system operator—for which a separate assessment is not made. 59 F.C.C.2d, at 315–316. The Commission has indicated that it will “not con-

allocate four separate channels for use by public, educational, local governmental, and leased access users, with one channel assigned to each. § 76.254(a). Absent demand for full-time use of each access channel, the combined demand can be accommodated with fewer than four channels but with at least one. § 76.254(b)-(c).^{30b} When demand on a particular access channel exceeds a specified limit, the cable system must provide another access channel for the same purpose, to the extent of the system's activated capacity. § 76.254(d). The rules also require cable systems to make equipment available for those utilizing public access channels. § 76.256(a).

Under the rules, cable operators are deprived of all discretion regarding who may exploit their access channels and what may be transmitted over such channels. System operators are specifically enjoined from exercising any control over the content of access programming except that they must adopt rules proscribing the transmission on most access channels of lottery information and commercial matter.^{30c} §§ 77.256(b), (d). The regulations also instruct cable operators to issue rules providing for first-come, nondiscriminatory access on public and leased channels. §§ 77.256(d)(1), (3).

Finally, the rules circumscribe what operators might charge for privileges of access and use of facilities and equipment. No charge may be assessed for the use of one public access channel. § 76.256(c)(2). Operators may not charge for the use of educational and governmental access for the first five years the system services such users. § 76.256(c)(1). Leased access channel users must be charged an "appropriate" fee. § 76.256(d)(3). Moreover, the rules ad-

sider as acting in good faith an operator with a system of limited activated channel capability who attempts to displace existing access uses with his own origination efforts." *Id.*, at 316. Additionally, the Commission has stated that pay entertainment programming should not be "provided at the expense of local access efforts which are displaced. Should a system operator for example have only one complete channel available to provide access services we shall consider it as clear evidence of bad faith in complying with his access obligations if such operator decides to use that channel to provide pay programming." *Id.*, at 317.

^{30b}. Cable systems in operation on June 21, 1976, that lack sufficient activated channel capacity to furnish one full channel for access purposes may meet their access obligations by providing whatever portions of channels that are available for such purposes. 47 CFR § 76.254(c) (1976). Systems initiated

after that date, and existing systems desirous of adding a nonmandatory broadcast signal after that date, must supply one full channel for access use even if they must install converters to do so. See *1976 Order*, 59 F.C.C.2d, at 314-315.

^{30c}. Cable systems were also required to promulgate rules prohibiting the transmission of obscene and indecent material on access channels. 47 CFR § 76.256(d) (1976). The Court of Appeals for the District of Columbia Circuit stayed this aspect of the rules in an order filed in *American Civil Liberties Union v. FCC*, — U.S.App.D.C. —, No. 76-1695 (Aug. 26, 1977). The court below, moreover, disapproved the requirement in belief that it imposed censorship obligations on cable operators. The Commission has instituted a review of the requirement, and it is not now in controversy before this Court.

monish that charges for equipment, personnel, and production exacted from access users "shall be reasonable and consistent with the goal of affording users a low-cost means of television access." § 76.256(c)(3). And "[n]o charges shall be made for live public access programs not exceeding five minutes in length." *Ibid.* Lastly, a system may not charge access users for utilization of its playback equipment or the personnel required to operate such equipment when the cable's production equipment is not deployed and when tapes or film can be played without technical alteration to the system's equipment. *Petition for Reconsideration in Docket No. 20508, 62 F.C.C.2d 399, 407 (1976).*

The Commission's capacity and access rules were challenged on jurisdictional grounds in the course of the rulemaking proceedings. In its 1976 *Order*, the Commission rejected such comments on the ground that the regulations furthered objectives that it might properly pursue in its supervision over broadcasting. Specifically, the Commission maintained that its rules would promote "the achievement of long-standing communications regulatory objectives by increasing outlets for local self-expression and augmenting the public's choice of programs." 59 F.C.C.2d, at 298. The Commission did not find persuasive the contention that "the access requirements are in effect common carrier obligations which are beyond our authority to impose." *Id.*, at 299. The explanation was:

"So long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow "common carrier" in nature. The proper question, we believe, is not whether they fall in one category or another of regulation—whether they are more akin to obligations imposed on common carriers or obligations imposed on broadcasters to operate in the public interest—but whether the rules adopted promote statutory objectives." *Ibid.*

Additionally, the Commission denied that the rules violated the First Amendment, reasoning that when broadcasting or related activity by cable systems is involved First Amendment values are served by measures facilitating an exchange of ideas.

On petition for review, the Eighth Circuit set aside the Commission's access, channel capacity, and facilities rules as beyond the agency's jurisdiction. 571 F.2d 1025 (1978). The court was of the view that the regulations were not reasonably ancillary to the Commission's jurisdiction over broadcasting, a jurisdictional condition established by past decisions of this Court. The rules amounted to an attempt to impose common-carrier obligations on cable operators,

the court said, and thus ran counter to the statutory command that broadcasters themselves may not be treated as common carriers. See Communications Act of 1934, § 3(h), 47 U.S.C.A. § 153(h). Furthermore, the court made plain its belief that the regulations presented grave First Amendment problems. We granted certiorari, — U.S. —, 99 S.Ct. 77, 58 L.Ed.2d 107 (1978), and we now affirm.

II

A

The Commission derives its regulatory authority from the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C.A. § 151 et seq. The Act preceded the advent of cable television and understandably does not expressly provide for the regulation of that medium. But it is clear that Congress meant to confer “broad authority” on the Commission, H.R.Rep.No.1850, 73d Cong., 2d Sess., 1 (1934), so as “to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.” *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 60 S.Ct. 437, 439, 84 L.Ed. 2d 451 (1940). To that end, Congress subjected to regulation “all interstate and foreign communication by wire or radio.” Communications Act of 1934, § 2(a), U.S.C.A. § 152(a). In *United States v. Southwestern Cable Co.*, supra, we construed § 2(a) as conferring on the Commission a circumscribed range of power to regulate cable television, and we reaffirmed that determination in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). The question now before us is whether the Act, as construed in these two cases, authorizes the capacity and access regulations that are here under challenge.

B

Because its access and capacity rules promote the long-established regulatory goals of maximization of outlets for local expression and diversification of programming—the objectives promoted by the rule sustained in *Midwest Video*—the Commission maintains that it plainly had jurisdiction to promulgate them. Respondents, in opposition, view the access regulations as an intrusion on cable system operations that is qualitatively different from the impact of the rule upheld in *Midwest Video*. Specifically, it is urged that by requiring the allocation of access channels to categories of users specified by the regulations and by depriving the cable operator of the power to select individual users or to control the programming on such channels, the regulations wrest a considerable degree of editorial control from the cable operator and in effect compel the cable system to provide a kind of common-carrier service. Respondents contend, therefore, that the regulations are not only qualitatively

different from those heretofore approved by the courts but also contravene statutory limitations designed to safeguard the journalistic freedom of broadcasters, particularly the command of § 3(h) of the Act that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier." 47 U.S.C.A. § 153(h).

We agree with respondents that recognition of agency jurisdiction to promulgate the access rules would require an extension of this Court's prior decisions. Our holding in *Midwest Video* sustained the Commission's authority to regulate cable television with a purpose affirmatively to promote goals pursued in the regulation of television broadcasting; and the plurality's analysis of the origination requirement stressed the requirement's nexus to such goals. But the origination rule did not abrogate the cable operators' control over the composition of their programming, as do the access rules. It compelled operators only to assume a more positive role in that regard, one comparable to that fulfilled by television broadcasters. Cable operators had become enmeshed in the field of television broadcasting, and, by requiring them to engage in the functional equivalent of broadcasting, the Commission had sought "only to ensure that [they] satisfactorily [met] community needs within the context of their undertaking." 406 U.S., at 670, 92 S.Ct., at 1872 (opinion of MR. JUSTICE BRENNAN).

With its access rules, however, the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively, the Commission has regulated cable systems, *pro tanto*, to common-carrier status.^{30d} A common-carrier service in the communications context is one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing. . . ." Report and Order, Industrial Radiolocation Service, Docket No. 16106, 5 F.C.C.2d 197, 202 (1966); see *National Association of Regulatory Utility Commissioners v. FCC*, 173 U.S.App.D.C. 413, 424, 525 F.2d 630, 641 (1976), cert. denied, 425 U.S. 992, 96 S.Ct. 2203, 48 L.Ed.2d 816 (1976); *Multipoint Distribution Service*, 45 F.C.C.2d 616, 618 (1974). A common carrier does not "make individualized decisions, in particular cases, whether and on what terms to deal." *National*

30d. A cable system may operate as a common carrier with respect to a portion of its service only. See *National Association of Regulatory Utility Commissioners v. FCC*, 174 U.S.App. D.C. 374, 381, 533 F.2d 601, 608 (1976) (opinion of Wilkey, J.) ("Since it is clearly possible for a given entity to

carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others."); *First Report and Order*, in Docket No. 18397, 20 F.C.C.2d 201, 207 (1969). [The *NARUC* case is noted at 89 Harv. L.Rev. 1257 (1976).]

Association of Regulatory Utility Commissioners v. FCC, 525 F.2d, at 641.

The access rules plainly impose common-carrier obligations on cable operators.^{30f} Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis. 47 CFR §§ 76.254(a), 76.256(d) (1976).^{30g} Operators are prohibited from determining or influencing the content of access programming. § 76.256(b). And the rules delimit what operators may charge for access and use of equipment. § 76.256(c). . . . But the Commission continues to insist that this characterization of the obligation imposed by the rules is immaterial to the question of its power to issue them; its authority to promulgate the rules is assured, in the Commission's view, so long as the rules promote statutory objectives.

Congress, however did not regard the character of regulatory obligations as irrelevant to the determination of whether they might permissibly be imposed in the context of broadcasting itself. The Commission is directed explicitly by § 3(h) of the Act not to treat persons engaged in broadcasting as common carriers. We considered the genealogy and the meaning of this provision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973). The issue in that case was whether a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak on issues important to them violated the Communications Act of 1934 or the First Amendment. . . .

The holding of the Court in *Columbia Broadcasting* was in accord with the view of the Commission that the Act itself did not require a licensee to accept paid editorial advertisements. Accordingly, we did not decide the question whether the Act, though not mandating the claimed access, would nevertheless permit the Commission to require broadcasters to extend a range of public access by regulations similar to those at issue here. The Court speculated that the Commission might have flexibility to regulate access, *id.*, at 122, 93 S.Ct., at 2096, and that "[c]onceivably at some future time Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable," *id.*, at 131, 93 S.Ct., at 2100. But this is insufficient support for the Commission's position in the present case. The language of § 3(h)

30f. As we have noted, and as the Commission has held, cable systems otherwise "are not common carriers within the meaning of the Act." *United States v. Southwestern Cable Co.*, 392 U.S., at 169 n. 29, 88 S.Ct., at 2001; see *Frontier Broadcasting Co. v. Collier*, [24 F.C.C. 251 (1958).]

30g. See also *1976 Order*, 59 F.C.C.2d, at 316 ("We expect the operator in general to administer all access channels on a first come, first served nondiscriminatory basis.")

is unequivocal; it stipulates that broadcasters shall not be treated as common carriers. As we see it, § 3(h), consistently with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems. The provision's background manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access. . . . ^{30h}

Of course, § 3(h) does not explicitly limit the regulation of cable systems. But without reference to the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under § 2(a) would be unbounded. See *United States v. Midwest Video*, 406 U.S., at 661, 92 S.Ct., at 1867 (opinion of MR. JUSTICE BRENNAN). Though afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority. The Court regarded the Commission's regulatory effort at issue in *Southwestern* as consistent with the Act because it had been found necessary to ensure the achievement of the Commission's statutory responsibilities.³⁰ⁱ Specifically, regulation was imperative to prevent interference with the Commission's work in the broadcasting area. And in *Midwest Video* the Commission had endeavored to promote long-established goals of broadcasting regulation. Petitioners do not deny that statutory objectives pertinent to broadcasting bear on what the Commission might require cable systems to do. Indeed, they argue that the Commission's authority to promulgate the access rules derives from the relationship of those rules to the objectives discussed in *Midwest Video*. But they overlook the fact that Congress has restricted the Commission's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting.

30h. The Commission contends that the signal carriage rules involved in *Southwestern* are, in part, analogous to the Commission's access rules in question here. The signal carriage rules required, *inter alia*, that cable operators transmit, upon request, the broadcast signals of broadcast licensees into whose service area the cable operator imported competing signals. See First Report and Order in Docket No. 14895, 38 F.C.C. 683, 716-719 (1965). But that requirement did not amount to a duty to hold out facilities indifferently for public use and thus did not compel cable operators to function as common carriers. . . . Rather the rule was limited to remedying a specific perceived evil and thus involved a balance of considerations not addressed by § 3(h).

30i. We do not suggest, nor do we find it necessary to conclude, that the discretion exercised by cable operators is of the same magnitude as that enjoyed by broadcasters. Moreover, we reject petitioners' contention that the Commission's access rules will not significantly compromise the editorial discretion actually exercised by cable operators. At least in certain instances the access obligations will restrict expansion of other cable services. . . . And even when not occasioning the displacement of alternate programming, compelling cable operators indiscriminately to accept access programming will interfere with their determinations regarding the total service offering to be extended to subscribers.

That limitation is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions. Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include. As the Commission, itself, has observed, "both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide." Report and Order in Docket No. 20829, 43 Fed. Reg. 53742 (1978).^{30j}

In determining, then, whether the Commission's assertion of jurisdiction is "reasonably ancillary to the effective performance of [its] responsibilities for the regulation of television broadcasting," *United States v. Southwestern Cable Co.*, 392 U.S., at 178, 88 S.Ct., at 2005, we are unable to ignore Congress' stern disapproval—evidenced in § 3(h)—of negation of the editorial discretion otherwise enjoyed by broadcasters and cable operators alike. Though the lack of congressional guidance has in the past led us to defer—albeit cautiously—to the Commission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited.

The exercise of jurisdiction in *Midwest Video*, it has been said, "strain[ed] the outer limits" of Commission authority. 406 U.S., at 676, 92 S.Ct., at 1874 (BURGER, C. J., concurring). In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are constrained to hold that the Commission exceeded those limits in promulgating its access rules. The Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters. We think authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress.^{30k}

Affirmed.

30j. The Commission has argued that the capacity, access, and facilities regulations should not be reviewed as a unit, but as discrete rules entailing unique considerations. But the Commission concedes that the facilities and access rules are integrally related, see Brief for United States 36 n. 32, and acknowledges that the capacity rules were adopted in part to complement the access requirement, see Brief for United States 35; *1976 Order*, 59 F.C.C.2d, at 313, 322. At the very least it is unclear whether any particular rule or portion thereof would have been promulgated in isolation. Accordingly, we affirm the lower

court's determination to set aside the amalgam of rules without intimating any view regarding whether a particular element thereof might appropriately be revitalized in a different context.

30k. The court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute. . . .

MR. JUSTICE STEVENS with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

In 1969 the Commission adopted a rule requiring cable television systems to originate a significant number of local programs. In *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (*Midwest Video*), the Court upheld the Commission's authority to promulgate this "mandatory origination" rule. Thereafter, the Commission decided that less onerous rules would accomplish its purpose of "increasing the number of outlets for community self expression and augmenting the public's choice of programs and types of services." Accordingly, it adopted the access rules that the Court invalidates today.

In my opinion the Court's holding in *Midwest Video* that the mandatory origination rules were within the Commission's statutory authority requires a like holding with respect to the less burdensome access rules at issue here. The Court's contrary conclusion is based on its reading of § 3(h) of the Act as denying the Commission the power to impose common-carrier obligations on broadcasters. I am persuaded that the Court has misread the statute.

Section 3 is the definitional section of the Act. It does not purport to grant or deny the Commission any substantive authority. Section 3(h) makes it clear that every broadcast station is not to be *deemed* a common carrier, and therefore subject to common-carrier regulation under Title II of the Act, simply because it is engaged in radio broadcasting. But nothing in the words of the statute or its legislative history suggests that § 3(h) places limits on the Commission's exercise of powers otherwise within its statutory authority because a lawfully imposed requirement might be termed a "common carrier obligation."

The Commission's understanding supports this reading of § 3 (h). . . . The Commission's construction of § 3(h) is clear: it has never interpreted that provision, or any other in the Communications Act, as a limitation on its authority to impose common-carrier obligations on cable systems.

The Commission's 1966 rules, which gave rise to this Court's decision in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001, imposed just such an obligation. Under those rules, local systems were required to carry, upon request and in a specific order of priority, the signals of broadcast stations into whose viewing area they bring competing signals. And its 1969 rules, according to the FCC Report and Order, reflected the Commission's view "that a multi-purpose CATV operation combining carriage of broadcast signals with program origination and common carrier services might best exploit cable channel capacity to the advantage of the public and to promote the basic purpose for which this Commission was created." . . .

In my judgment, this is the correct approach. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, supra, relied upon almost exclusively by the majority, is not to the contrary. In that case, we reviewed the provisions of the Communications Act, including § 3(h), which had some bearing on the access question presented. We emphasized, as does the majority here, that “Congress has time and again rejected various legislative attempts that would have mandated a variety of forms of individual access.” *Id.*, 406 U.S., at 122, 93 S.Ct., at 2096. But we went on to conclude: “That is not to say that Congress’ rejection of such proposals must be taken to mean that Congress is opposed to private rights of access under all circumstances. *Rather, the point is that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require.*” *Ibid.* (emphasis added).

The Commission here has exercised its “flexibility to experiment” in choosing to replace the mandatory origination rule upheld in *Midwest Video* with what it views as the less onerous local access rules at issue here. I have no reason to doubt its conclusion that these rules, like the mandatory origination rule they replace, do promote the statutory objectives of “increasing the number of outlets for community self-expression and augmenting the public’s choice of programs and types of services.” And under this Court’s holding in *Midwest Video*, this is all that is required to uphold the jurisdiction of the Commission to promulgate these rules. . . .

D. CABLE SYSTEM AFFILIATION WITH OTHER COMMUNICATIONS ENTITIES ³¹

GENERAL TELEPHONE OF CALIFORNIA v. FCC, 413 F.2d 390 (D.C. Cir. 1969), cert. denied, 396 U.S. 888 (1969). The FCC ruled that telephone companies could not construct facilities to provide “channel service” to CATV companies without obtaining certificates of public convenience and necessity under § 214 of the Communications Act. “Channel service” is the provision of facilities, such as lines or portions of lines, for distributing CATV signals from the “head end,” where they are received, to the houses of subscribers. The FCC rul-

31. See Barnett, *Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters*, 22 *Stan.L.Rev.* 221 (1970); Smith, *Ownership Policy and the Cable Industry*, 2 *Yale Rev.L. & Soc. Action* 269 (1972); W. S. Baer et al., *Concentration of Mass Media Ownership: Assessing the State of Current Knowledge* (Rand Corp. 1974); A. Branscomb: *The First Amendment as a*

Shield or a Sword: An Integrated Look at Regulation of Multi-Media Ownership (Rand Corp. 1975); Comment, *FCC’s Rescission of the 1970 Television-Cable Cross-Ownership Rule*, 26 *Amer.U.L.Rev.* 688 (1977); J. Alleman et al., *Rural Telecommunications Service: Cross Ownership Rule* (1977). See also Pearson, *Problem of Improving Television Service in Rural America*, 16 *Washburn L.J.* 571 (1977).

ing rested on its findings that the telephone companies were engaged in "a common carrier undertaking" and the signals they were transmitting were interstate in character. 13 F.C.C.2d 448 (1968). The Court of Appeals affirmed.

The Court of Appeals proceeded on the assumption that the broadcast signals originated in a state other than the one in which the CATV was located, and, on this basis, held that the relaying of such signals constituted interstate communications—even though the facilities serving the CATV system might be located wholly within a single state. Since interstate communications were involved, § 2(b)(1) of the Communications Act, providing an exemption for intrastate communication service, was held to be inapplicable. Similarly, the exemption in § 214(a)(1) for lines other than interstate lines was held to be inapplicable. The court further held that CATV channel service did not qualify as telephone exchange service (exempt under § 221(b)); nor did such service qualify under the exemption for connecting carriers (§ 2(b)(2)); nor was the initiation of a new CATV service exempt as a local, branch, or terminal line of ten miles or less (§ 214(a)(2)), although nonsubstantial extensions of existing CATV channel services might qualify under the latter exemption.

"Here, the channel distribution systems are provided by common carriers to already-regulated CATV operators who in turn are merely relaying the signals of fully regulated broadcasters. Therefore, coaxial cable construction by these operating telephone companies directly affects two types of operations already subject to Commission regulation and is provided by a party otherwise covered by Title II common carrier provisions . . . [T]he Commission's regulatory and enforcement powers should not be artificially fragmented or compartmentalized when the result would be to frustrate a comprehensive, pervasive regulatory scheme."

TELEPHONE COMPANY CHANNEL SERVICE TO AFFILIATED CATV SYSTEMS

Federal Communications Commission, 1970.

21 F.C.C.2d 307, 18 R.R.2d 1549, 35 Fed.Reg. 2776, reconsideration denied,
22 F.C.C.2d 746, 18 R.R.2d 1798, 35 Fed.Reg. 6753.

This proceeding was initiated by the Commission on its own motion by a notice of inquiry and notice of proposed rule making (notice) released April 4, 1969 (34 F.R. 6290). The precipitating factor underlying the notice was the filing of 17 formal applications by telephone companies which sought authority under section 214 of the Communications Act to construct or operate, or to construct and operate channel facilities to be furnished under a published tariff to a Community Antenna Television System (CATV). In all said applica-

tions there existed some degree of ownership affiliation between the telephone company applicants and the CATV customers to be served. The Commission believed that these pending applications raised certain significant policy or legal questions that should be resolved by the Commission before those applications could be considered in other respects. Foremost among such questions was whether telephone companies, either directly or through their owned or controlled affiliates, should be permitted to engage in furnishing CATV service to the public and, if so, what conditions should be attached to any authorizations therefor issued by the Commission under section 214 to such companies to insure that rendition of the service would serve the public convenience and necessity.

. . . . The central problem . . . is the anomalous competitive situation between CATV systems affiliated with the telephone companies, and those which have no such affiliation, but have to rely on the telephone companies for either construction and lease of channel facilities or for the use of poles for the construction of their own facilities.³²

The notice attempted to spell out some of the related legal and economic problems which require an early resolution, such as the equitable use of facilities by the independent CATV operators; the prevention of potential favoritism by the telephone company towards its affiliated CATV system, either in the methods of establishing it, or by subsidizing the affiliate to the detriment of its telephone subscribers; and the fending off of any potentially undesirable social and economic consequences of concentration of control as a result of direct or indirect operation of CATV systems by telephone companies.

The Justice Department and most of the independent CATV parties argue that the telephone companies have been seeking to extend their regulated telephone monopoly into the areas of CATV and broadband coaxial cables, primarily to assure themselves of control over the services broadband coaxial cable will perform in the future. The Justice Department, believing that telephone company-CATV affiliation would inhibit the development of these new services on a competitive basis, proposes to keep telephone companies out of CATV ownership and operations within their telephone service areas, except in cases involving remote communities where "no reasonable alternative operator exists at present or in the foreseeable future." It also

32. The distributive cable network of a CATV system is provided either by channels constructed and leased by common carriers, or by attaching the CATV operator's own cables to utility poles (or using underground conduits) controlled by the telephone companies as direct owners, or through their arrangements with other utilities. The

CATV system would normally have to use the same set of poles or conduits as the telephone company, because the communities generally will not permit the construction of duplicate sets of poles or conduits. [This footnote has been renumbered; other footnotes have been omitted.]

recommends that we freeze the granting of all telephone company applications for 214 broadband cable authorizations pending the adoption of "adequate" regulatory measures. We do not believe that such action is necessary to assure the unhampered growth of the wide-spectrum services. However, we shall be alert to any discriminatory or anticompetitive attempts discussed in the Department's comments. In our opinion, the Department's essential concerns will be met by the actions we are taking herein.

The entry by a telephone company, directly or through an affiliate, into the retailing aspects of CATV services in the community within which it furnishes communications services can lead to undesirable consequences. This is because of the monopoly position of the telephone company in the community, as a result of which it has effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems. Hence, the telephone company is in an effective position to preempt the market for this service which, at present, is essentially a monopoly service in most population centers. It can accomplish this by favoring its own or affiliated interest as against nonaffiliated interests in providing access to those pole lines or conduits. Numerous parties have complained that this, in fact, has occurred in many communities where the telephone company has entered into a pole attachment arrangement with its affiliated CATV company to the exclusion of others who may have sought such arrangements on reasonable terms. Accordingly, the actions we are taking herein are designed to prevent, as much as possible, any such abuse.

Moreover, telephone company preemption of CATV service in a community not only tends to exclude others from entry into that service, but also tends to extend, without need or justification, the telephone company's monopoly position to broadband cable facilities and the new and different services such facilities are expected to be providing in the future. This is because CATV service represents the initial practical application of broadband cable technology for providing services requiring a wider spectrum distribution facility than can be supplied within the technical capability of the existing plant of the telephone company. In this regard, there is a substantial expectation that broadband cables, in addition to CATV services, will make economically and technically possible a wide variety of new and different services involving the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmission of all kinds. There is also a real potential that such services will be furnished over regional and national networks consisting of local broadband cable systems interconnected by intercity microwave, coaxial cable, and communications satellite systems. Whether these services will evolve in a common carrier mode or some other institutional structure remains for future determination in the light of future developments. However, there is, at present, ample basis for regarding

the provision of CATV service within a community as, at least, one important gateway to entering the yet undeveloped market for these other wide-spectrum services. Thus, it is our purpose to insure against any arbitrary blockage of this gateway.

It is entirely understandable and appropriate that telephone companies should seek to equip themselves with the facilities required to meet existing and anticipated demands of the public for broadband facilities and services. However, in the process of doing so, we cannot condone their employment of policies which result in denying others the opportunity to also enter the new and emerging markets for facilities and services. We believe that the public interest in modern and efficient means of communications will best be served, at this time, by preserving, to the extent practicable, a competitive environment for the development and use of broadband cable facilities and services and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities. We are of the opinion that the preservation of such competition will best be assured by the exclusion of telephone companies in their service areas from engaging in the sale of CATV service to the viewing public except where no practical alternative exists to make such service available within a particular community.

In view of the foregoing, it shall be our policy to bar all telephone common carriers from furnishing CATV service to the viewing public in their operating territory except when, for good cause shown, a waiver of this policy is granted. Accordingly, we shall require telephone common carriers, seeking authority under section 214 of the Communications Act to construct and operate distribution facilities for channel service to CATV systems, to make an appropriate showing in their applications that the proposed CATV customer or customers is unrelated to or unaffiliated directly or indirectly with the applicant. Applications which do not contain such showing will be returned as unacceptable for filing. As a concomitant to this policy, and in view of the ability of telephone common carriers to use their monopoly position with respect to pole lines and conduit space to potentially exclude others from entering into CATV service, as discussed above, telephone common carriers will also be precluded from providing CATV service directly or indirectly to the viewing public by entering into pole line or conduit rental agreements with their affiliates in communities where they provide exchange service. (Cf. *TeleCable Corp.*, 17 FCC 2d 517, 19 FCC 2d 574, 590; *Manatee Cablevision*, 18 FCC 2d 812.) To fulfill the intended purpose of this report and order, we shall broadly interpret the concept of affiliation between the telephone company and its proposed CATV customer, and our rules shall so provide.

In the case of their CATV affiliates, presently operating, we find that to assure a meaningful implementation of the above policies, it is necessary that telephone common carriers be also required to discontinue providing CATV service to the public in their service areas through such indirect method. However, to assure that existing CATV services would not be precipitously withdrawn from the public, temporary authorizations will be granted under section 214 to cover existing common carrier CATV channel services furnished to an affiliate, with the specific condition that these services be discontinued within 4 years from the effective date of this report and order.

We conclude that there is no justification for including any specific exceptions from the policy We believe that, where the need exists, there will be nonaffiliated, independent CATV systems ready, willing and able to service any area in which a telephone company would otherwise seek to provide service through an affiliated CATV system. Given the 4-year period for discontinuance of providing CATV service by telephone common carriers or their affiliates, we believe that no substantial segment of the public would be deprived of CATV service. In those rural communities, and communities of low population density where CATV service demonstrably could not exist except through an affiliate of the local telephone company and thus a telephone affiliate may be the only feasible source of CATV service to a community, adequate provisions will be made for waivers of any of our rules in such cases (with the understanding that appropriate accounting safeguards will be employed as to the regulated, versus unregulated, operations of the affiliated telephone company).

We do not believe that our change in policy will have any effect upon the recognized role of local or State government agencies in their choice of who should be licensed or franchised to be CATV operators. Both the State and/or municipal agencies will continue to be free to franchise any nonaffiliated independent CATV system where such franchising is now part of the local law, while any tendency or opportunity for discrimination by a telephone company on behalf of an affiliated CATV system will be removed.

It appears from the record in this proceeding, as well as from the various other information heretofore formally brought to our attention, that the potential seedbed of the controversy has been the independent CATV systems' alleged difficulty in obtaining pole line attachment agreements from the local telephone companies. Since pole lines are an essential part of the problem, they must necessarily be also part of the solution. Consequently, it is our further conclusion that any future authority to a telephone company under section 214 (a) of the Act to provide CATV channel facilities, should be conditioned upon a documented showing that the customer CATV system

had available, at its option, pole attachment rights (or conduit space, as the case may be) (a) at reasonable charges, and (b) without undue restrictions on the uses that may be made of the channel by the customer. This option must be open to the CATV customer not only at the time of the grant but also prior to its decision to seek an award of a local franchise. Additional showing is also required that this policy was made known to the local franchising authority.

Pole line attachment (or conduit) rights must be offered on a nondiscriminatory basis where space for such facilities can reasonably be made available without impediment to the telephone company's obligation to supply non-CATV communications services to the public. The existence of technical limitations, which might prevent the leasing of space for additional lines on existing poles, should be convincingly shown by the telephone company and the exception be limited to the duration of the technical problem.

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33. [Ed.] The FCC's regulations promulgated in the preceding opinion were sustained on judicial review. The court held that the FCC properly could impose limitations on telephone company affiliates as well as the telephone companies themselves. Without encompassing affiliates, the FCC's purpose could be defeated. And the court held that the purpose was legitimate: "There is no reason to deny independent operators the opportunity to participate in broadband cable development, yet without adequate regulation the power to deny entry would reside in the telephone companies. Thus, in order to prevent unnecessary concentration of the communications media, these rules were promulgated."

The court rejected the argument of the telephone companies that they had been unconstitutionally deprived of their right to engage in the CATV business, observing that they remained free to do so outside their local telephone service areas. The court also rejected the argument that the regulations unconstitutionally deprived the telephone companies of space on their poles: "The rules themselves do not require the telephone companies to furnish CATV facilities to independent operators. In fact under the rules they are free *not* to provide such service." *General Telephone of the Southwest v. U. S.*, 449 F.2d 846 (5th Cir. 1971).

For FCC action on petitions seeking waivers of divestiture requirements, see *Telephone Company—CATV Cross Interests*, 50 F.C.C.2d 156, 32 R.R.2d 225 (1974).

In *Telephone Company—CATV Cross-Ownership*, 69 F.C.C.2d 1097, 43 R.R.2d 1417 (1978), the FCC stated that it would follow a policy of more liberal grants of waivers to telephone companies seeking to engage in cable operations in rural communities, and at the same time initiated a rulemaking proceeding looking toward further liberalization. The FCC was impressed by two factors: (1) recent technological advances making the joint offering of telephone and cable service a seemingly attractive approach, from a technical and economic perspective, in rural areas; and (2) the apparent fact that "integrated operation in some form may be the only practical way to make cable television and other broadband services available to . . . rural communities" with low population densities.

In *California Water & Telephone Co.*, 37 R.R.2d 1166 (1976), and 64 F.C.C.2d 753, 40 R.R.2d 419 (1977), the FCC disclaimed jurisdiction over rental of pole space by cable systems from electric or telephone companies. Congress responded with Public Law 95-234, 92 Stat. 35 (1978), 47 U.S.C.A. § 224, conferring such jurisdiction in the absence of state regulation.

**SECOND REPORT AND ORDER
(CROSS OWNERSHIP OF
CATV SYSTEMS)**

Federal Communications Commission, 1970.
23 F.C.C.2d 816, 19 R.R.2d 1775, on reconsideration,
26 R.R.2d 739, 38 Fed.Reg. 2970 (1973).

2. This *Second Report* concerns the diversification proposals set forth in paragraphs 23–25 of the December 1968 *Notice*, (15 F. C.C.2d 417). The Commission there proposed to adopt rules to further the policy of diversity of control over communications media by: (1) prohibiting cross-ownership of CATV systems and television stations (and possibly radio stations and newspapers) serving the same area. . . .

4. The contention in many of the comments that there is no need for diversity-of-ownership requirements if CATV operators do not engage in program origination is largely beside the point.³⁴ . . . [T]he proposals which we are contemplating in this area are based upon present and potential program origination by CATV operators. Some CATV systems already originate and CATV interest in cablecasting is on the increase. We concluded, in the *First Report* in Docket No. 18397, that program origination by CATV is in the public interest and should be encouraged . . . In view of CATV's developing role as an "opinion molder," it seems to us that the question is not whether there should be rules favoring diversity, but rather what kinds of requirements would best promote this policy without thwarting the other goals of communications policy.

6. Both the National Cable Television Association (NCTA) and the National Association of Broadcasters (NAB) opposed our proposal to prohibit cross-ownership of CATV systems and television stations within the Grade B contour or a mileage zone—the NCTA on the ground that the Commission lacks authority to do so and should leave monopoly considerations to the Federal Trade Commission and the Department of Justice; the NAB on the ground that any resultant contribution to diversification would be *de minimis* and at the expense of public service programming on CATV which broadcasters

34. Diversification rules would be desirable even if CATV operations were limited to carriage of broadcast signals and common carrier activities, in view of the limited number of broadcast and newspaper media in all communities, and the potential importance of cable facilities in providing many communications services. We further

believe that the diversity provisions announced herein should apply to systems which do not originate or which are exempt from any origination requirement; otherwise the effect might be to discourage such systems from originating. [Some footnotes have been omitted; others have been renumbered.]

are allegedly best qualified to originate. Parties with common CATV and broadcast interests were uniformly opposed to the ban, and urged that, at most, such rules be applied only to future acquisitions. Several parties asserted that broadcasters are best qualified to engage in CATV program origination because of their experience in the broadcast field and familiarity with license responsibilities. It was also argued that local cross-ownership should be permitted in view of the possibility that television broadcasting might ultimately be converted to cable distribution in whole or in part. . . . A number of parties suggested that common ownership of local television stations and CATV systems should be permitted, but that the station's signal should count as program origination and that any additional origination should be done by others on common carrier channels.

7. On the other hand, some CATV operators and some broadcasters commented in favor of the proposed cross-ownership prohibition. According to Wheeling Antenna Company, for example, CATV origination of local-interest programs is likely to be subordinated to more profitable broadcast operations if joint ownership is permitted; e. g., broadcasters would not risk loss of audiences of revenue-producing prime-time broadcast programs by pitting local-interest programs against them. Wheeling Antenna claimed that the full potential of CATV origination will not be achieved unless there is a complete separation of broadcast and CATV operations and the CATV operator has "no alternative but to work harder at tilling his own fields."

8. The Department of Justice strongly supported the Commission's proposal to prohibit any local television station from owning a CATV system in the same market, and recommended further that the same principle be applied to newspaper ownership of a CATV system in the same market. Though indicating that AM and FM radio licensees without other local media interests may lack substantial market power and hence might be excluded from any ban, the Department suggested that this area might bear further investigation by the Commission. The Department stressed that limitations on local cross-ownership are "needed to insure that healthy and vigorous competition occurs in markets where entry is limited and the competitive alternatives are necessarily few in number." It took the position that divestiture should be required, but carried out gradually so as to ensure that parties have a reasonable opportunity to recover the value of any properties they are required to divest. . . .

9. Parties opposed to television network ownership of cable systems contended, *inter alia*, that such cross-ownership would impose a restraint on the diversity of television programming that cable television might otherwise provide (since networks have a financial interest in maintaining a maximum audience for the programming offered by commercial television stations, and CATV systems will

typically carry the local, or distant, signals of broadcast stations affiliated with each of the major networks); and, in addition, that network ownership of cable systems would hinder the development of new cable-oriented networks and hence have a dampening effect on potential programming competition on the national level as well.

11. In December, 1968, NCTA's then chairman, Robert H. Beisswenger, reported that about 30 percent of the cable systems in operation at that time were controlled by broadcasters, and that, of the 256 systems started in 1966, 46 percent were owned by radio or television stations. If these figures reflect a trend toward domination of the cable industry by an already overly-concentrated broadcast industry, the Commission has an obligation, now, while CATV is still in an early formative stage, to weigh the implications of this trend and to take appropriate action.

12. Having considered the comments herein, we remain of the view that the public interest would be best served by the adoption of a rule prohibiting local cross-ownership of CATV systems and television broadcast stations. Such a rule would further the Commission's policy favoring diversity of control over local mass communications media. The arguments which have been submitted in opposition to it are not sufficient, in our judgment, to countervail that policy. We have seen, for example, no evidence, or reason to assume, that a CATV system's local program origination would suffer if denied the assistance of a co-owned local television station; indeed, such joint ownership might discourage effective CATV program origination, insofar as it threatened to reduce the station's own program audience. As for the broadcaster's experience in adherence to Commission rules and policies, we have no doubt that CATV operators will also quickly develop such "expertise": the Commission's equal-time, fairness, and sponsor-identification requirements involve no great difficulties of comprehension or compliance. The suggestion that the licensee of a local television station be permitted to own local CATV systems if he abstains from originating CATV programming on those systems lacks merit, even though it would solve the "duopoly" problem, because it would deprive the viewer of an additional source of television programming. While some additional origination might be forthcoming by others on common carrier channels, that would also be the case if an independent CATV operator were engaged in origination on one channel. In addition, where there is more than one local television station, it does not appear desirable either to permit a joint venture in a related medium or to permit one to gain a competitive advantage over others excluded from such a TV-CATV combination.

13. We believe that the local TV-CATV cross-ownership ban should extend to the predicted Grade B contour of the television sta-

tion's normal service area. That is the area in which the broadcaster is obliged to ascertain and meet viewer's needs and interests. Since what is at stake is diversity to the CATV subscribing portion of the public, the pertinent measure is the extent of the overlap within the service area of the CATV system. Thus, it makes no difference to the CATV subscribers that the service area of a commonly owned system constitutes only 5 or less percent of the station's Grade B contour, if 100 percent of the CATV service area is within that contour. We conclude that if the CATV system is wholly or partially within the Grade B contour, cross-ownership should be barred. We note that, with such a bar, the station would also have no conflicting consideration in deciding whether to install a translator in some area within the Grade B contour. It has been suggested that television stations should be able to choose between translator and CATV facilities as a means of reaching poor-reception areas within its predicted Grade B contour; but we do not think that any general exception for this purpose is warranted; such areas can also be served by CATV systems under separate ownership and control. However, we would consider waivers on an ad hoc basis where it is clearly established that a cross-ownership ban would not result in greater diversity.³⁵

14. We also believe that cross-ownership of a translator station and a CATV system serving the same community should be prohibited. In our case-by-case consideration of existing translator-CATV cross-ownerships, we have observed that such combinations are unlikely to yield the best translator service to the public. Here, too, exceptions will be considered upon a showing that in the absence of cross-ownership there would be no increase in broadcast or CATV service to the public.

15. Finally, we believe that the three national broadcast networks should not be permitted to hold an ownership interest in any CATV system, including those located beyond the service areas of network owned and operated stations. Our reasons are essentially those stated in paragraph 9, *supra*, plus the fact that the networks already have a predominant position nationwide through their affiliated stations in all markets, their control over network programming presented in prime time, and their share of the national television audience. Network ownership of CATV systems is not necessary in the event of a full or partial conversion of broadcast television to CATV.

16. It should be noted that, with the exception of network-owned television stations, nothing in the foregoing prevents joint ownership of a television broadcast station and a non-local CATV system.

35. There may, for example, be some sparsely populated area where no one is willing to apply for an available broadcast channel except a local

CATV operator interested in providing CATV-originated programming to a wider area.

It is not our desire to keep television broadcasters out of the CATV industry, but rather to avoid over-concentrations of media control. Thus, for example, though we remain persuaded that "grandfathering" of existing local cross-ownerships should not be allowed, we would have no objection to exchanges of CATV systems among broadcasters which would maintain their involvement in the CATV industry while eliminating local cross-ownerships. We have provided a three-year grace period (which may be extended in individual cases for good cause shown) for divestiture of locally cross-owned CATV systems, both to facilitate such exchanges and to assure that parties have a reasonable opportunity to recover the value of any properties they are required to sell. In view of the present volume of voluntary CATV transfers, it appears that systems are readily transferable. Moreover, except for broadcast network CATV owners, broadcasters may well be able to work out exchanges with other systems subject to divestiture outside their service areas. Such exchanges may be effectuated without payment of any capital gains tax if the "involuntary conversion" provision of Section 1033 of the Internal Revenue Code is applicable.

On reconsideration:

39. Our adoption of these provisions—designed to foster diversification of control of the channels of mass communication—was guided by two principal goals, both of which have long been established as basic legislative policies. One of these goals is increased competition in the economic marketplace; the other is increased competition in the marketplace of ideas.

40. We did not choose to wait until cable reached maturity before acting to achieve these goals. Having grappled over the years with the problems of cross-media control of radio and television stations, by national broadcast networks, and by newspapers and other broadcast stations in the same communities and market areas, we had become increasingly persuaded, first, that cross-media control is generally undesirable (although temporary exceptions are sometimes warranted); second, that the evidence of previously developed electronic mass media indicated that, in the absence of regulatory prohibition, considerable cross-media control of cable television could be expected, and that tendencies in that direction had already begun; and, third, that cross-media control of cable would become increasingly difficult to halt and reverse as cable grew if its growth were not accompanied by early imposed regulations designed to foster diversification of control.

42. CTI characterizes our adoption of cable cross-ownership rules as a "mechanical transfer" of broadcast concepts to cable notwithstanding "fundamental technical and competitive distinctions between . . . (them)." Whatever distinctions may exist between

TV stations and cable systems, it is nonetheless true that actions taken by cable system operators—to carry or not carry certain distant stations, to offer program origination or not, to move speedily or at the lowest pace permitted to develop access channel facilities and encourage their use—all can affect the audiences and earnings of colocated television stations. In the light of this fact, we remain persuaded that cable systems are more likely to grow, in size and service to their subscribers, if they are not under common control with colocated television stations. We have not been shown that cable growth will be significantly retarded by the unavailability, under our rules, of financial investment by colocated stations.

43. We do not agree with the contention that new developments have washed away the case for cable-broadcast cross-ownership restrictions. Our adoption of the Cable Television Report and Order was designed to encourage the growth of cable; to the extent that our efforts in that regard are successful, the time available to us for early preventative action with respect to cross-control of cable and other media is foreshortened. The assurance we are offered that cable will ultimately become essentially a “common carrier” of mass communications may or may not be correct, but in either event fails to come to grip with the short run, during which origination cablecasting can be expected to play a significant role in attracting, and affecting, cable subscribers.

[The opinion on reconsideration further indicated that, in the case of existing colocated television-CATV systems, petitions for waiver of the requirement of divestiture would be viewed sympathetically. See also CATV-TV Cross Ownership, 53 F.C.C.2d 1102, 34 R.R.2d 169 (1975) (suspending an August 10, 1975 deadline for divestiture); CATV-TV Cross Ownership, 55 F.C.C.2d 540, 34 R.R.2d 1693 (1975), reconsideration denied, 58 F.C.C.2d 596, 36 R.R.2d 897 (1976) (revising the divestiture requirement to apply only when a commonly owned television station was the only non-satellite television station to place a city grade signal over the community served by the cable system).] ³⁶

CODE OF FEDERAL REGULATIONS

Title 47

SUBPART J—DIVERSIFICATION OF CONTROL

§ 76.501 Cross-ownership.

(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station

36. [Ed.] In *Cable Television Service*, 52 F.C.C.2d 170, 33 R.R.2d 114 (1975), the FCC ruled that cross-ownership between newspapers and cable systems

posed no present problem sufficient to warrant rulemaking restricting such cross-ownership.

if such system directly or indirectly owns, operates, controls, or has an interest in:

(1) A national television network (such as ABC, CBS, or NBC); or

(2) A television broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of this chapter, overlaps in whole or in part the service area of such system (i. e., the area within which the system is serving subscribers); or

(3) A television translator station licensed to the community of such system.

Note 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2: The word "interest" as used herein includes, in the case of corporations, common officers or directors and partial (as well as total) ownership interests represented by ownership of voting stock.

[Note 3 concerns stockholders of a corporation with more than 50 stockholders and makes special provision for small holdings (less than one percent), holdings of investment companies, banks and insurance companies, and instances where nominal and beneficial ownership are divided.]

(b) Effective date:

(1) The provisions of subparagraphs (1) and (3) of paragraph (a) of this section are not effective until August 10, 1975, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (e. g., if a franchise were in existence on or before July 1, 1970): provided, however, that the provisions of paragraph (a) of this section are effective on August 10, 1970, as to such interests acquired after July 1, 1970.

(2) The provisions of subparagraph (2) of paragraph (a) of this section are not effective until August 10, 1977, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970 (e. g., if a franchise were in existence on or before July 1, 1970), and will be applied to cause divestiture as to ownership interests proscribed herein only where the cable system is, directly or indirectly, owned, operated, controlled by, or has an interest in a non-satellite television broadcast station which places a principal community contour encompassing the entire community and there is no other commercial non-satellite television broadcast station placing a principal community contour encompassing the entire community.

E. FEDERAL—STATE—LOCAL RELATIONS AND THE FRANCHISING PROCESS ³⁷

CABLE TELEVISION SERVICE ³⁸

Federal Communications Commission, 1972.

37 Fed.Reg. 3252, 36 F.C.C.2d 143, 24 R.R.2d 1501, on reconsideration,
36 F.C.C.2d 326, 25 R.R.2d 1501.

171. In our notice of proposed rule making in Docket 18892 we observed that "actions have been taken in the cable field without any overall plan as to the Federal-local relationship." This has resulted in a patchwork of disparate approaches affecting the development of cable television. While the Commission was pursuing a program to

37. On the scope of federal, state and local jurisdiction over cable television, see Botein, CATV Regulation: A Jumble of Jurisdictions, 45 N.Y.U.L.Rev. 816 (1970); Barnett, State, Federal, and Local Regulation of Cable Television, 47 Notre Dame Law. 685 (1972); Wallach, Whose Intent? A Study of Administrative Preemption: State Regulation of Cable Television, 25 Case W.Res.L.Rev. 258 (1975); Le Duc, Control of Cable Television: The Senseless Assault on States' Rights, 24 Cath.U.L.Rev. 795 (1975); Mahony, Cable Television's Jurisdictional Dispute, 24 Cath.U.L.Rev. 872 (1975); Berman, CATV Leased-Access Channels and the FCC: The Intractable Jurisdictional Question, 51 Notre Dame Law. 145 (1975); Smith, Local Taxation of Cable Television Systems: The Constitutional Problems, 24 Cath. U.L.Rev. 755 (1975); Wallach, Whose Intent? A Study of Administrative Preemption: State Regulation of Cable Television, 25 Case W.Res.L.Rev. 258 (1975); Albert, Federal and Local Regulation of Cable Television, 48 U. Colo.L.Rev. 501 (1977).

On state and local regulation, including franchising, see Report of the Mayor's Advisory Task Force on CATV and Telecommunications (N.Y.C.1968); New York Public Service Commission, Report on Regulation of Cable Television by the State of New York (1970); Center for Analysis of Public Issues, Crossed Wires: Cable Television in New Jersey (1971); C. Tate (ed.) Cable Television in the Cities: Community Control, Public Access and Minority

Ownership (1971); M. Price & J. Wicklein, Cable Television: A Guide for Citizen Action (1972); L. Johnson & M. Botein, Cable Television: The Process of Franchising (Rand Corp.1973); M. Price & M. Botein, Cable Television: Citizen Participation After the Franchise (Rand Corp.1973); W. Baer et al., Cable Television: Franchising Considerations (Rand Corp.1974); W. Baer, Cable Television, A Handbook for Decisionmaking (Rand Corp.1974); Comment, Regulating CATV: Local Government and the Franchising Process, 19 S.D.L.Rev. 143 (1974); Johnson & Blau, Single Versus Multiple System Cable Television, 18 J.Broad. 323 (1974); N.J. Bd. of Pub. Util. Comm'rs, A Guide of the Writing of the Cable Television Consent Ordinance (1976); Note, Cable Television and the Practical Implications of Local Regulation and Control, 27 Drake L.Rev. 391 (1977-78).

Of particular significance, see Williamson, Franchise Bidding for Natural Monopolies—In General and With Respect to CATV, 7 Bell J.Econ. 73 (1976).

On municipal ownership, see Note, Toward Community Ownership of Cable Television, 83 Yale L.J. 1708 (1974); Comment, Community Antenna Television: The Case for Municipal Control, 22 Wayne L.Rev. 99 (1975); R. Jacobson, Municipal Control of Cable Communications (1977); Synchef, Municipal Ownership of Cable Television Systems, 12 U.San. Fran.L.Rev. 205 (1978). See also authorities cited supra note 1.

38. [Ed.] Footnotes have been omitted.

promote national cable policy, State and local governments were formulating policies to reflect local needs and desires. In many respects this dual approach worked well. To a growing extent, however, the rapid expansion of the cable television industry has led to overlapping and sometimes incompatible regulations. This resulted in confusion, and we faced an obvious need to clarify the respective Federal, State, and local regulatory roles. . . .

COMMISSION'S REGULATORY PROGRAM

177. **Dual jurisdiction.** The comments advance persuasive arguments against Federal licensing. We agree that conventional licensing would place an unmanageable burden on the Commission. Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts. Local authorities are also in better position to follow up on service complaints. Under the circumstances, a deliberately structured dualism is indicated; the industry seems uniquely suited to this kind of creative federalism. We are also persuaded that because of the limited resources of States and municipalities and our own obligation to insure an efficient communications service with adequate facilities at reasonable charges, we must set at least minimum standards for franchises issued by local authorities. These standards relate to such matters as the franchise selection process, construction deadlines, duration of the franchise, rates, and rate changes, the handling of service complaints, and the reasonableness of franchise fees. The standards will be administered in the certificating process.

178. **Franchising.** We are requiring that before a cable system commences operation with broadcast signals, it must obtain a certificate of compliance from the Commission. The application for such a certificate must contain (§ 76.31(a)(1)) a copy of the franchise and a detailed statement showing that the franchising authority has considered in a public proceeding the system operator's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of construction arrangements. We expect that franchising authorities will publicly invite applications, that all applications will be placed on public file, that notice of such filings will be given, that where appropriate a public hearing will be held to afford all interested persons an opportunity to testify on the qualifications of the applicants, and that the franchising authority will issue a public report setting forth the basis for its action. Such public participation in the franchising process is necessary to assure that the needs and desires of all segments of the community are carefully considered.

179. **Applicant qualifications.** We are authorizing the use of broadcast signals in order to obtain new benefits for the public. No such benefits will be forthcoming if the cable television applicant is not fully qualified to operate. The character of an applicant, for example, is of particular importance especially because he may be engaged in program origination. Some governmental body must insure that a franchise applicant's qualifications are consistent with the public interest, and we believe this matter is appropriate for local determination.

180. **Franchise area.** Another matter uniquely within the competence of local authorities is the delineation of franchise areas. We emphasize that provision must be made for cable service to develop equitably and reasonably in all parts of the community. A plan that would bring cable only to the more affluent parts of a city, ignoring the poorer areas, simply could not stand. No broadcast signals would be authorized under such circumstances. While it is obvious that a franchisee cannot build everywhere at once within a designated franchise area, provision must be made that he develop service reasonably and equitably. There are a variety of ways to divide up communities; the matter is one for local judgment.

181. **Construction.** We are establishing in § 76.31(a)(2) general timetables for construction and operation of systems to insure that franchises do not lie fallow or become the subject of trafficking. Specifically, we are providing that the franchise require the cable system to accomplish significant construction within 1 year after the certificate of compliance is issued, and that thereafter energized trunk cable be extended to a substantial percentage of the franchise area each year, the percentage to be determined by the franchising authority. As a general proposition, we believe that energized trunk cable should be extended to at least 20 percent of the franchise area per year, with the extension to begin within 1 year after the Commission issues its certificate of compliance. But we have not established 20 percent as an inflexible figure, recognizing that local circumstances may vary.

182. **Franchise duration.** We are requiring in § 76.31(a)(3) that franchising authorities place reasonable limits on the duration of franchises. Long terms have generally been found unsatisfactory by State and local regulatory authorities, and are an invitation to obsolescence in light of the momentum of cable technology. We believe that in most cases a franchise should not exceed 15 years and that renewal periods be of reasonable duration. We recognize that decisions of local franchising authorities may vary in particular circumstances. For instance, an applicant's proposal to wire innercity areas without charge or at reduced rates might call for a longer franchise. On the other hand, we note that there is some support for franchise periods of less than 15 years.

183. **Subscriber rates.** In § 76.31(a)(4) we are permitting local authorities to regulate rates for services regularly furnished to all subscribers. The appropriate standard here is the maintenance of rates that are fair to the system and to the subscribing public—a matter that will turn on the facts of each particular case (after appropriate public proceedings affording due process) and the accumulated experience of other cable communities.

184. **Service complaints.** Section 76.31(a)(5) requires that franchises provide for the investigation and resolution of local service complaints and also that the franchisee maintain a local business office or agent for these purposes. We note that some local bodies are already considering detailed plans along these general lines.

185. **Franchise fee.** While we have decided against adopting a 2 percent limitation on franchise fees, we believe some provision is necessary to insure reasonableness in this respect. First, many local authorities appear to have exacted high franchise fees more for revenue-raising than for regulatory purposes. Most fees are about 5 or 6 percent, but some have been known to run as high as 36 percent. The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers. Second, and of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy. Finally, cable systems are subject to substantial obligations under our new rules and may soon be subject to congressionally-imposed copyright payments. We are seeking to strike a balance that permits the achievement of Federal goals and at the same time allows adequate revenues to defray the costs of local regulation.

186. The Commission imposes an annual fee of 30 cents per subscriber to help finance its own cable regulatory program. Assuming average annual revenues to the cable system of \$60 per subscriber, the Commission's fee amounts to one-half of 1 percent of a system's gross receipts. The regulatory program to be carried out by local entities is different in scope and may vary from jurisdiction to jurisdiction. It is our judgment that maximum franchise fees should be between 3 and 5 percent of gross subscriber revenues. But we believe it more appropriate to specify this percentage range as a general standard, for specific local application. When the fee is in excess of 3 percent (including all forms of consideration, such as initial lump sum payments), the franchising authority is required to submit a showing that the specified fee is appropriate in light of the planned local regulatory program, and the franchisee must demonstrate that the fee will not interfere with its ability to meet the obligations imposed by our rules.

187. Grandfathering. The grandfathering provisions of our rules with respect to franchise standards seek to achieve a large measure of flexibility. An existing cable system will be required to certify within 5 years of the effective date of these rules or on renewal of its franchise, whichever comes first, that its franchise meets the requirements of the rules. This deferral should relieve both cable systems and local authorities of whatever minor dislocations our rules might otherwise cause.

39

AMENDMENT AND CLARIFICATION OF TELEVISION SERVICE RULES

Federal Communications Commission, 1974.
46 F.C.C.2d 175, 29 R.R.2d 1621, on reconsideration,
49 F.C.C.2d 1078, 32 R.R.2d 1.

CONSTRUCTION—LINE EXTENSION

58. In both Section 76.31(a)(1) and (2), we refer to the “. . . adequacy and feasibility of . . . construction arrangements” and that the cable operator must “. . . equitably and reasonably extend energized trunk cable” Confusion arising from these requirements prompts further clarification.

59. It was our intent that all parts of a franchise area that could reasonably be wired would be wired. The initial problem we were trying to cope with was the “hole in the donut” situation that could have developed in larger markets, that is, the wiring of the more affluent outlying areas of a city while ignoring the center city or the wiring of the “desirable” section of town and not providing the communications benefits of cable to the poorer areas. It now develops that in most instances this is not as much of a problem as was feared. In fact, the problem is reversed. The high density areas are being wired but the outlying, less populated suburbs are not.

60. Clearly, this problem can best be dealt with at the local level since every community presents unique demographic vagaries.

39. [Ed.] On reconsideration, the FCC indicated that its requirements with respect to minimum channel capacity and two-way capability precluded more extensive state or local requirements absent a showing of need. With respect to general technical standards, however, local franchising authorities were permitted to set more stringent standards.

In Preemption of CATV Technical Standards, 49 F.C.C.2d 470, 31 R.R.2d 1187 (1974), the FCC amended its regulations to preclude state or local regulation of technical standards for systems

not operational or certified on January 1, 1975. The preemption was directed to electronic equipment performance and was subject to waiver upon an appropriate showing. The FCC did not seek to regulate such matters as electrical supply, structure placement, construction practices, or protection against environmental hazards to the system (corrosion, temperature extremes, high winds).

FCC technical standards are included in Subpart K of the cable regulations, 47 C.F.R. § 76.601 et seq.

Some over-all guidelines, however, should be set out. Obviously, the ideal case is where a franchisee is required to wire the entire franchise area. This is our present rule. The purpose of the rule was to assure that no "cream-skimming", wiring just the economically lucrative portions of a franchise area, would take place. . . . [Some] jurisdictions define the franchise area by way of a so-called "line extension" clause, that is where the cable operator is only required to wire those parts of the political subdivision that contain a specified number of homes per mile measured on some stated formula or base. The numbers we have seen range generally from 30 to 60 homes per mile. In some cases, we acknowledge such a formula is justified. The potential subscribership in a particular community may be marginal in terms of system viability, and the extension of lines to citizens in outlying areas or pockets might spell the difference between success and failure of the system. . . .

61. A middle course has been adopted in some instances whereby a formula is established in the franchise so that if outlying pockets of viewers wish the cable extended to them they must pay the specified costs involved in extending the trunk line.

62. We can see reasonable justifications in all of these approaches. They point up the necessity of local involvement in the cable process to deal with the unique problems presented by various communities. We think it would be a mistake to attempt to specify a nationwide rule on this point. Indeed, it might be very difficult to create any such rule even on a state by state level. This is a job for the localities.

63. Because we recognize this problem, we have and will continue to grant certificates of compliance to applicants whose franchises do not require our ideal, the wiring of the entire community. However, before we do, we want assurances in the application and from the franchisor that the public, and particularly those citizens directly affected by the exclusions or conditional wiring provisions, are informed of the effect of such provisions before they are adopted. . . . We are not prohibiting line extension provisions in franchises, but we do intend to require that there be a showing that such provisions were developed knowledgeably and publicly. Any line extension formulas arrived at under these conditions are likely to be reasonable, having taken into consideration costs, population density and averages, terrain problems, long range land development plans, etc. under public scrutiny.

[The Commission's regulations were amended to reflect these views. 50 F.C.C.2d 61, 32 R.R.2d 336 (1975).]

FRANCHISE EXPIRATION AND CANCELLATION

. . . [We have] expressed concern over situations where franchise renewal applicants threaten to terminate service to the

public rather than reach an accord with the franchising authority. . . . [T]he comments in the FSLAC Report (Issue # 10) are helpful by way of clarification:

“ . . . [T]wo . . . problems in this area . . . bear mentioning. First, as the franchise term draws to a close with no assured renewal or fair compensation in sight, the cable operator acquires a strong disincentive to invest in needed new equipment that he cannot be certain of amortizing over the remaining term; the result, obviously, is a deterioration of service. Second, unfortunately, this situation has in the past created extreme and sometimes unwarranted pressures on franchise authorities and system operators to reach renewal agreements. Both these excessive pressures and the disincentive should be removed.

“First, the Committee feels there should be no cancellation or expiration of the franchise without fair procedures and fair compensation. The existing franchisee should be given adequate notice and opportunity to be heard. Furthermore, we suggest that if the decision is adverse to the existing franchisee, the franchisor should have some provisions for an assignable obligation to acquire the system at a predetermined compensation formula. In the case of non-renewal this formula should call for payment of fair market value of the system as a going concern; whereas in the case of cancellation of the franchise for material breach of its terms, the compensation criterion might call for depreciated original cost with no value assigned to the franchise. In either case, the Committee would suggest that there be provision for impartial arbitration if the negotiators fail to agree on a price. The franchisor's obligation should be fully assignable to a successor franchisee selected by the franchisor.

“It is also advisable, we believe, that there be a requirement that, during the reasonable interim period while transfer of the system is being arranged, the original franchisee be required to continue service to the public as a trustee for his successor in interest, subject to an accounting for net earnings or losses during the interim period.

“All of these provisions should be included in the franchise itself so that the parties to the franchise know their respective rights and obligations and can plan their operations accordingly.”

78. We think the Committee's advice is well taken. All the provisions mentioned are of utmost importance to the orderly process of renewal or transfer of system control. The public is directly and potentially severely affected if these provisions, or ones like them, are not contained in the franchise. We strongly suggest that all franchising authorities include such provisions.

79. Our concern in this area is so great, particularly as to guaranteed continuation of service to the public, that we are considering adopting rules requiring franchises to contain specific provisions and procedures relating to expiration, cancellation, and continuation of service. We invite all interested parties to comment on this proposal. . . .

SUBSCRIBER RATE REGULATION

84. In Section 76.31(a)(4) we require that cable systems, in order to receive a certificate of compliance, must have a franchise providing for franchisor approval of initial charges for installation and regular subscriber service. We have intentionally and specifically limited rate regulation responsibilities to the area of regular subscriber service, and we will continue to do so. We have defined "regular subscriber service" as that service regularly provided to all subscribers. This would include all broadcast signal carriage and all our required access channels including origination programming. It does not include specialized programming for which a per-program or per-channel charge is made. The purpose of this rule was to clearly focus the regulatory responsibility for regular subscriber rates. It was not meant to promote rate regulation of any other kind.

85. After considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any governmental level. Attempting to impose rate regulation on specialized services that have not yet developed would not only be premature but would in all likelihood have a chilling effect on the anticipated development. This is precisely what we are trying to avoid. The same logic applies to all other areas of rate regulation in cable, i. e., advertising, pay services, digital services, alarm systems, two way experiments, etc. No one has any firm idea of how any of these services will develop or how much they will cost. Hence, for now we are preempting the field and have decided not to impose restrictive regulations. Of course, at such time as clear trends develop and if we find that the free market place does not adequately protect the public interest, we will act, but not until then.⁴⁰

Note on rescission of federal franchising standards. In Applications for Certificates of Compliance, 66 F.C.C.2d 360, 41 R.R.2d 885 (1977), the FCC rescinded all federal regulations applicable to the franchising process except for the limitation on franchise fees, which

40. FCC preemption of state and local regulation of rates for pay cable was sustained in Brookhaven Cable TV Inc.

v. Kelley, 573 F.2d 765 (2d Cir. 1978), cert. denied 47 U.S.L.W. 3679 (1979).

it retained in limited form. It also retained most of the other standards as recommended guidelines in 47 C.F.R. § 76.31 :

“Franchise fees shall be no more than 3 percent of the franchisee’s gross revenues per year from all cable services in the community (including all forms of consideration, such as initial lump sum payments). If the franchise fee is in the range of 3 to 5 percent of such revenues, the fee shall be approved by the Commission if reasonable upon showings: (i) by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and (ii) by the franchising authority, that it is appropriate in light of the planned local regulatory program. With respect to a system community unit that was franchised or in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of the system’s current franchise period, or until 15 years from the date of initial grant of the franchise, whichever occurs first.

“NOTE: The following procedures and provisions are recommended for adoption as part of the local franchising process, but are not mandatory:

(1) The franchisee’s legal, character, financial, technical, and other qualifications and the adequacy and feasibility of its construction arrangements should be approved by the franchising authority as part of a full public proceeding affording due process;

(2) The initial franchise period should not exceed fifteen (15) years; any renewal period should be of reasonable duration, not to exceed fifteen (15) years, such renewal to be granted after a public proceeding affording due process;

(3) The franchise should specify that the franchisee shall accomplish significant construction within one (1) year after receiving Commission certification, and shall thereafter reasonably make cable service available to a substantial percentage of its franchise area each year (such percentage to be determined by the franchising authority);

(4) Where a franchise contains a policy of construction requiring less than complete wiring of the franchise area, such policy should be adopted only after a full public proceeding, which includes specific notice of the consideration of such a policy;

(5) The franchise should: (i) specify that procedures have been adopted by the franchisee and franchisor for the investigation and resolution of all complaints regarding cable television operations; (ii) require that the franchisee maintain a local business office or agent for these purposes; (iii) designate, by

title, the office or official of the franchising authority that has primary responsibility for the continuing administration of the franchise and implementation of complaint procedures; and (iv) specify that notice of the procedures for reporting and resolving complaints will be given to each subscriber at the time of initial subscription to the cable system.”⁴¹

41. On reconsideration, the FCC reaffirmed its decision to delete franchising standards and requested comments on whether to delete the franchise fee limitation. 45 R.R.2d 727 (1979).

The FCC earlier had rescinded its requirement that subscriber fees be regulated by a state or local agency. Cable Television Subscriber Rates, 38 R.R.2d 110 (1976).

Chapter X

SUBSCRIPTION SERVICES AND PUBLIC BROADCASTING

A. SUBSCRIPTION SERVICES¹

Note on Subscription Broadcast Services. The advent of subscription broadcast services dates from 1941, when the FCC approved a proposal by Muzak to use a developmental FM station to broadcast no commercially sponsored programs, but rather to provide programs to subscribers for a fee. Special receiving equipment was to be leased to subscribers, while others would be precluded from hearing the program by the transmission of a discordant sound which could be eliminated only by the special leased equipment. The FCC held that the service proposed was a "broadcasting" service, since it was available without discrimination to all members of the general public who were willing to pay the fee to lease the receiving equipment.²

A somewhat related question arose in 1953, when motion picture producers and theater owners sought FCC allocation of spectrum space for a "theater television service." The FCC ruled that the transmission of signals from producers to theaters was essentially a specialized common carrier service, and that companies engaging in such service would be eligible for licensing as common carriers rather than as broadcasters.³ Closed-circuit television—for example, exhibitions in

1. See Comment, Aspects of Pay Television: Regulation, Constitutional Law, Antitrust, 53 Calif.L.Rev. 1378 (1965); Brown, The Subscription Television Controversy: A Continuing System of Federal Communications Ills, 24 Fed.Com.B.J. 259 (1971); Ledbetter & Greene, An Overview of Pay Cable Television, 2 Yale Rev.L. & Soc. Action 209 (1972); Comment, Regulation of Pay Cable and Closed Circuit Movies, 40 U.Chi.L.Rev. 600 (1973); Kenny, Closed Circuit Television: What Place in Our Regulatory Framework? 31 Fed.B.J. 167 (1972); R. Adler & W. S. Baer, The Electronic Box Office (1974); Rappaport, Emergence of Subscription Cable Television and its Role in Communications, 29 Fed.Com.B.J. 301 (1976); Hoffer, Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations, 53 Denver L.J. 477 (1976).

See also Minasian, Television Pricing and the Theory of Public Goods, 7 J.

Law & Econ. 71 (1964); Coase, Evaluation of Public Policy Relating to Broadcasting: Social and Economic Issues, 41 J.Land & P.U.Econ. 161 (1965); Blank, The Quest for Quantity and Diversity in Television Programming, 56 Amer.Econ. Papers & Proc. 448 (1966); Saliba, Television Programming and the Public Interest: Subscription TV Versus Public Ownership, 6 Antitrust Law & Econ. 109 (No. 4, 1973); Spence and Owen, Television Programming, Monopolistic Competition and Welfare, 91 Q.J.Econ. 103 (1977); Baldwin, Wirth and Zenty, The Economics of Per-Program Pay Cable Television, 22 J.Broad. 143 (1978).

2. Muzak Corp., 8 F.C.C. 581 (1941).

3. Allocation of Frequencies for Theater Television Service, 9 R.R. 1528 (1953).

movie theaters of championship fights—thus came to rely on transmissions of common carriers to link the theaters with the production scene. Muzak, which had pioneered in subscription broadcasting, eventually transformed its operation into one which utilized common carrier transmissions—employing telephone lines—to deliver its background music to the premises of its subscribers: stores, offices, factories and the like.

Meanwhile, as FM experienced first a surge and then a recession in the post-World War II period, a somewhat different background music service was developed. An FM station would broadcast, to the general public, the type of programs desired as background music, together with the usual advertising and announcements. The station would also offer a subscription service to stores and other establishments interested only in background music. These would receive, for a fee, special equipment which would permit the deletion of commercial messages and announcements; supersonic “beeps”, transmitted on an adjacent frequency, would turn the receiver off preceding the announcement and turn it back on again when the message was concluded. The operation, described as “simplexing”, permitted FM licensees to supplement advertising revenues with subscription fees.

In 1955, the FCC concluded that programming tailored for the needs of background music subscribers was too specialized to constitute broadcasting to the general public, and formulated a plan enabling the continuance of background music services on a different basis. Subject to restrictions, simplexing operations were permitted to continue on an interim basis. But the future basis of the service was to be “multiplexing”—the transmission of signals on an adjacent sub-carrier frequency that were different from those employed on the main carrier frequency. The former were to be received by subscribers only, while the latter were to be received by the general public. In the FCC’s eyes, the main carrier transmissions would be broadcasting while the sub-carrier transmissions would be an ancillary non-broadcasting service.⁴ The enforced conversion from simplexing to multiplexing was postponed several times, and when the FCC became insistent upon bringing simplexing to an end, its decision was challenged on judicial review. The court held that the simplexing operation constituted broadcasting because intended to be received by the general public, even though portions of the transmissions were deleted for the benefit of subscribers. Since the Commission had proceeded on an erroneous basis, the Court set aside the Commission’s determination, without prejudice to further action by the Commission on a different footing.⁵ On the basis of a revised opinion, the Commission

4. *Non-Broadcast Activities by FM Stations*, 11 R.R. 1590 (1955), preceded by notice at 19 Fed.Reg. 143 (1953).

5. *Functional Music, Inc. v. FCC*, 107 U.S.App.D.C. 34, 274 F.2d 543 (1958), certiorari denied 361 U.S. 813, 80 S.Ct. 50, 4 L.Ed.2d 60 (1959).

subsequently reaffirmed its opposition to simplexing and again required conversion to multiplexing.⁶

The subscription service which has attracted the most attention is "pay television." Two modes of operations are possible. First, "closed circuit" transmissions of signals may be made by wire to the home of the subscriber. Such operations will be considered subsequently. Second, "over the air" transmissions of signals may be made to specially equipped receiving apparatus in the home of the subscriber. In its *First Report on Subscription Television*,⁷ the FCC in 1957 approved a three-year trial of a number of "over the air" systems of subscription television.

In approving a trial, the Commission observed that the proponents of pay television urged that the subscription method, by broadening the financial base of broadcasting, would augment program sources and services available to the public; opponents argued that pay television would divert programs from the existing system of advertiser-supported television and simply add a charge to the public. The opponents also contended that the shift to subscription services would lead to monopolization of the means of receiving television signals. The Commission concluded that the claims and counterclaims could be better evaluated after a period of trial operation.

The Commission held that it had authority under the Communications Act to approve a trial operation of subscription television; that subscription television did not appear to be a common carrier service under the Act; that it was unclear whether subscription television constituted "broadcasting" within the Act's definition; but that resolution of the latter issue was not required since the Commission was empowered to authorize non-broadcast uses of the radio spectrum. The trial operation was to be made subject to a number of conditions, which need not be detailed in light of their subsequent revision.

The release of the *First Report* on October 17, 1957, led to intensified efforts on the part of opponents of subscription television. Two campaigns were waged. First, broadcasters and theater owners contacted Congressmen directly to present their arguments against the pay television experiment. Second, a massive publicity effort encouraged large numbers of viewers to express their fears and objections to their elected representatives. In January of 1958, the House Committee on Interstate and Foreign Commerce held hearings on the problem, and on February 6, 1958, the Committee adopted a resolution opposing the experiment outlined in the *First Report* and stating that the experiment should not proceed unless and until the Communications Act was amended to specifically permit authorization of subscription television. A similar position was taken by the Senate Committee on Interstate and Foreign Commerce on February 19.

6. FM Simplex Operations, 2 R.R.2d 7, 23 F.C.C. 532, 16 R.R. 1509 (1957). 1683 (1964).

Numerous bills were introduced in both houses proposing either to prohibit subscription television or to permit it under restricted conditions.

In its *Second Report on Subscription Television*,⁸ released on February 27, the Commission reviewed the Congressional activity engendered by its *First Report* and noted that hearings were planned on the various bills pending. In view of the Congressional ferment, the Commission announced that applications under the *First Report* would not be processed until thirty days after the adjournment of the Congress then in session. That Congress adjourned without passing any new legislation. However, Chairman Harris of the House Committee on Interstate and Foreign Commerce, in a letter dated July 3, 1958, requested that the Commission maintain the status quo to permit consideration of the pending bills at the next session of Congress. In its response of July 23, the Commission agreed that no applications would be granted until the first session of the next Congress had adjourned, but stated that applications would be accepted and processed in the interim.

Early in 1959, agreement was reached between the Commission and the House Committee on a subscription television experiment more narrow in scope than the one proposed in the *First Report*. The new conditions were embodied in the *Third Report on Subscription Television*,⁹ released March 24, 1959. The next day, the House Committee voted 11 to 10 in favor of the *Third Report*, and on March 26, 1959, Chairman Harris announced to the House that his Committee had no objection to the revised experiment.¹⁰

The only television operation conducted pursuant to the *Third Report* was in Hartford, Connecticut.¹¹ It relied heavily on movies and sports—they constituted over 90% of programming—and ran at a substantial loss; however no siphoning occurred. But all these results might be altered in the case of a national subscription service, as opposed to a single experimental system operating in a limited market.

The Commission considered the matter anew in its *Fourth Report*, which in 1968 set forth the terms under which over-the-air subscription television services could be conducted:¹²

(1) Four commercial nonsubscription television stations were required to be operational in the market the subscription television station sought to serve.

8. 16 R.R. 1539 (1958).

9. 26 F.C.C. 265, 16 R.R. 1540a (1959).

10. 105 Cong.Rec. 5362-5363 (1959).

11. Hartford Phonevision Co., 30 F.C.C. 2d 301, 20 R.R. 754 (1961), sustained sub nom. Connecticut Committee Against Pay TV v. FCC, 301 F.2d 835 (D.C.Cir. 1962), cert. denied 371 U.S. 816 (1962).

12. 33 Fed.Reg. 19149, 15 F.C.C.2d 466 (1968), sustained sub nom. National Association of Theatre Owners v. FCC, 136 U.S.App.D.C. 332, 420 F.2d 194 (1969), cert. den., 397 U.S. 922, 90 S.Ct. 914, 25 L.Ed.2d 102 (1970), modified, 34 Fed.Reg. 14375 (1969) and 37 Fed. Reg. 6743, 34 F.C.C.2d 271 (1972).

(2) No more than one subscription television station could be authorized in a single community.¹³

(3) In addition to subscription services, the authorized subscription television station was required to carry a minimum quantity of "free" programming (28 hours per week).

(4) Commercial advertisements could not be carried when programs were being offered on a subscription basis.

(5) The licensee of the subscription station was required to retain discretion and responsibility for all programming and determinations as to subscription charges (except that limited advance programming commitments might be made with FCC approval).

(6) Subject to limited exceptions, subscription services could not include (a) motion picture films with a general release date in the United States more than two years in advance of the proposed subscription showing; (b) sports events which were televised live on a nonsubscription, regular basis in the community during the two years (later extended to any one of the five years) prior to the proposed subscription showing; or (c) any "series type of program with interconnected plot or substantially the same cast of principal characters."

(7) No more than 90% of total subscription services could consist of feature films and sports events combined.

The FCC did not undertake to regulate the charges of subscription television services, but it did require nondiscriminatory service and charges to all customers (subject to such classifications as the FCC might approve), and also required that subscription television decoders be leased, and not sold, to subscribers.

The FCC was of the view that, subject to the limitations imposed, subscription television would not "siphon" substantial talent and programming from advertiser-supported television. At the same time, at least some opportunity for diversity would be afforded, if only in the form of uninterrupted first-run movies and otherwise unavailable sporting events. And, possibly, if permitted to operate on a national basis, other potential sources of programming would be tapped by subscription television. A few licenses to operate over-the-air subscription services on UHF channels were issued and by the late-seventies six operations had commenced.¹⁴

13. In *Subscription Television Authorizations (TAT Communications)*, 55 F.C.C.2d 187, 34 R.R.2d 1145 (1975), the FCC ruled that, where a market embraced more than one community, each community could receive a subscription television authorization as long as the requisite number of Grade A signals (five, including the subscrip-

tion station) encompassed the community. Thus, for larger markets including several communities, more than one subscription television operation may be authorized.

14. See *Weaver v. Jordan*, 49 Cal.Rptr. 537, 411 P.2d 289, 63 P.U.R.3d 231 (Cal. Sup.Ct.1966) (one judge dissenting).

In 1970, the FCC applied to "pay cable" (cable television exacting a separate charge on a per program or per channel basis) the same program restrictions as had been applied to over-the-air subscription television.¹⁵ Pay cable operations expanded much more rapidly than over-the-air subscription services, and by the mid-seventies there were over 500,000 pay cable subscribers and the service was growing rapidly.¹⁶

The FCC in 1975 modified the program restrictions applicable both to pay cable and over-the-air subscription services. The general effects of the modification were: (1) to remove all restrictions on series-type programs; (2) to relax restrictions on movies, by extending the period for permissible new movies from two to three years and by adding a number of exemptions for movies more than three years old; (3) to relax the restrictions on sports by permitting the broadcast of certain sports events notwithstanding concurrent coverage by nonsubscription television; and (4) to retain the restrictions against commercials and against broadcast of more than 90% movies and sports. The 1975 regulations were challenged in *Home Box Office* and are discussed more fully therein.

HOME BOX OFFICE, INC. v. FCC

District of Columbia Circuit Court of Appeals, 1977.

567 F.2d 9, certiorari denied, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977).

PER CURIAM:

In these 15 cases, consolidated for purposes of argument and decision, petitioners challenge various facets of four orders of the Federal Communications Commission which, taken together, regulate and limit the program fare "cablecasters"¹⁷ and "subscription

certiorari denied, 87 S.Ct. 49 (1966). In 1964, in an initiative measure adopted by the state's electorate, home subscription television was banned in California. The prohibition applied both to radio wave and wire transmissions to home television sets, but exempted CATV systems and noncommercial educational television systems. The Supreme Court of California held the enactment "to be invalid as an abridgment of the free speech guarantees of state and federal constitutions." The Court observed that the "suppression of the proscribed medium as a vehicle of transmission to the home purports to be absolute; it amounts to total censorship, in advance, so far as home viewers are concerned."

15. 23 F.C.C.2d 825 (1970).

16. In early 1970, there were approximately three million pay cable subscribers. *Television Digest*, NCTA Convention Supp., May 20-23, 1970, pp. 1-3.

17. "Cablecasting" refers to the origination of programming on a cable television system, in contradistinction to the retransmission of signals that have been received over the air from conventional broadcast television stations. See 47 C.F.R. §§ 76.5(v)-(x) (1975). The rules challenged here apply to both "access" cablecasters, who lease (or are given) channel time from cable system operators, id. § 76.5(x), and "origination" cablecasters, who are system operators, id. § 76.5(w). Id. § 76.225. The rules challenged here ap-

broadcast television stations”¹⁸ may offer to the public for a fee set on a per-program or per-channel basis. Technically, the orders reviewed here amend previous, more stringent, Commission rules. While this procedural nicety has not gone unnoticed by those petitioners who attack only the amendments to the rules on the theory that they represent a major, but unexplained and hence arbitrary, change of prior Commission policy,¹⁹ it has largely escaped those who take the opposing view that any regulation exceeds the authority of the Commission.²⁰ We accept neither view in full but instead uphold the orders challenged here insofar as they relate to subscription broadcast television and vacate the orders as arbitrary, capricious, and unauthorized by law in all other respects.

I. THE FACTUAL BACKGROUND

At the heart of these cases are the Commission’s “pay cable” rules. . . . The effect of these rules is to restrict sharply the ability of cablecasters to present feature film and sports programs if a separate program or channel charge is made for this material. In addition, the rules prohibit cablecasters from devoting more than 90 percent of their cablecast hours to movie and sports programs and further bar cablecasters from showing commercial advertising on cable channels on which programs are presented for a direct charge to the viewer. Virtually identical restrictions apply to subscription broadcast television. . . .

[The restrictions relating to feature film and sports programs were based on the FCC’s concern that, absent such restrictions, there would be a “siphoning” of such programs, or the best of such programs, from conventional television to pay television, to the detriment of persons not subscribing to pay television.]

To understand the postulated “siphoning” phenomenon and its potential harm, it is useful to consider the structure of the television industry today. In 1975 there were 70.1 million American homes with television sets, of which 9.8 million had access to some cable system. Although the number of cable subscribers is large, individ-

ply only to cablecasting on systems which also carry broadcast signals. See *id.* §§ 76.5(a), 76.225. Although some petitioners have argued that the rules should be extended to all cablecasters, we think the Commission has given a rational basis for this distinction. See First Report and Order, 52 F.C.C.2d 1, 47-48 (1975), JA 71-72. [Some footnotes have been omitted; others have been renumbered.]

18. Subscription broadcast television stations are those with the technical capability to broadcast programs “in-

tended to be received in intelligible form by members of the public only for a fee or charge.” 47 C.F.R. § 73.641(b) (1975).

19. This group includes the major broadcast networks, the National Association of Broadcasters, and one group of *amici*.

20. This view is taken by the Justice Department, the cable television interests, producers of programs suitable for showing on either cable or broadcast television, and a group of *amici*.

ual cable systems are quite small, with the largest having only 101,000 customers and with only 224 of approximately 3,405 systems having more than 10,000 subscribers. The number of homes that presently have access to pay cable facilities is about a half million and is growing rapidly. Most of these homes are located outside major television markets, with the exception of the New York City area and parts of California. Extension of service to other urban areas might be accomplished at a capital cost of some \$8 billion, but laying cable to reach that half of the American population which lives in rural areas would by any estimate be extremely expensive, perhaps requiring an additional \$240 billion. Because of these capital requirements, extension of cable service with cablecasting capability to the country as a whole does not seem possible in the immediate future.

Similarly, access of all Americans to cable seems foreclosed by the cost of cable service. Cable service charges are generally separated into two distinct fees, one basic fee entitling the viewer to receive only broadcast signals, the other entitling the viewer to see cablecast programs as well. The basic fee is approximately \$5-\$6 monthly. Technical capability exists today to distribute and bill for cablecast programs on a program-by-program basis, but this is not currently done. Instead a single fee of \$5-\$7 monthly, in addition to the basic fee, is charged for access to the cablecasting channels. Nonetheless, as the name of one petitioner suggests, it is quite literally possible to turn the home receiver into a "Home Box Office," thereby marketing television features in much the same way that movies are marketed in theaters today. As with other box offices, however, only those with enough money to buy a ticket can get in to see the show.

Siphoning is said to occur when an event or program currently shown on conventional free television is purchased by a cable operator for showing on a subscription cable channel. If such a transfer occurs, the Commission believes, the program or event will become unavailable for showing on the free television system or its showing on free television will be delayed (since the commercial appeal of the cable showing is the assurance of earlier access to program material, an assurance that might itself be brought about by agreement between the seller of the program or event and the subscription cablecaster).²¹ In either case a segment of the American people—those in areas not served by cable or those too poor to afford subscription cable service—could receive delayed access to the program

21. The position of the Commission is not clear. The concern in the subscription television proceeding was that material shown on subscription television would simply become unavailable for conventional viewing. See Fourth Report and Order, *supra* note 5, 15 FCC2d at 494-509. Here,

at least with regard to feature films, the Commission seems to have identified the evil to be avoided as delay in showing a film on conventional television. See First Report and Order, . . . 52 FCC2d at 49-50 (¶ 162) JA 73-74.

or could be denied access altogether. The ability of the half-million cable subscribers thus to preempt the other 70 million television homes is said to arise from the fact that subscribers are willing to pay more to see certain types of features than are advertisers to spread their messages by attaching them to those same features. For example, according to Commissioner Robinson, subscribers may be willing to pay 15 to 30 cents per viewing hour for the privilege of viewing a recent feature film, while advertisers are willing to pay only three cents per viewer. As a result a pay audience of one million could routinely buy a film away from a nonpaying audience of five to ten million.

Whether such a siphoning scenario is in fact likely to occur and, if so, whether the result of siphoning would be to lower the quality of free television programming available to certain areas of the country or to certain economic strata of the population are matters of great dispute among the Commission and the various petitioners and intervenors seeking review of the Commission's regulations in this case. Other petitioners both here and before the Commission argue that the rules which ostensibly place cable in a subordinate role in order to increase program diversity—a goal which has been basic to a number of Commission regulations—in fact diminish diversity by prohibiting subscription cable operators from showing the programs that are most likely to be the financial backbone of a successful cable operation. As a result, it is claimed, cultural and minority programming that could otherwise “piggyback” on a cable system supported by more broadly popular fare is precluded. Indeed, some petitioners argue that the subscription broadcast television rules had the effect of killing that medium in its infancy by denying it access to necessary programming—a charge supported by the apparent lack of any viable commercial applications of subscription broadcast television today and left unrefuted by the Commission—and urge us not to let the Commission similarly snuff out pay cable. Finally, other petitioners take the position that the threat of siphoning is very real and that the Commission's rules do not adequately cope with this threat to conventional television service.

II. PAY CABLE RULES

A. *Statutory Authority*

Midwest Video Corp. and *Southwestern Cable Co.* hold that the Commission may only exercise authority over cable television to the extent “reasonably ancillary” to the Commission's jurisdiction over broadcast television. *United States v. Southwestern Cable Co.*, supra, 392 U.S. at 178, 88 S.Ct. 1994; *United States v. Midwest Video Corp.*, supra, 406 U.S. at 670, 92 S.Ct. 1860. . . .

The Supreme Court's opinions in *Southwestern Cable Co.* and *Midwest Video Corp.* . . . look in two directions. First, they

recognize an expansive jurisdiction for the Commission based on Section 2(a) of the Communications Act and the need to give the Commission sufficient latitude to cope with technological developments in a rapidly changing field. But the opinions are also narrow. Even the broadest opinion, that of the plurality in *Midwest Video Corp.*, recognizes that the Commission can act only for ends for which it could also regulate broadcast television. Indeed, even this standard will be too commodious in certain cases, since as we discuss in Part III *infra* the scope of the Commission's constitutionally permitted authority over broadcast television in areas impinging on the First Amendment is broader than its authority over cable television. Finally, the opinions in both cases go no farther than to allow the Commission to regulate to achieve "long-established" goals or to protect its "ultimate purposes." That these cases establish an outer boundary to the Commission's authority we have no doubt . . . and if judicial review is to be effective in keeping the Commission within that boundary, we think the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well-understood and consistently held policy developed in the Commission's regulation of broadcast television . . .

The purpose of the Commission's pay cable rules is to prevent "siphoning" of feature film and sports material from conventional broadcast television to pay cable.²² Although there is dispute over the effectiveness of the rules, it is clear that their thrust is to prevent *any* competition by pay cable entrepreneurs for film or sports material that either has been shown on conventional television or is likely to be shown there.²³ How such an effect furthers any legitimate goal of the Communications Act is not clear. The Commission states only that its "mandate to act in the public interest requires that [it] strive to maintain the public's ability to receive the informational and entertainment programming now provided by conventional television at no direct cost," First Report and Order, *supra*, 52 FCC 2d at 43, JA 67, and that its action "is designed to enhance the integrity of broadcast signals and is a proper execution of our responsibility under Section 2(b) [*sic*] of the Communications Act * * *," *id.* at 45, JA 69.

22. As promulgated in the First Report and Order, . . . the rules also applied to series programming. Since the rules have subsequently been amended to delete series programming restrictions, . . . , we do not deal with this aspect of the rules here.

23. See, e. g., First Report and Order, . . . 52 FCC2d at 51-55, JA 75-79. This position is most clearly expressed in the Commission's standard for waiving its film rules:

[W]aivers will be granted upon a convincing showing to the Commission that a film desired for subscription exhibition is not desired for exhibition over conventional television in the market, or that the owner of the film, even absent the existence of subscription television, would not make the film available to conventional television.

Id. at 55, JA 79.

Insofar as the Commission places reliance on such conclusory phrases as “enhance the integrity of broadcast signals,” we think it has crossed “the line from the tolerably terse to the intolerably mute.” . . . Beneath such generalities, however, the Commission seems to be making two more specific arguments which relate the public interest to retention of the conventional television structure. First, the Commission appears to take the position that it has both the obligation and the authority to regulate program format content to maintain present levels of public enjoyment. For this reason, and because the Commission also seems to assert that the overall level of public enjoyment of television entertainment would be reduced if films or sports events were shown only on pay cable or shown on conventional television only after some delay, it concludes that anti-siphoning rules are both needed and authorized. Second, and closely related, is the argument pressed here by counsel for the Commission that Section 1 of the Communications Act, 47 U.S.C.A. § 151 (1970), mandates the Commission to promulgate anti-siphoning rules since cable television cannot now and will not in the near future provide a nationwide communications service. See Transcript of Oral Argument at 57–58. Before considering each of these arguments in turn, we note that we do *not* understand the Commission to be asserting that subscription cable television will divide audiences and revenues available to broadcast stations in such a manner as to put the very existence of these stations in doubt. . . .

The question of the Commission’s obligation or authority to regulate television to maintain public enjoyment is one whose analysis takes us into a thicket of disagreement between this court and the Commission. See *Citizens Committee to Save WEFM v. FCC*, 165 U.S.App.D.C. 185, 191–207, 506 F.2d 246, 252–268 (1974) (*en banc*).

. . . The Communications Act not only allows, but in some instances requires, the Commission to consider the preferences of the public, and the Commission in discharging this authority must regulate the entertainment programming which station owners can present whenever a significant segment of the public is threatened with the loss of a preferred broadcast format. Were *WEFM* the last word, it is at least possible that the Commission could promulgate the anti-siphoning rules under the theory of jurisdiction recognized by the plurality in *Midwest Video Corp.*, since the end to be achieved—protection of preferred television service for those not served by cable television—would also justify regulation of the broadcast media.

The Commission has not, however, acquiesced in *WEFM*. Instead, it recently launched and concluded a proceeding on “Changes in the Entertainment Formats of Broadcast Stations.” See Notice of Inquiry, 57 FCC2d 580 (1976); Memorandum Opinion and Order, 60 FCC2d 858 (1976). Its conclusions there bear repeating in some detail. First, the Commission has reiterated its conclusion that it

has no statutory authority to dictate entertainment formats. . . . A second point relevant here is the Commission's professed inability to determine the boundaries of a "particular entertainment format." *Id.*, at 862. "The Commission does not know, as a matter of indwelling administrative expertise, whether a particular format is 'unique' or, indeed, assuming that it is, whether it has been deviated from by a licensee." *Id.* In any case, concludes the Commission, "[i]t is impossible to determine whether consumers would be better off [with any particular format] without reference to the actual preferences of real people." *Id.* at 864.

If the Commission's own recently announced standards are applied to the rules challenged here, it seems clear that the rules cannot stand. The very essence of the feature film and sports rules is to require the permission of the Commission "to commence * * * programming, including program format services, offered to the public." However, it has been the consistent position of the Commission itself that cablecasters, like broadcasters, are not to be regulated as common carriers, a view sustained by a number of courts. See, e. g., *American Civil Liberties Union v. FCC*, *supra*, 523 F.2d at 1344; *Philadelphia Television Broadcasting Co. v. FCC*, 123 U.S.App.D.C. 298, 359 F.2d 282 (1966). Moreover, given the similarities between cablecasting operations and broadcasting, we seriously doubt that the Communications Act could be construed to give the Commission "regulatory tools" over cablecasting that it did not have over broadcasting. . . . Thus, even if the siphoning rules might in some sense increase the public good, this consideration alone cannot justify the Commission's regulations. . . .

In addition, the record before us is devoid of any "reference to the actual preferences of real people." While we would be willing to concede that certain formats, such as the World Series, are sufficiently unique and popular that a factual inquiry into actual preferences might not be required, this would not seem to be the case with either feature films or "non-specific" sports events.²⁴ Moreover, there is not even speculation in the record about what material would replace that which might be "siphoned" to cable television. Without such a comparative inquiry, we do not understand how the Commission could define the current level of programming as a baseline for adequate service. Finally, with regard to feature films we question how the Commission, which has stated that it has no criteria by which to distinguish among formats, could have determined that feature films are a sufficiently unique format to warrant protection. The record demonstrates that broadcasters are increasingly substi-

24. Non-specific sports events are essentially those that occur during regular season play. See First Report

and Order, . . . ; 52 FCC2d at 59, JA 33.

tuting made-for-television movies—for which “siphoning” is not a problem since the broadcasters own the copyrights—for feature films. See, e. g., First Report and Order, *supra*, 52 FCC2d at 26, JA 50. The inference from this would seem to be that the Commission has drawn its categories too narrowly and that a feature film rule may not really be necessary to ensure broadcast presentation of popular movie material. Whether or not this is the case, the inference is certainly too strong to be dismissed, as the Commission has done here, without discussion.

In analyzing the feature film and sports rules under the standards announced by the Commission in its broadcast format change proceeding, we do not wish to imply that we have reconsidered the position of this court in *WEFM*. The sole purpose of undertaking this analysis is to demonstrate that the Commission has, in this proceeding, seemingly backed into an area of regulation in which it would not assert jurisdiction were it to face the issues directly. Indeed, in this very proceeding, and despite the Commission’s definition of current quantity and quality levels of films and sports events as the minimum level consistent with adequate television service, there is no indication that the Commission is prepared to require *broadcasters* to continue to present material presently on conventional television. . . . In the absence of this court’s opinion in *WEFM*, these unexplained inconsistencies in agency policy would require us to set aside the Commission’s rules and remand the case to the agency to allow it to “supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.” . . . Because we understand the Commission’s Memorandum Opinion and Order in the format change proceeding to constitute a request to this court to reconsider its position in *WEFM*, see 60 FCC2d at 865–866, and because we are hesitant to approve rules which seem inconsistent with the Commission’s best thinking in a closely analogous area, we think we should not affirm the feature film and sports regulations on the basis of *WEFM*.

Before reaching a conclusion on whether remand is necessary, however, we must consider the Commission’s second theory of jurisdiction. Our analysis is hampered by the failure of the Commission to make clear its argument that Section 1 of the Communications Act,²⁵ as interpreted by this court in *NATO v. FCC*, [420 F.2d 194] requires rules against “siphoning” of material away from free television. In the subscription broadcast proceeding the petitioning theater owners sought to block that part of the Commission’s sub-

25. Section 1 provides in relevant part: For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide

wire and radio communication service with adequate facilities at reasonable charges, * * * there is created a commission to be known as the “Federal Communications Commission” * * *

47 U.S.C.A. § 151 (1970).

scription television rules which permitted subscription television by arguing that Section 1 of the Act prohibited the Commission from withdrawing one channel from the broadcast spectrum for use by only the few who might be willing to pay for the privilege of receiving broadcast signals. See First Report, 23 FCC 532, 536-540 (1957). The Commission, in dismissing such an interpretation of the Act, stated:

[Section 1 has] been relied on in support of an argument to the effect that the Act did not contemplate or permit, and in fact bars authorization by the Commission of a program service, by broadcast stations, which would be available only to such members of the public as were able and willing to pay a charge. We believe, however, that such a construction cannot reasonably be made of these excerpts. Section 1 states the general purposes of the Act in broad terms. The reference to "all the people of the United States" does not, for example, preclude licensing the use of radio frequencies for the safety and special radio services. Frequencies so allocated are not available to all the people of the United States. While the words "at reasonable charges" evidently refer to the Commission's regulation of rates charged by common carriers for message communications, and does not, presumably, refer to charges for programs disseminated over broadcast stations, it may be noted that this express reference to charges is unaccompanied by any prohibitive language concerning charges for programs transmitted by broadcast stations.

Id., at 538. In *NATO* this court, after reviewing the legislative history of the Communications Act, 136 U.S.App.D.C. at 358-360, 420 F.2d at 200-202, agreed, finding that the Act did not prohibit licensing of subscription television services, but was indeed "designed to foster diversity in the financial organization and *modus operandi* of broadcasting stations as well as in the content of programs * * *." 136 U.S.App.D.C. at 360, 420 F.2d at 202. Thus, as interpreted by both this court and the Commission, Section 1 does not itself compel the Commission to protect conventional advertiser-supported television broadcasting.

However, counsel for the Commission at oral argument appeared to be making a second argument about the meaning of Section 1. Stressing that Section 1 also mentions that the Commission is to foster "Nation-wide" service, counsel argued that cable could not be a nationwide service in the reasonably foreseeable future and that "siphoning" would, therefore (the logic behind this "therefore" is by no means clear), destroy nationwide service in contravention of the policy of Section 1. See Transcript of Oral Argument at 57-58. We need not consider whether Section 1 can be so construed since counsel's argument is nothing more than a naked allegation, un-

ported in the record. Indeed, the Commission has nowhere spelled out even a theory of the dynamic which could result in loss of broadcast television service to regions not served by cable. Nor is such a dynamic readily apparent. For example, cablecasters are unlikely to withhold feature film and sports material from markets they do not serve since broadcast of this material in such markets could not reduce the potential cable audience and because exhibition rights to this material would undoubtedly have substantial value. In these circumstances, the postulated loss of regional service is too speculative to support jurisdiction. . . .

Finally, none of the suggested bases for Commission jurisdiction justifies imposition of the no-advertising and 90-percent rules on cable television. These rules evolved out of the subscription broadcast television proceeding, see Fourth Report and Order, *supra*, 15 FCC2d at 484, and were retained here apparently because they raised "little dissent." . . .

B. *The Evidence*

(a) *The Need for Regulation*

At the outset, we must consider whether the Commission has made out a case for undertaking rulemaking at all since a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." . . . Here the Commission has framed the problem it is addressing as

how cablecasting can best be regulated to provide a beneficial supplement to over-the-air broadcasting without at the same time undermining the continued operation of that "free" television service.

. . . To state the problem this way, however, is to gloss over the fact that the Commission has in no way justified its position that cable television must be a supplement to, rather than an equal of, broadcast television. Such an artificial narrowing of the scope of the regulatory problem is itself arbitrary and capricious and is ground for reversal. . . . Moreover, by narrowing its discussion in this way the Commission has failed to crystallize what is in fact harmful about "siphoning." Sometimes the harm is characterized as selective bidding away of programming from conventional television, see First Report and Order, *supra*, 52 FCC2d at 49, JA 73, sometimes delay, see *id.* at 50, JA 74, and sometimes (perhaps) the financial collapse of conventional broadcasting, compare *id.* at 45, JA 69, with Second Report and Order, *supra*, — FCC2d at —, 35 P & F Radio Reg.2d at 772, JA 136. As a result, informed criticism has been precluded and formulation of alternatives stymied.

Setting aside the question whether siphoning is harmful to the public interest, we must next ask whether the record shows that si-

phoning will occur. The Commission assures us that siphoning is "real, not imagined." First Report and Order, *supra*, 52 FCC2d at 50, JA 74. We find little comfort in this assurance, however, because the Commission has not directed our attention to any comments in a voluminous record which would support its statement. Moreover, whatever evidence the Commission thought it had was self-admittedly insufficient to give it a "clear picture as to the effects of subscription television upon conventional broadcasting." *Id.* at 49, JA 73. Our own review of the First Report and the joint appendix filed in these cases suggests that, if there is any evidentiary support at all, it is indeed scanty. As to the potential financial power of cable television we are left to draw the inference from two facts—that championship boxing matches often appear only on closed-circuit television in theaters and that Evel Knievel chose to televise his jet-cycled dive into the Snake River in the same fashion—and a series of mathematical demonstrations. See *id.* at 9, JA 33. See also Memorandum Opinion and Order, *supra*, 23 FCC2d at 828 n. 6 (Docket 18397) (reliance on mathematical demonstration). While the former may be directly relevant to siphoning of what the Commission has characterized as "specific" sports events, it is not at all clear what light they shed on the question of who is going to pay how much to see feature films and nonspecific sports events on pay cable.

The meaning of the various mathematical demonstrations is even less certain. Petitioner American Broadcasting Companies, Inc., for example, has proposed the following technique for estimating the relative income available to cable and conventional television:

30. The most comprehensive attempt to develop a methodology for making this comparison is contained in the reply comments of the American Broadcasting Company. It there developed a formula for estimating the pay cable dollars available for the purchase of any particular program. The formula, in somewhat simplified terms, is as follows:

$$\begin{aligned} & (\text{Total households}) \times (\text{percent of households with tv sets}) \\ & \times (\text{percent of households with tv sets that are cable tv} \\ & \text{subscribers}) \times (\text{percent of cable tv subscribers that have} \\ & \text{pay cable option available}) \times (\text{percent of subscribers with} \\ & \text{pay option that are pay subscribers}) \times (\text{percent of pay sub-} \\ & \text{scribers that view program in question}) \times (\text{charge to sub-} \\ & \text{scriber for program}) \times (\text{percent of subscription charge} \\ & \text{passed through to program supplier}) = (\text{total national pay} \\ & \text{cable dollars available for the purchase of program in ques-} \\ & \text{tion}). \end{aligned}$$

ABC's own assumptions as to the state of the pay cable television industry in 1980 are as follows:

Total household	75,400,000
TV set penetration ...percent	97

Ch. 10	<i>SUBSCRIPTION SERVICES</i>	491
CATV penetrationdo		35
CATV penetration with pay		
TV potentialdo		80
Pay subscriber penetration of systems with		
pay potentialdo		15
Percent of pay subscribers viewing		
programdo		50
Charge to subscriber for programdollars ..		2.25
Percent of pay fee collected passed on to		
program producers ...percent		35
In the circumstance posited by ABC, slightly more than 1.5 million homes would pay \$2.25 each for a particular program making available slightly more than \$1.2 million dollars to the pay cable industry for the purchase of the program in question. This, ABC suggests, compares with the \$1.5 million dollars a network might pay for two showings of a "blockbuster" feature film like <i>Love Story</i> during a five-year period, and with the \$1 million dollars that might be paid for a movie of somewhat less appeal.		

First Report and Order, *supra*, 52 FCC2d at 9-10, JA 33-34. From this demonstration American Broadcasting Companies (sic) and other petitioners who presented similar mathematical models would draw the conclusion that

[p]ay cable operations will have more money than television stations or television networks to purchase programming and, being creatures of a competitive economic system, will inevitably purchase much of the best programming now broadcast on free television and leave free television only with what is left over.

* * *

Id. at 10, JA 34.

Even conceding the accuracy of the figures used (a concession which finds no support in the record, however), we think the proponents of the mathematical models have not proved their case. The problem is the incommensurability of the ultimate figures compared: nationwide income of pay cablecasters in 1980 on the one hand, and recent, but historical, network expenditures on the other. It seems patently obvious that no comparison is valid unless financial figures are extrapolated to the same year. More important is the potential for distortion introduced into the comparison by using *income* on one hand versus *expenditure* on the other. The Justice Department and other petitioners have repeatedly pointed out that the conventional television industry is highly concentrated and is, therefore, likely to enjoy substantial monopoly and monopsony power. See, e. g., Comments of the United State Department of Justice in Docket No. 19554, at 20, JA 168 (April 7, 1969); Comments of the United States Department of Justice in Docket No. 19554, at 15-16,

JA 194-195 (Sept. 5, 1969). Evidence consistent with such an inference is readily available. For example, Noll, Peck and McGowan report that television broadcast stations enjoyed a 20 percent return on sales in 1969 versus eight percent for all manufacturing industry²⁶ and suggest that this is evidence that "competition is less rigorous in television than elsewhere in the economy." To be sure, television and manufacturing are very different industries, and had the Commission evaluated and rejected the arguments of the Justice Department and others a different question would be presented on this review. But the Commission did not consider whether conventional television broadcasters could pay more for feature film and sports material than at present without pushing their profits below a competitive return on investment and, consequently, it could not properly conclude that siphoning would occur because it could not know whether or how much broadcasters, faced with competition, would increase their expenditures by reducing alleged monopoly profits. Since the Commission did not assess either potential distorting effect of the comparison offered by the broadcasters, any conclusion it may have drawn from this evidence would be arbitrary.

We have similar difficulties with the second cardinal assumption of the Commission, i. e., that "siphoning" would lead to loss of film and sports programming for audiences not served by cable systems or too poor to subscribe to pay cable. See Transcript of Oral Argument at 61-62; br. for respondent FCC at 53-54. To reach such a conclusion the Commission must assume that cable firms, once having purchased exhibition rights to a program, will not respond to market demand to sell the rights for viewing in those areas that cable firms do not reach. We find no discussion in the record supporting such an assumption. Indeed, a contrary assumption would be more consistent with economic theory since it would *prima facie* be to the advantage of cable operators to sell broadcast rights to conventional television stations in regions of the country where no cable service existed. Moreover, the greater the area not covered by cable, the greater the demand would tend to be for broadcast rights, and the more likely it would be that, through a combination of cable and broadcast, nationwide coverage would be achieved.

We find the Commission's argument that "siphoning" could lead to loss of programming for those too poor to purchase cable television more plausible. Here again, however, we find that the Commission has not documented its case that the poor would be deprived of adequate television service and, worse, that the Commission, by prohibiting advertising in connection with subscription operations, has virtually ensured that the price of pay cable will never be within

26. R. Noll, M. Peck, & J. McGowan [Economic Aspects of Television Regulation (1973)] at 16. The National Association of Broadcasters has esti-

imated the 1975 profit margins will average 18.9 percent. See Broadcasting, July 26, 1978, at 19.

reach of the poor. There is little disagreement at the theoretical level about the mechanism through which the poor would be deprived of broadcast service in markets served by cable television. Cable operators, to be able to sell a show, would require exclusive exhibition rights in the markets they served, with the result that events purchased by cable operators for subscription presentation would be unavailable to broadcasters, or would be available only after a delay. What follows from this scenario, even assuming that cable operators would have the financial strength to outbid broadcasters, is by no means clear. There is uncontradicted evidence in the record, for example, that the popularity of film material does not decline with an increase in the interval between first theater exhibition and first television broadcast. See Comments of Program Suppliers in Docket No. 19554, at 21, JA 386 (Nov. 1, 1972). At least as to movies, therefore, "siphoning" may not harm the poor very much.

Equally important, the pay cable rules taken as a whole scarcely demonstrate a consistent solicitude for the poor. Thus, although "free" home viewing relies upon advertiser-supported programming, the Commission has in this proceeding barred cable firms from offering advertising in connection with subscription operations. . . . As a result, the Commission forecloses the possibility that some combination of user fees and advertising might make subscription cable television available to the poor, giving them access to the diverse programming cable may potentially bring. . . .

(b) *Consideration of Anticompetitive Effects*

Many petitioners, while not conceding the need for regulation, press a series of additional objections to the rules which collectively represent a charge that the Commission has failed to consider anticompetitive effects of the regulatory strategy it has adopted. For analytic purposes the various theories of petitioners can be treated as two: first, a contention that the Commission has inadequately resolved traditional antitrust objections to the strengthening of broadcasters' monopsony power over the feature film and sports broadcasting industries; and, second, that the Commission has similarly been oblivious to the rules' negative impact on its otherwise longstanding policy favoring diversification of control of programming choices. We will treat these arguments seriatim.

We cannot fathom how the Commission reached the conclusion that the balance here should be struck in favor of regulation. Paragraph 150 of the First Report and Order, which contains the only discussion purporting to be an explanation, is obviously flawed and is completely irrelevant to most of the antitrust issues raised. The Commission analogizes the regulatory problem here to that presented in *United States v. Southwestern Cable Co.*, supra. This is simply incorrect. The exclusivity and distant signal rules reviewed there

did not implicate questions of anticompetitive impacts on filmmakers or sports entrepreneurs and presented no occasion for an attempt to quantify or qualify the competitive harm resulting from reinforcing broadcasters' monopsony power over those industries. Nor did these rules address situations of alleged selective siphoning; the harm to be avoided was fragmentation of audiences leading to the financial demise of UHF and educational broadcasting. Economic harm in this sense is not at issue here, as the Commission itself recognizes.

Petitioners' second argument—that the pay cable rules consolidate network control over program production and selection and are, therefore, inconsistent with other Commission policy and, perhaps, the First Amendment—had more force prior to repeal of the series restrictions in the Second Report and Order, *supra*. We agree with petitioners that the series rule would have restricted the market for independently produced entertainment programming, thereby creating an effect directly contrary to that sought to be achieved in the Prime Time Access Rules proceedings. As a result the series rules could not have been sustained on the record before us. . . . The related argument of some petitioners that the rules will have the effect of reducing the economic feasibility of cablecasting minority-interest programming, and hence of reducing diversity, is plausible, but we cannot say on this record that the postulated effect is more than speculative. Certainly an inquiry into this problem would be appropriate in any proceedings the Commission might have on remand. . . .

III. FIRST AMENDMENT

More stringent, but substantially similar, rules to those adopted in the dockets under review here were upheld by this court in *NATO v. FCC*, *supra*, and it is wholly because of this precedent that the Commission believes the instant rules to be consistent with the First Amendment. See First Report and Order, *supra*, 52 FCC2d at 44 (¶ 148), JA 68. Although we today reaffirm our holding in *NATO*, see Part V *infra*, we decline to extend *NATO* to Commission regulation of cable television since we find important differences between cable and broadcast television and “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 89 S.Ct. 1794, 1805, 23 L.Ed.2d 371 (1969).

Despite the novelty and complexity of the antisiphoning rules challenged in *NATO*, the constitutional question decided there was straightforward: whether a grant of a broadcast license could be conditioned on terms which made reference to “the kind and content of programs being offered to the public.” . . . Review of Commission deliberations culminating in the rules affirmed in *NATO* reveals plainly that the sole purpose of the subscription broadcast tele-

vision inquiry and the pilot subscription television operations was to determine how to allocate television licenses so that the overall service rendered a community was the "best practicable." Therefore, there was no need for *NATO* to break new First Amendment ground, and a reading of the *NATO* opinion will show that it did not do so.

The First Amendment theory espoused in *National Broadcasting Co.* and reaffirmed in *Red Lion Broadcasting Co.* cannot be directly applied to cable television since an essential precondition of that theory—physical interference and scarcity requiring an umpiring role for government—is absent. Interference among speakers on a single cable is controlled by electrical equipment which divides the cable into channels and by the owners of the cable system who determine who shall have access to each channel and for how long. Nor is there any apparent physical scarcity of channels relative to the number of persons who may seek access to the cable system. Currently cable systems have the capacity to convey over 35 channels of programming. Technology is now available that would increase capacity to 80 channels, and in the future channel capacity may become unlimited. See *br.* for petitioner Home Box Office, Inc. at 9; Note, Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper, 51 N.Y.U.L.Rev. 133, 135 (1976). And even though there is some evidence that local distribution of cable signals is a natural economic monopoly, which may raise the spectre of private censorship by the system owner, there is no readily apparent barrier of physical or electrical interference to operation of a number of cable systems in a given locality. In any case, scarcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press, see *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247–256, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point.

. . . Regulations intended to curtail expression—either directly by banning speech because of a harm thought to stem from its communicative or persuasive effect on its intended audience . . . or indirectly by favoring certain classes of speakers over others, . . . —can be justified (if at all) only under categorization doctrines such as obscenity, "fighting words," or "clear and present danger." . . . Regulations evincing a "governmental interest * * * unrelated to the suppression of free expression * * *," *United States v. O'Brien*, supra, 391 U.S. at 377, 88 S.Ct. at 1679, are treated differently, however. If such regulations "[1] further an important or substantial governmental interest; * * * and [2] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that in-

terest," *id.* (bracketed numbers added), then the regulations are valid.²⁷

Applying *O'Brien* here, we cannot say that the pay cable rules were intended to suppress free expression. The narrow purpose espoused by the Commission—protecting the viewing rights of those not served by cable or too poor to pay for cable—is neutral. Indeed, it is not unlike a regulation quieting hecklers or enforcing order on the radio spectrum. As in those situations, the conduct regulated would otherwise blot out transmission of a message, regardless of its content, to at least a segment of its potential audience. . . .

The Commission seeks only to channel movie and sports material to its intended recipients over broadcast television, rather than pay cable, whenever the economics of advertiser-supported programming permit. If the rules and their associated waiver provisions²⁸ achieved no more than this—a proposition which will be examined in detail below—they would present no barrier: material suitable for broadcast would be broadcast; material financially viable only on cable would be on cable. Those served by pay cable would surely be served by broadcast television as well and, therefore, would have access to anything that could profitably be presented on either medium. Those without cable would at least be no worse off than at present. Conversely, the speech of movie and sports producers would not be affected because the regulations would not stand as a barrier to presentation of any material to one or both audiences.

The speech of cablecasters, while undoubtedly inhibited, is similarly free from restrictions abridging freedom of expression. The rules clearly have no effect on traditional broadcast modes of persuasive speech such as news broadcasts or editorials. Nor do they affect films which the cablecaster has himself produced. Moreover, they do not even affect the cablecaster's ability to exhibit the work of others so long as no per-channel or per-program fee is charged. The sole effect of the rules is to prohibit the cablecaster from exhibiting for a separate fee the artistic work of others. Finally, no claim is made here that this narrow exclusion prevents the cablecaster from making an effective presentation of his views, nor for

27. Although *O'Brien* was a case involving draft card burning, it has not been limited to that sort of symbolic speech situation. See, e. g., *Procunier v. Martinez*, *supra* note 90 (prisoners' mail); *A Quaker Action Group v. Morton*, 170 U.S.App.D.C. 124, 516 F.2d 717 (1975) (public gatherings at the White House). See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78-82, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (Powell, J., concurring) (obscenity zoning).

28. The provision relating to movies is set out . . . *supra*. The waiver

provisions for sports programming are less clear. The Commission makes no mention of any waiver policy with respect to specific sports events. On the other hand, cablecasters may seek a waiver of the non-specific sports rules if they can demonstrate that a reduction in broadcast presentation of such events has been caused by "reasons completely unrelated to program siphoning." *First Report and Order*, . . . 52 FCC2d at 62, JA 86.

that matter is any claim made that cablecaster "endorsement" of the views of a particular film adds importantly to the message of the filmmaker.

Despite our conclusion that content regulations are not at issue here, we nonetheless hold that the rules as promulgated and as put into effect by the Commission cannot be squared with *O'Brien's* other requirements and, consequently, they violate the First Amendment. The no-advertising and 90-percent rules clearly violate *O'Brien's* first criterion. Not only do they serve no "important or substantial * * * interest," 391 U.S. at 377, 88 S.Ct. 1673, they serve no purpose which will withstand scrutiny on this record. The sports and features films rules fare no better. We have already concluded that the Commission has not put itself in a position to know whether the alleged siphoning phenomenon is a real or merely a fanciful threat to those not served by cable. Instead, the Commission has indulged in speculation and innuendo. *O'Brien* requires that "an important or substantial governmental interest" be demonstrated, however—a requirement which translates in the rulemaking context into a record that convincingly shows a problem to exist and that relates the proffered solution to the statutory mandate of the agency. The record before us fails on both scores. Moreover, we doubt that the Commission's interest in preventing delay of motion picture broadcasts could be shown to be important or substantial on any record.²⁹

Finally, we think the strategy the Commission has pursued in implementing its interest in preventing siphoning creates a restriction "greater than is essential to the furtherance of that interest." *Id.* The Commission's approach to preserving the present quantity and quality levels of broadcast television has not been to set such levels directly. Instead, the Commission has sought to divide film and sports material into that suitable for broadcasting and that which can be shown, if at all, only on cable, and has left broadcasters free to choose from among the former without any competition from cable television. Even assuming that such a scheme is reasonable, a position contested by a number of petitioners, it is nonetheless very clear that, if such a strategy is to be used, the rules must be closely tailored to the end to be achieved so that material not broadcast (because it is unsuitable or unsalable) is readily available to cablecasters. Otherwise the rules will curtail the flow of programming to those served by cable and willing to pay for it, with a consequent loss of diversity and unnecessary restriction of the First Amendment rights of producers, cablecasters, and viewers.

29. The only evidence in the record before us relating to the effect of delay on the public interest is uncontradicted evidence showing that delay has

no effect on the popularity of feature film material. See Comments of Program Suppliers in Docket No. 19554, at 21, JA 386 (Nov. 1, 1972).

[W]e agree with numerous petitioners that the rules are grossly overbroad. Examples of this are legion. It is undisputed, for example, that many films will never be suitable for broadcast television because of their limited appeal, their sophisticated subject matter, or their repeated releases to theaters. Yet, after a film is three years old its exhibition on cable television is restricted regardless of whether it was ever suitable for broadcast. Similarly, in some circumstances the sports rules have the anomalous effect of reducing the number of non-specific games that can be shown on cable television at the same time that broadcasters are reducing the number of games they will show. This provision is apparently justified on the ground that it is too difficult to monitor the reasons broadcasters cut back their game schedules and that at least some cutbacks might be caused by cable competition. However, this record reveals no reason to think that cutbacks represent siphoning any more than they represent editorial or commercial judgment. Where the First Amendment is concerned, creation of such a rebuttable presumption of siphoning without clear record support is simply impermissible. Other examples could be cited, but this would only belabor points already extensively presented to the Commission. To provide guidance to the Commission for any proceedings it may have on remand, however, we conclude by reminding the Commission that prior restraints on speech are heavily disfavored and can be sustained only where the proponent of the restraint can convincingly demonstrate a need.

V. SUBSCRIPTION BROADCAST TELEVISION

Over six years ago this court rendered its decision in *NATO v. FCC*, supra, affirming in all respects subscription broadcast television rules promulgated in the Commission's Fourth Report and Order. That inquiry, unlike the subscription broadcast rules here under review, was based on elaborate data generated in a two-year trial of subscription broadcast television in Hartford, Connecticut. Since *NATO* it appears that few, if any, subscription broadcast stations have begun operation on a commercial basis, and consequently the best information available about the general effect of subscription television on conventional broadcasting is that in the Fourth Report. Because of these essentially static factual circumstances, it would be inappropriate for us to reopen now questions of the overall rationality of anti-siphoning rules as they pertain to subscription broadcast television and, as a result, we agree with a number of petitioners that the only question for review here is the rationality of the amendments to the subscription broadcast television rules announced in Dockets 18397 and 19554. We further hold that *NATO* forecloses general antitrust and First Amendment objections to the subscription broadcast television rules.

The differences between the rules passed on in *NATO* and the present subscription broadcast rules can be quickly summarized. The no-advertising and 90-percent rules remain unchanged. The feature film rules allow an additional year of unrestricted subscription broadcasting after general release and generally relax requirements for subscription broadcasting of films over ten years old. In addition, foreign language films are no longer covered by the rules and the criterion for subscription showing of films three to ten years old has been modified to allow exhibition when a conventional broadcaster in the market holds a present contractual right to exhibit the film. The rule prohibiting subscription exhibition of series programming has been dropped. The sports rules have also been modified; however, no one here challenges the sports rules as applied to subscription broadcast television.

We turn first to the feature film rules. There is ample evidence in the record supporting the Commission's conclusion that "[f]ew films are televised before they are three years old, and most are four years or older before their first telecast." First Report and Order, *supra*, 52 FCC2d at 51, JA 75. In particular, we note the extensive surveys of the program suppliers which suggest that the average age of films shown on broadcast television is over five years. Therefore the Commission's further conclusion that the period of subscription viewing of feature films could be extended to three years from date of release without affecting broadcasting exhibition of feature films is clearly reasonable. We also agree with the Commission that no purpose would be served by restricting subscription exhibition of films which could not be siphoned because they were under contract to a broadcaster. Finally, we do not think it unreasonable for the Commission to categorize other films unsuitable for broadcasting through its foreign language and after-ten-years rules. Even a challenger of these rules, Metromedia, could only demonstrate that 23 percent of older films were suitable for broadcasting. Because the films to be protected constitute only a small fraction of the total available pool, a blanket prohibition of subscription use of these films would raise serious questions of overbreadth. Finally, we are unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn, for example the ten-year age, are patently unreasonable, having no relationship to the underlying regulatory problem.

We also affirm the Commission's deletion of the series programming rule. The Commission's discussion in its Second Report and Order, — FCC2d —, 35 P & F Radio Reg.2d 767 (1975), JA 131, concludes that conditions now existing in the program production industry are adequate to supply series programming for both cable and conventional broadcast use, a conclusion which we agree is amply supported by public comments. Further, as we indicated in discussing the pay cable rules, the series restrictions reflect a policy com-

pletely opposed to that adopted contemporaneously in the Prime Time Access Rules proceedings and consequently could not have been affirmed without a more detailed explanation than the Commission has so far proffered.³⁰

STERLING MANHATTAN CABLE TELEVISION, INC., 38 F.C.C.2d 1149, 26 R.R.2d 610 (1973). Sterling, a cable television system serving the southern portion of Manhattan, complained that New York Telephone Company, the telephone company serving New York City, was acting unlawfully in leasing telephone lines for distribution of motion picture films to hotel rooms in southern Manhattan. The telephone lines were leased by the Trans-World Communications Division of Columbia Pictures Industries in order to provide closed-circuit motion picture service to five hotels. The signal source of the films was in Manhattan, and they were transmitted over the leased channels of the telephone company to the master antenna systems of the hotels, and, for a fee, were available to hotel guests on designated channels of the television sets in their rooms. It was alleged that Trans-World planned to develop its offering to the point where it could provide closed-circuit service to 160,000 hotel rooms, one sixth of the nation's total.

Sterling contended the New York Telephone could not carry the closed-circuit films over leased lines without a certificate from the FCC under sec. 214 because such transmissions were interstate wire communications. The FCC disagreed, observing that all the facilities involved were located within New York City, that the telephone company provided the service pursuant to a tariff for intrastate service filed with the New York Public Service Commission, and that the leased lines were not being employed to relay broadcast signals. Cases involving the retransmission of broadcast signals, inherently interstate in nature, were held to be inapplicable. The FCC also considered it immaterial that the films involved originated out-

30. [Ed] Concurring opinions have been omitted.

On *Home Box Office*, see notes 6 Fordham Urban L.J. 647 (1978); 53 Ind. L.J. 821 (1978); 30 U.Fla.L.Rev. 718 (1978).

In *Subscription Television Movie Restrictions*, 41 R.R.2d 1491 (1977), and *Repeal of Program Restrictions on Subscription Television*, 42 R.R.2d 1207 (1978), the FCC rescinded all limitations on the programming of over-the-air subscription services in light of the invalidation of such restrictions in *Home Box Office* as they applied to pay cable.

See also *Home Box Office, Inc. v. FCC*, 587 F.2d 1248 (D.C.Cir. 1978), sustaining the Commission's termination of an inquiry into the exclusivity provisions of contracts between motion picture distributors and television stations and networks, 41 R.R.2d 839 (1977). The invalidation of the FCC's "anti-siphoning" regulations was regarded by the Commission and the Court as a legitimate basis for permitting market developments, unimpeded by FCC regulation, to determine whether the imposition of regulations was needed.

side of New York, and were transported to New York in interstate commerce: "the wire communication here involved starts with the transmission over Telephone Company facilities, and not with the transportation from outside New York State of movie films intended for exhibition in New York City."

Sterling further contended that Trans-World's activity, if permitted to continue, would have a serious adverse impact on cable television and television broadcast stations in New York City, and that, since the hotel master antenna systems were engaged in receiving and distributing broadcast signals as well as transmitting Trans-World's movies, Trans-World's system also was engaged in interstate communications. The FCC considered Sterling's claim of adverse impact to be speculative and unsupported by factual allegations "even if we assume, *arguendo*, that any wire communication service involving a TV receiver set can be regarded as interstate if it has substantial and close impact upon the interstate scheme involving transmissions to such receivers." The FCC noted that it was instituting a broad proceeding to consider the competitive relationships among various methods of transmitting motion pictures to hotels and existing cable and broadcast services, and left open the possibility that developments could result in some adverse impact on television and cable services. "If Trans-World or some entrepreneurs should develop new plans that change drastically the nature of the issue we are exploring in the proceeding (e. g., service to residential apartments, rather than hotels, which are predominantly transient, or transmission of program material other than feature films), we can promptly be notified of such plans, and we can act to maintain our authority to protect the public interest."

Finally, the Commission rejected the contention that, in the context of this case, jurisdiction under sec. 214 could be premised on the fact that Trans-World's system could be employed for interconnected interstate communications—a matter disputed by Trans-World—even if it was as yet not so employed. Sterling's complaint was denied "without prejudice to any action the Commission may find appropriate" as the result of its newly instituted proceeding.

Note on Multipoint Distribution Service (MDS). One of the methods of distributing subscription television signals is Multipoint Distribution Service or MDS. The FCC first gave formal recognition to the service in 1962; it promulgated revised regulations in Multipoint Distribution Service, 45 F.C.C.2d 616, 29 R.R.2d 382 (1974). MDS consists of a fixed station transmitting more or less omnidirectionally to numerous fixed receivers with directive antennas. The intelligence which is transmitted is supplied by the subscriber and may consist of private television, high speed computer data, facsimile, control information, or other communications capable of radio transmission. The transmission is one-way; the audience can-

not use the system to respond. The range of transmission (usually up to about 25 miles) depends on the power of the transmitter, the size and characteristics of the receiving antenna and the existence of a line of sight path between transmitter and receiver.

The carrier's tariff generally specifies the technical service parameters and a charge based on transmission time (e. g., by the hour or half hour) and on the number of receiver locations. The customer normally supplies the carrier with a video tape or motion picture film to be transmitted or advises the carrier of any interconnection with long distance facilities which may be required in the case of origination in another town. In many cases, a carrier also supplies television cameras and other equipment necessary for live origination of programming by a customer. Common MDS services include management communications, sales meetings, employee education, continuing professional education, and specialized entertainment programming (particularly subscription television).

The transmitted MDS signal is: (1) intercepted by a directive parabolic or horn-type antenna erected at each customer selected receiving location; (2) converted from the microwave frequency to a selected lower frequency; (3) passed through a decoder which senses an address code and activates the receiver if the address code corresponds to that receiving site; and (4) displayed upon an unused channel of a standard television receiver (or fed to a data terminal, facsimile device, etc., in the case of a nontelevision signal).

In authorizing the service, the FCC reached a number of policy conclusions:

First, the MDS carrier was not to control the content of the transmitted signals. Limits were imposed on service to affiliated enterprises and on carrier production of the information transmitted. The FCC also expressed concern about a single large subscriber excluding others by preempting all or substantially all of available MDS capacity; but no regulation was considered necessary on this matter at the inception of the service.

Second, the FCC determined to provide a second channel for MDS service where frequency availability made such a course practicable. A second channel was expected to be able to function satisfactorily at most locations. The FCC further indicated that it would seek to encourage competition by declining to license both channels to the same carrier, at least in the first instance. In the case of expansion, a newcomer would be given a preference over an incumbent.

Third, the FCC declined to license receiving sites and decided to impose no restrictions on such sites.

Regulations embodying the FCC's conclusions provide as follows:

Authorizations are to be granted to existing and proposed common carriers. In addition to the usual requirements of fitness, fre-

quency availability, and public interest, convenience and necessity, the applicant must show that at least 50% of the service rendered will be to "subscribers who are not affiliated or related to the applicant." 47 C.F.R. § 21.900. The carrier generally may render "any kind of communications service consistent with the Commission's rules and the legally applicable tariff of the carrier, provided that: (1) the carrier is not substantially involved in the production of, the writing of, or the influencing of the content of any information to be transmitted over the facilities; (2) the carrier does not render service to any [affiliated entity] whenever the total hours of service rendered to related subscribers exceeds the total hours of service rendered to unrelated subscribers within any calendar month; (3) the carrier controls the operation of all receiving facilities (including any equipment necessary to convert the signal to a standard television channel but excluding the television receiver); and (4) the carrier's tariff allows the subscriber the option of owning the receiving equipment (except for the decoder) so long as [the type, condition, installation, maintenance and operation of the equipment conform to the carrier's specifications]." Further, the "carrier's tariff shall fully describe the parameters of the service to be provided, including the degree of privacy of communications a subscriber can expect in ordinary service," and, on request, shall "provide for complete security of transmission." 47 C.F.R. § 21.903.

Frequencies in the band 2150–2162 MHz are made available for assignment to stations in this service. But all such frequencies are shared with other services. Three channels are available: 2150–2156 MHz (channel 1), 2156–2162 MHz (channel 2) and 2156–2160 MHz (channel 2A). Channels 2 and 2A are alternatives and would not be licensed in the same community. Most of the FCC's regulations are concerned with avoiding interference among stations in this service and between such stations and other authorized services. 47 C.F.R. §§ 21.901–21.902, 21.904–21.906. Transmitting power normally is limited to 10 watts, except that power up to 100 watts may be authorized upon a special showing. 47 C.F.R. § 21.904. Carriers transmitting television signals must meet prescribed standards except where specifically exempted. 47 C.F.R. §§ 21.907–21.908.

"An application for a second channel will not be accepted from a licensee or permittee of, or applicant for, another channel in this service (or any entity related thereto) in the same metropolitan area unless the applicant: (1) has operated the original channel for a minimum of one year; and (2) can demonstrate that there exists a public demand for additional service which is not likely to be satisfied by a competing carrier." 47 C.F.R. § 21.901(d).

The FCC has refused to permit state regulatory requirements to impede the development of MDS. See *Midwest Corp.*, 38 F.C.C. 2d 897, 26 R.R.2d 416 (1973), on reconsideration, 53 F.C.C.2d 294, 33 R.R.2d 1551 (1975); *Orth-O-Vision, Inc.*, 69 F.C.C.2d 657, 44

R.R.2d 329 (1978). In the latter case, the state purported to regulate master antenna television systems (MATVs) that were customers of an MDS subscriber (Home Box Office); the FCC ruled that the purpose and effect of the state regulation was to prohibit the MATVs from receiving federally authorized MDS transmissions and that the state regulation was therefore preempted and invalid.³¹

B. PUBLIC BROADCASTING

Note on the Development of Public Broadcasting. Among the earliest radio stations on the air were some operated by colleges and universities. Under the Radio Act of 1927 and the Communications Act of 1934, educational and other non-profit organizations obtained licenses in the same manner as commercial broadcasters. With respect to standard (AM) broadcasting, the situation persists to the present day: any licensee on any frequency may conduct either commercial or noncommercial operations. Virtually all AM stations presently operate on a commercial basis.

When FM broadcasting began on an experimental basis in the late thirties, noncommercial operations were authorized. The restructuring of FM allocations in 1945 reserved 20 FM channels (of a total of one hundred) for noncommercial broadcasting. The predecessor of the contemporary regulatory structure, 47 C.F.R. § 73.501 et seq., was promulgated in 1947. See 12 Fed.Reg. 1369 (1947). The service developed slowly, partly because of the slow development of FM generally.

When the FCC made a major restructuring of television channel assignments in 1952, 242 assignments were reserved for educational purposes. See Sixth Report and Order, 17 Fed.Reg. 3905, 3908 (1952). The number has been substantially increased in the intervening years to 655, 127 VHF's and 528 UHF's. See 47 C.F.R. § 73.606. However, in 1952, in 69 of the top 100 markets no VHF channels were available for reservation for educational purposes, and educational broadcasters were subjected to the disabilities associated with UHF assignments—frequencies which could not be received by most television sets then in the hands of the public.

The initial financial support for educational television came from colleges and universities, the first university television station (KUHT, Houston) beginning broadcasting in 1953. The first non-commercial television station supported by a non-profit community group (WQED, Pittsburgh) was licensed in 1954. Starting in 1951, the Ford Foundation became a major source of funding for noncommercial educational television stations; among other activities, it

31. For a comparative proceeding involving multiple MDS applicants, see *Lipper v. International Television Corp.*, 69 F.C.C.2d 2158, 44 R.R. 1145 (1978). See also *Home Box Office v.*

Pay TV of Greater New York, 45 R.R.2d 927 (E.D.N.Y.1979) (providing protection against unauthorized interception of MDS signals).

founded a center for program origination and support which in 1959 became National Educational Television (NET).

Congress in 1962 passed the Educational Television Facilities Act, authorizing \$32 million over a five-year period for construction of physical facilities (studios, transmitters and the like), subject to a requirement that federal funds be matched by an equal amount of non-federal funds. 76 Stat. 64 (1962), as amended, 47 U.S.C.A. §§ 390-395. The program, although revised both in scope and in detail, continues to provide federal financial assistance for station construction, and is administered by the Department of Health, Education and Welfare. Also in 1962, Channel 13 in New York City was purchased from its commercial owners for \$5.75 million. This station was to become the largest noncommercial television operation in the country.

In 1967, the first Carnegie Commission reported on the state of noncommercial television and recommended additional federal and other financial assistance. The year before, there were 126 ETV stations on the air, operating with a total income of \$58.3 million—derived principally from state and local governments (\$26.7 million), state universities (\$6.5 million), private foundations (\$8.4 million), and the federal government (\$6.5 million). The Commission recommended a dedicated federal tax on television receivers to finance a non-profit, non-government entity which would provide program support and interconnection for the nation's ETV stations. Congress responded with the Public Broadcasting Act, 81 Stat. 868 (1967), as amended, 47 U.S.C.A. § 396. The statute created the Corporation for Public Broadcasting (CPB), with a Board of Directors of 15 members appointed by the President and confirmed by the Senate. Funds for CPB were made available by annual appropriations and used to support ETV station operations as well as program procurement. However, CPB was prohibited from producing programs, from operating stations or from establishing station interconnections.

To some extent, national operating responsibilities denied CPB were assumed by the Public Broadcasting Service (PBS), formed by ETV stations in 1969 to operate interconnection services and to play a role in program origination and coordination. Thereafter programming emanated from production centers funded by federal and non-federal sources, from individual stations with similar multiple funding, and from a variety of independent sources. Beginning in 1971, friction developed between CPB and PBS concerning programming responsibilities. At the same time, the Nixon Administration, concerned about a perceived anti-administration bias in PBS public affairs programs, attempted to shift programming authority from the national organizations to local stations. The veto of CPB's funding bill in 1972 led to further disarray in public television ranks and to a cessation of almost all CPB support for public affairs programs.

In 1973, CPB and PBS came to an understanding that CPB would finance interconnection and some programming, but would make more funds available to the stations for program procurement; as to directly funded programs, CPB and PBS would proceed in consultation. There emerged in 1974 a new organization, the Station Program Cooperative (SPC), which provided the means by which the individual stations, with their increased funds, could pool their resources to finance national programming by making their selections known to PBS.

In 1975, the first multi-year authorization measure passed Congress, providing for federal funds increasing from \$103 million in fiscal 1977 to \$160 million in fiscal 1980. 89 Stat. 1099 (1975), as amended, 47 U.S.C.A. §§ 396, 397. The legislation required \$2.50 in nonfederal funds for every \$1.00 in federal funds and imposed a requirement that 40 to 50 percent of federal funds be passed through to the stations as unrestricted grants—a statutory embodiment of the 1973 CPB–PBS compromise.

In 1977, a proposal to interconnect ETV stations by satellite was approved by the FCC. Public Broadcasting Service, 39 R.R.2d 1516 (1977).

The Public Telecommunications Financing Act of 1978, 92 Stat. 2405 (1978), continued the trend toward increased federal funding, multi-year authorizations, and the requirement of flow-through of federal funds to individual stations. Details are included in the provisions set forth in the Statutory Appendix. The structure of public television broadcasting in 1978 consisted of 280 ETV stations (authorized or on the air); the CPB as a source of funding of individual station operations and, to a limited extent, of national program production; and PBS, manager of the system's interconnection arrangements and, through station activities in connection with SPC, a source of national programming. The entities continue to function with considerable friction, particularly with respect to the relative roles of each in the determination of programming priorities. In fiscal year 1977, public television had a total income of \$416.5 million, of which 27.3% came from the federal government and the remainder from state and local governments (30.1%), colleges (9.5%), foundations (5.2%), business (9.1%), subscribers and auctions (13.4%) and other sources (4.9%).

Public television stations can be viewed in 80 percent of the nation's homes. Approximately 63 percent of television households watch public television at least once per month. However, the average prime time share of television households watching public television is approximately 2.4 percent, compared to 30 percent for the average commercial network; the weekly cumulative audience is 33 percent, compared to 90 percent for the average commercial network.

Public radio stations also are encompassed by the legislation creating CPB, and receive federal funds through CPB. In 1970, National Public Radio (NPR) was formed to undertake both interconnection and program production responsibilities. In 1978, there were nearly 200 public radio stations, qualified to receive CPB grants, with over 4.2 million regular listeners. There also were approximately 800 additional public radio stations which were not qualified for CPB assistance because they did not meet minimum operating standards.

In early 1979, the second Carnegie Commission issued a report on public broadcasting, recommending major changes in organization and financing. Entitled *A Public Trust: The Landmark Report of the Carnegie Commission on the Future of Public Television*, the document is a valuable source of information, some of which has been used in preparing this summary.³²

CODE OF FEDERAL REGULATIONS

Title 47

§ 76.621 Noncommercial educational stations.

In addition to the other provisions of this subpart, the following shall be applicable to noncommercial educational television broadcast stations.

(a) Except as provided in paragraph (b) of this section, noncommercial educational broadcast stations will be licensed only to non-profit educational organizations upon a showing that the proposed station will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a non-profit and noncommercial television broadcast service.

(1) In determining the eligibility of publicly supported educational organizations, the accreditation of their respective state departments of education shall be taken into consideration.

(2) In determining the eligibility of privately controlled educational organizations, the accreditation of state departments of education or recognized regional and national educational accrediting organizations shall be taken into consideration.

(b) Where a municipality or other political subdivision has no independently constituted educational organization such as, for ex-

32. On public broadcasting generally, see Carnegie Commission on Educational Television: *A Program for Action* (1967); Alexander, *Public Television and the "Ought" of Public Policy*, 1968 Wash.U.L.Q. 35; F. Powledge, *Public Television: A Question of Survival* (ACLU 1972); J. Macy, *To Irrigate a Wasteland* (1974); Chase, *Public Broadcasting and the Problem*

of Government Influence: *Towards a Legislative Solution*, 9 U.Mich.J.L. Reform 62 (1975); D. Cates and M. Nyhan, *The Future of Public Broadcasting* (1976).

Compare Crandall, *The Economic Case for a Fourth Commercial Television Network*, 22 Public Policy 513 (1974).

ample, a board of education having autonomy with respect to carrying out the municipality's educational program, such municipality shall be eligible for a noncommercial educational television broadcast station. In such circumstances, a full and detailed showing must be made that a grant of the application will be consistent with the intent and purpose of the Commission's rules and regulations relating to such stations.

(c) Noncommercial educational television broadcast stations may transmit educational, cultural and entertainment programs, and programs designed for use by schools and school systems in connection with regular school courses, as well as routine and administrative material pertaining thereto.

(d) A noncommercial educational television station may broadcast programs produced by or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. The payment of line charges by another station network, or someone other than the licensee of a noncommercial educational television station, or general contributions to the operating costs of a station, shall not be considered as being prohibited by this paragraph.

(e) Each station shall furnish a non-profit and noncommercial broadcast service. However, noncommercial educational television stations shall be subject to the provisions of § 73.654 to the extent that they are applicable to the broadcast of programs produced by, or at the expense of, or furnished by others, except that no announcements (visual or aural) promoting the sale of a product or service shall be broadcast in connection with any program: provided, however, that where a sponsor's name or product appears on the visual image during the course of a simultaneous or rebroadcast program either on the backdrop or in a similar form, the portions of the program showing such information need not be deleted.

NOTE 1: Announcements of the producing or furnishing of programs, or the provision of funds for their production, may be [made] no more than twice, at the opening and at the close of any program, except that where a program lasts longer than one hour an announcement may be made at hourly intervals during the program if the last such announcement occurs at least 15 minutes before the announcement at the close of the program. The person or organization furnishing or producing the program, or providing funds for its production, shall be identified by name only, except that in the case of a commercial company having bona fide operating divisions or subsidiaries one of which has furnished the program or funds, the division or subsidiary may be mentioned in addition to or

instead of the commercial company. No material beyond the company (or division or subsidiary) name shall be included. . . . No mention shall be made of any product or service with which a commercial enterprise being identified has a connection, except to the extent the name of the product or service is the same as that of the enterprise (or division or subsidiary) and is so included. A repeat broadcast of a particular program is considered a separate program for the purpose of this Note.

NOTE 2: Announcements may be made of general contributions of a substantial nature which make possible the broadcast of programs for part, or all, of the day's schedule. Such announcements may be made at the opening and closing of the day or segment, including all of those persons or organizations whose substantial contributions are making possible the broadcast day or segment. In addition, one such general contributor may be identified once during each hour of the day or segment. The provisions of Note 1 of this section as to permissible contents apply to announcements under this Note.

NOTE 4: The provisions of Notes 1 and 2 of this section shall not apply during the broadcast times in which "auctions" are held to finance station operation. Credit announcements during "auction" broadcasts may identify particular products or services, but shall not include promotion of such products or services beyond that necessary for the specific auction purpose. Visual exposure may be given to a display in the auction area including the underwriter's name and trademark, and product or service or a representation thereof.

NOTE 5: The numerical limitations on permissible announcements contained in Notes 1 and 2 of this section do not apply to announcements on behalf of noncommercial, non-profit entities, such as the Corporation for Public Broadcasting, state or regional entities, or charitable foundations.³³

Note on additional programming regulations applicable to public broadcasting. In addition to the restrictions on commercialization, public broadcasting entities are subject to several additional limitations:

CPB may not "contribute to or support any political party or any candidate for public office." 47 U.S.C.A. § 396(f)(1)(3).

33. The FCC examined a number of promotional practices in Noncommercial Educational Broadcasting Sta-

tions, 43 R.R.2d 731 (1978), answered a number of specific questions, and proposed revised regulations.

CPB is to make programs available to stations "with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature." 47 U.S.C.A. § 396(g)(1)(A).

Noncommercial educational broadcasting stations may not "engage in editorializing or . . . support or oppose any candidate for public office." 47 U.S.C.A. § 399(a).

Licensees receiving financial assistance under the Public Broadcasting Act are required to retain for 60 days "an audio recording of each of its broadcasts of any program in which any issue of public importance is discussed." 47 U.S.C.A. § 399(b).

In *Community-Service Broadcasting of Mid-America, Inc.*, 593 F.2d 1102, 43 R.R.2d 1675 (D.C.Cir. 1978), a divided Court of Appeals held that § 399(b) of the Communications Act, and the FCC's implementing regulations, violated the First Amendment. These provisions required that any noncommercial educational radio or television station, which received any federal funds under the Communications Act, make audio recordings of any programs "which consist of talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round-tables, and similar programs primarily concerning local, national, and international public affairs." The recordings were required to be retained for 60 days. Because of the dependence of noncommercial stations upon public funding, the requirement was held to have a chilling effect on the expression of views on public issues by such stations, because the recordings facilitated the task of those who might seek to use the legislative process to curtail the funds, or restrict the programming freedom, of noncommercial stations. The program-by-program review also would permit the exertion of official pressures short of adverse legislation. At the same time, the statute could not be defended as ancillary to the "objectivity and balance" standard of § 396(g)(1), because that standard was applicable only to the Corporation for Public Broadcasting, "and even there only to a narrower category of programming dealing with controversial issues." The Court found no substantial government interest which would justify the burden imposed on the free speech of noncommercial broadcasters by § 399(b).

In *Accuracy in Media, Inc. v. FCC*, 172 U.S.App.D.C. 188, 521 F.2d 288 (1975), certiorari denied 425 U.S. 934, 96 S.Ct. 1664, 48 L. Ed.2d 175 (1976), the Court of Appeals sustained the FCC's ruling that the agency lacked authority to enforce § 396(g)(1)(A) of the Public Broadcasting Act of 1967, 47 U.S.C.A. § 396(g)(1)(A), specifying that the Corporation for Public Broadcasting shall facilitate development of programming for noncommercial stations "with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature." While the FCC retained authority

to enforce the fairness doctrine against individual noncommercial stations, the Court held that only Congress could enforce the terms of § 396(g)(1)(A).³⁴

34. Accord, *Network Project v. Corporation for Public Broadcasting*, 561 F.2d 963 (D.C.Cir. 1977) (private parties lack standing to enforce the objectivity and balance requirement of § 398(g)(1)(A)).

On remand from *Network Project*, the District Court held that the First Amendment did not confer a right of action upon viewers or program producers against CPB and PBS for elimination of funding for controversial programs; for requiring detailed descriptions of programs as a condition of funding; for prescreening and censoring programs; for requiring changes in programs prior to distribution; and for notifying local stations of programs considered to be contro-

versial. The Court held that there was insufficient government involvement to constitute state action; that Congress had not intended noncommercial television to be a "public forum"; and that the change in administrations had eliminated the instances of governmental interference upon which plaintiffs were relying. 45 R.R.2d 701 (D.D.C. Jan. 23, 1979).

See Canby, *First Amendment and the State as Editor: Implications for Public Broadcasting*, 42 *Texas L.Rev.* 1123 (1974); Lindsey, *Public Broadcasting: Editorial Restraints and the First Amendment*, 28 *Fed.Com.B.J.* 63 (1975); Note, "Balance and Objectivity" in *Public Broadcasting: Fairer than Fair?* 61 *Va.L.Rev.* 643 (1975).

STATUTORY APPENDIX

COMMUNICATIONS ACT OF 1934

48 Stat. 1064 (1934), as amended, 47 U.S.C.A. § 151 et seq.

TITLE I—GENERAL PROVISIONS

PURPOSES OF ACT; CREATION OF FEDERAL COMMUNICATIONS COMMISSION

Sec. 1. [47 U.S.C.A. § 151.]

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

APPLICATION OF ACT

Sec. 2. [47 U.S.C.A. § 152.]

(a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided . . .

. . .

DEFINITIONS

Sec. 3. [47 U.S.C.A. § 153.]

For the purposes of this Act, unless the context otherwise requires:

. . .

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals,

pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(c) "Licensee" means the holder of a radio station license granted or continued in force under authority of this Act.

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

(i) "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation.

(j) "Corporation" includes any corporation, joint-stock company, or association.

(k) "Radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.

(o) "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

(p) "Chain broadcasting" means simultaneous broadcasting of an identical program by two or more connected stations.

(cc) "Station license," "radio station license," or "license" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to this Act, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio by whatever name the instrument may be designated by the Commission.

(dd) "Broadcast station," "broadcasting station," or "radio broadcast station" means a radio station equipped to engage in broadcasting as herein defined.

(ee) "Construction permit" or "permit for construction" means that instrument of authorization required by this Act or the rules and regulations of the Commission made pursuant to

this Act for the construction of a station, or the installation of apparatus, for the transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission.

. . .

TITLE II—COMMON CARRIERS

. . .

REGULATION OF POLE ATTACHMENTS

Sec. 224. [47 U.S.C.A. § 224.]

(a) As used in this section:

(1) The term “utility” means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls, poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State;

. . .

(4) The term “pole attachment” means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(b)(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of [this Act.]

. . .

(c)(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that:

- (A) it regulates such rates, terms, and conditions; and
- (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider

the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

(d)(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(e) Upon the expiration of the 5-year period that begins on [Feb. 21, 1978] the provisions of subsection (d) of this section shall cease to have any effect.

TITLE III—PROVISIONS RELATING TO RADIO

PART I—GENERAL PROVISIONS

LICENSE FOR RADIO COMMUNICATION OR TRANSMISSION OF ENERGY

Sec. 301. [47 U.S.C.A. § 301.]

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the trans-

mission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

GENERAL POWERS OF THE COMMISSION

Sec. 303. [47 U.S.C.A. § 303.]

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall:

- (a) Classify radio stations;
- (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;
- (c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;
- (d) Determine the location of classes of stations or individual stations;
- (e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;
- (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;
- (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;
- (h) Have authority to establish areas or zones to be served by any station;

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

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

WAIVER BY LICENSEE

Sec. 304. [47 U.S.C.A. § 304.]

No station license shall be granted by the Commission until the applicant therefore shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

GOVERNMENT-OWNED STATIONS

Sec. 305. [47 U.S.C.A. § 305.]

(a) Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 301 and 303 of this Act. All such Government stations shall use such frequencies as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business, shall conform to such rules and regulations designed to prevent interference with other

radio stations and the rights of others as the Commission may prescribe.

. . .

ALLOCATION OF FACILITIES; TERM OF LICENSES

Sec. 307. [47 U.S.C.A. § 307.]

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

. . .

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. . . . Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

(e) No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license.

APPLICATIONS FOR LICENSES . . .

Sec. 308. [47 U.S.C.A. § 308.]

(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it . . .

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. . . .

ACTION UPON APPLICATIONS; FORM OF AND CONDITIONS ATTACHED TO LICENSES

Sec. 309. [47 U.S.C.A. § 309.]

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Except as provided in subsection (c) of this section, no such application—

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services . . .

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Subsection (b) of this section shall not apply—

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for—

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license

(d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing . . . The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . .

(f) When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring

emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405.

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act; (3) every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 of this Act.¹

LIMITATION ON HOLDING AND TRANSFER OF LICENSES

Sec. 310. [47 U.S.C.A. § 310.]

(a) The station license required hereby shall not be granted to or held by any foreign government or representative thereof.

(b) No broadcast or common carrier . . . license shall be granted to or held by—

(1) Any alien or the representative of any alien;

(2) Any corporation organized under the laws of any foreign government;

(3) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of

1. [Ed.] Under § 606 of the Act, the President is given extensive powers

over communications facilities in time of war or national emergency.

the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representative, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

SPECIAL REQUIREMENTS WITH RESPECT TO CERTAIN APPLICATIONS IN THE BROADCASTING SERVICE

Sec. 311. [47 U.S.C.A. § 311.]

(a) When there is filed with the Commission any application to which section 309(b)(1) applies, for an instrument of authorization for a station in the broadcasting service, the applicant—

(1) shall give notice of such filing in the principal area which is served or is to be served by the station; and

(2) if the application is formally designated for hearing in accordance with section 309, shall give notice of such hearing in such area at least ten days before commencement of such hearing.

The Commission shall by rule prescribe the form and content of the notices to be given in compliance with this subsection, and the manner and frequency with which such notices shall be given.

(b) Hearings referred to in subsection (a) may be held at such places as the Commission shall determine to be appropriate, and in making such determination in any case the Commission shall consider whether the public interest, convenience, or necessity will be served by conducting the hearing at a place in, or in the vicinity of, the principal area to be served by the station involved.

(c)(1) If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station,

only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications.

(2) The request for Commission approval in any such case shall be made in writing jointly by all the parties to the agreement. Such request shall contain or be accompanied by full information with respect to the agreement, set forth in such detail, form, and manner as the Commission shall by rule require.

(3) The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. If the agreement does not contemplate a merger, but contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application.

(4) For the purposes of this subsection an application shall be deemed to be "pending" before the Commission from the time such application is filed with the Commission until an order of the Commission granting or denying it is no longer subject to rehearing by the Commission or to review by any court.

ADMINISTRATIVE SANCTIONS

Sec. 312. [47 U.S.C.A. § 312.]

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code; ² or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause [at a hearing] why an order of revocation or a cease and desist order should not be issued. . . .

2. [Ed.] These provisions read as follows:

§ 1304. Broadcasting lottery information

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or prop-

erty by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

§ 1464. Broadcasting obscene language

Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

§ 1307. State-conducted lotteries.

(a) The provisions of [§ 1304] shall not apply to any advertisement, list of prizes, or information concerning a lottery conducted by a State acting under color of State law . . . broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts a lottery

APPLICATION OF ANTITRUST LAWS; REFUSAL OF
LICENSES AND PERMITS IN CERTAIN CASES

Sec. 313. [47 U.S.C.A. § 313.]

(a) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court.

(b) The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under this section.

. . .

FACILITIES FOR CANDIDATES FOR PUBLIC OFFICE

Sec. 315. [47 U.S.C.A. § 315.]

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

- (1) Bona fide newscast,
- (2) Bona fide news interview,

(3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) On-the-spot coverage of bona fide news events (included but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcast station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) At any other time, the charges made for comparable use of such station by other users thereof.

(c) For the purposes of this section :

(1) The term "broadcasting station" includes a community antenna television system.

(2) The terms "licensee" and "station licensee" when used with respect to a community antenna television system, means the operator of such system.

(d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

MODIFICATION BY COMMISSION OF CONSTRUCTION PERMITS OR LICENSES

Sec. 316. [47 U.S.C.A. § 316.]

(a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order or modification shall become final until the holder of the license or permit shall have

been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue . . .

ANNOUNCEMENT WITH RESPECT TO CERTAIN MATTER BROADCAST

Sec. 317. [47 U.S.C.A. § 317.]

(a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

(b) In any case where a report has been made to a radio station, as required by section 508 of this Act, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

CONSTRUCTION PERMITS

Sec. 319. [47 U.S.C.A. § 319.]

(a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission. The application for a construction permit shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. . . .

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

(c) Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit. The provisions of section 309(a), (b), (c), (d), (e), (f), and (g) shall not apply with respect to any station license the issuance of which is provided for and governed by the provisions of this subsection.

FALSE DISTRESS SIGNALS; REBROADCASTING . . .

Sec. 325. [47 U.S.C.A. § 325.]

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

. . .

CENSORSHIP . . .

Sec. 326. [47 U.S.C.A. § 326.]

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

PROHIBITION AGAINST SHIPMENT OF CERTAIN
TELEVISION RECEIVERS

Sec. 330. [47 U.S.C.A. § 330.]

(a) No person shall ship in interstate commerce, or import from any foreign country into the United States, for sale or resale to the public, apparatus described in paragraph (s) of section 303 unless it complies with rules prescribed by the Commission pursuant to the authority granted by that paragraph: *Provided*, That this section shall not apply to carriers transporting such apparatus without trading in it.

. . .

TITLE V—PENAL PROVISIONS—FORFEITURES

FORFEITURES

Sec. 503. [47 U.S.C.A. § 503.] . . .

(b)(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this Act; or

(D) violated any provision of sections 1304, 1343, or 1464 of Title 18, United States Code;³ shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this Act; except that this subsection shall not apply to any conduct which is subject to forfeiture under . . . section 507 of this Act.

(2) The amount of any forfeiture penalty determined under this subsection shall not exceed \$2,000 for each violation. Each day of a continuing violation shall constitute a separate offense, but the total forfeiture penalty which may be imposed under this subsection, for acts or omissions described in paragraph (1) of this subsection and set forth in the notice or the notice of apparent liability issued under this subsection, shall not exceed:

(A) \$20,000, if the violator is (i) a common carrier subject to the provisions of this Act, (ii) a broadcast station licensee or permittee, or (iii) a cable television operator; or

(B) \$5,000, in any case not covered by subparagraph (A).

The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(3)(A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of Title 5, United States Code. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a).

3. [Ed.] See note 2, *supra*.

(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless and until—

(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

(B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this Act.

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required. Whenever the re-

quirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

. . . .

PROVISIONS RELATING TO FORFEITURES

Sec. 504. [47 U.S.C.A. § 504.]

(a) The forfeitures provided for in this Act . . . shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this Act, in a civil suit in the name of the United States Provided, that any such suit for the recovery of a forfeiture imposed pursuant to the provisions of this Act shall be a trial de novo

(b) The forfeitures imposed by [section 503(b)] of this Act shall be subject to remission or mitigation by the Commission under such regulations and methods of ascertaining the facts as may seem to it advisable

DISCLOSURE OF CERTAIN PAYMENTS

Sec. 508. [47 U.S.C.A. § 508.]

(a) Subject to subsection (d), any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

(b) Subject to subsection (d), any person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast.

(c) Subject to subsection (d), any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast, disclose to such other person any information of which he has

knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.

(d) The provisions of this section requiring the disclosure of information shall not apply in any case where, because of a waiver made by the Commission under section 317(d), an announcement is not required to be made under section 317.

(e) The inclusion in the program of the announcement required by section 317 shall constitute the disclosure required by this section.

(f) The term "service or other valuable consideration" as used in this section shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast, or for use on a program which is intended for broadcasting over any radio station, unless it is so furnished in consideration for an identification in such broadcast or in such program of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property in such broadcast or such program.

(g) Any person who violates any provision of this section shall, for each such violation, be fined not more than \$10,000 or imprisoned not more than one year, or both.

PROHIBITED PRACTICES IN CASE OF CONTESTS OF INTELLECTUAL KNOWLEDGE, INTELLECTUAL SKILL OR CHANCE

Sec. 509. [47 U.S.C.A. § 509.]

(a) It shall be unlawful for any person, with intent to deceive the listening or viewing public—

(1) To supply to any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill any special and secret assistance whereby the outcome of such contest will be in whole or in part prearranged or predetermined.

(2) By means of persuasion, bribery, intimidation, or otherwise, to induce or cause any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill to refrain in any manner from using or displaying his knowledge or skill in such contest, whereby the outcome thereof will be in whole or in part prearranged or predetermined.

(3) To engage in any artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance.

(4) To produce or participate in the production for broadcasting of, to broadcast or participate in the broadcasting of, to offer to a licensee for broadcasting, or to sponsor, any radio program, knowing or having reasonable ground for believing that, in connection with a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance constituting any part of such program, any person has done or is going to do any act or thing referred to in paragraph (1), (2), or (3) of this subsection.

(5) To conspire with any other person or persons to do any act or thing prohibited by paragraph (1), (2), (3), or (4) of this subsection, if one or more of such persons do any act to effect the object of such conspiracy.

(b) for the purposes of this section—

(1) The term “contest” means any contest broadcast by a radio station in connection with which any money or any other thing of value is offered as a prize or prizes to be paid or presented by the program sponsor or by any other person or persons, as announced in the course of the broadcast.

(2) The term “the listening or viewing public” means those members of the public who, with the aid of radio receiving sets, listen to or view programs broadcast by radio stations.

(c) Whoever violates subsection (a) shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

. . .

PUBLIC BROADCASTING ACT

81 Stat. 868 (1967), as amended, 47 U.S.C.A. § 396 et seq.

CORPORATION FOR PUBLIC BROADCASTING—CONGRESSIONAL DECLARATION OF POLICY

Sec. 396. [47 U.S.C.A. § 396.]

(a) The Congress hereby finds and declares that—

(1) it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes;

(2) it is in the public interest to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications services;

(3) expansion and development of public telecommunications and of diversity of its programming depend on freedom, imagination, and initiative on both local and national levels;

(4) the encouragement and support of public telecommunications, while matters of importance for private and local development, are also of appropriate and important concern to the Federal Government;

(5) it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence;

(6) it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States; and

(7) a private corporation should be created to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control.

(b) There is authorized to be established a nonprofit corporation, to be known as the "Corporation for Public Broadcasting", which will not be an agency or establishment of the United States Government. The Corporation shall be subject to the provisions of this section, and, to the extent consistent with this section, to the District of Columbia Nonprofit Corporation Act.

(c)(1) The Corporation shall have a Board of Directors (hereinafter in this section referred to as the "Board"), consisting of fifteen members appointed by the President, by and with the advice and consent of the Senate. Not more than eight members of the Board may be members of the same political party.

(2) The members of the Board (A) shall be selected from among citizens of the United States (not regular fulltime employees of the United States) who are eminent in such fields as education, cultural and civic affairs, or the arts, including radio and television; (B) shall be selected so as to provide as nearly as practicable a broad representation of various regions of the country, various professions and occupations, and various kinds of talent, and experience appropriate to the functions and responsibilities of the Corporation.

. . .

(4) The term of office of each member of the Board shall be six years . . .

. . .

(d)(1) The members of the Board shall annually elect one of their number as Chairman . . .

. . .

(e)(1) The Corporation shall have a President, and such other officers as may be named and appointed by the Board for terms and at rates of compensation fixed by the Board. . . . No individual

other than a citizen of the United States may be an officer of the Corporation. No officer of the Corporation, other than the Chairman and any Vice Chairman, may receive any salary or other compensation from any source other than the Corporation during the period of his employment by the Corporation. All officers shall serve at the pleasure of the Board.

(2) Except as provided in the second sentence of subsection (c) (1) of this section, no political test or qualification shall be used in selecting, appointing, promoting, or taking other personnel actions with respect to officers, agents, and employees of the Corporation.

(f) (1) The Corporation shall have no power to issue any shares of stock, or to declare or pay any dividends.

(2) No part of the income or assets of the Corporation shall inure to the benefit of any director, officer, employee, or any other individual except as salary or reasonable compensation for services.

(3) The Corporation may not contribute to or otherwise support any political party or candidate for elective public office.

(g) (1) In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a), the Corporation is authorized to—

(A) facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made available to public telecommunications entities, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature;

(B) assist in the establishment and development of one or more interconnection systems to be used for the distribution of public telecommunications services so that all public telecommunications entities may disseminate such services at times chosen by the entities;

(C) assist in the establishment and development of one or more systems of public telecommunications entities throughout the United States; and

(D) carry out its purposes and functions and engage in its activities in ways that will most effectively assure the maximum freedom of the public telecommunications entities and systems from interference with, or control of, program content or other activities.

(2) In order to carry out the purposes set forth in subsection (a), the Corporation is authorized to—

(A) obtain grants from and make contracts with individuals and with private, State, and Federal agencies, organizations, and institutions;

(B) contract with or make grants to public telecommunications entities, national, regional, and other systems of public telecommunications entities, and independent producers and production entities, for the production or acquisition of public telecommunications services to be made available for use by public telecommunications entities, except that—

(i) to the extent practicable, proposals for the provision of assistance by the Corporation in the production or acquisition of programs or series of programs shall be evaluated on the basis of comparative merit by panels of outside experts, representing diverse interests and perspectives, appointed by the Corporation; and

(ii) nothing in this subparagraph shall be construed to prohibit the exercise by the Corporation of its prudent business judgment with respect to any contract or grant to assist in the production or acquisition of any program or series of programs recommended by any such panel;

(C) make payments to existing and new public telecommunications entities to aid in financing the production or acquisition of public telecommunications services by such entities, particularly innovative approaches to such services, and other costs of operation of such entities;

(D) establish and maintain, or contribute to, a library and archives of noncommercial educational and cultural radio and television programs and related materials and develop public awareness of, and disseminate information about, public telecommunications services by various means, including the publication of a journal;

(E) arrange, by grant to or contract with appropriate public or private agencies, organizations, or institutions, for interconnection facilities suitable for distribution and transmission of public telecommunications services to public telecommunications entities;

(F) hire or accept the voluntary services of consultants, experts, advisory boards, and panels to aid the Corporation in carrying out the purposes of this subpart;

(G) conduct (directly or through grants or contracts) research, demonstrations, or training in matters related to public television or radio broadcasting and the use of nonbroadcast communications technologies for the dissemination of noncommercial educational and cultural television or radio programs;

(H) make grants or contracts for the use of nonbroadcast telecommunications technologies for the dissemination to the public of public telecommunications services; and

(I) take such other actions as may be necessary to accomplish the purposes set forth in subsection (a).

Nothing contained in this paragraph shall be construed to commit the Federal Government to provide any sums for the payment of any obligation of the Corporation which exceeds amounts provided in advance in appropriation Acts.

(3) To carry out the foregoing purposes and engage in the foregoing activities, the Corporation shall have the usual powers conferred upon a nonprofit corporation by the District of Columbia Nonprofit Corporation Act (D.C.Code, sec. 29-1001 et seq.), except that the Corporation is prohibited from—

(A) owning or operating any television or radio broadcast station, system, or network, community antenna television system, interconnection system or facility, program production facility, or any public telecommunications entity, system, or network; and

(B) producing programs, scheduling programs for dissemination, or disseminating programs to the public.

(4) All meetings of the Board of Directors of the Corporation, including any committee of the Board, shall be open to the public under such terms, conditions, and exceptions as are set forth in subsection (k) (4).

(5) The Corporation, in consultation with public broadcast stations, shall undertake a study to determine the manner in which personal services of volunteers should be included in determining the level of non-Federal financial support pursuant to subsection (k) (2)

(A) . . .

(6) The Corporation, in consultation with interested parties, shall create a 5-year plan for the development of public telecommunications services. Such plan shall be updated annually by the Corporation.

(h)(1) Nothing in this Act, or in any other provision of law, shall be construed to prevent United States communications common carriers from rendering free or reduced rate communications interconnection services for public television or radio services, subject to such rules and regulations as the Commission may prescribe.

(2) Subject to such terms and conditions as may be established by public telecommunications entities receiving space satellite interconnection facilities or services purchased or arranged for, in whole or in part, with funds authorized under this part, other public telecommunications entities shall have reasonable access to such facilities or services for the distribution of educational and cultural programs to public telecommunications entities. Any remaining capacity shall be made available to other persons for the transmission of noncommercial educational and cultural programs and program information relating to such programs, to public telecommunications entities, at a charge or charges comparable to the charge or charges, if any, im-

posed upon a public telecommunications entity for the distribution of noncommercial educational and cultural programs to public telecommunications entities. No such person shall be denied such access whenever sufficient capacity is available.

(k)(1)(A) There is hereby established in the Treasury a fund which shall be known as the Public Broadcasting Fund (hereinafter in this subsection referred to as the 'Fund'), to be administered by the Secretary of the Treasury.

(B) There is authorized to be appropriated to the Fund, for each of the fiscal years 1978, 1979, and 1980, an amount equal to 40 percent of the total amount of non-Federal financial support received by public broadcasting entities during the fiscal year second preceding each such fiscal year, except that the amount so appropriated shall not exceed \$121,000,000 for fiscal year 1978, \$140,000,000 for fiscal year 1979, and \$160,000,000 for fiscal year 1980.

(C) There is authorized to be appropriated to the Fund, for each of the fiscal years 1981, 1982, and 1983, an amount equal to 50 percent of the total amount of non-Federal financial support received by public broadcasting entities during the fiscal year second preceding each such fiscal year, except that the amount so appropriated shall not exceed \$180,000,000 for fiscal year 1981, \$200,000,000 for fiscal year 1982, and \$220,000,000 for fiscal year 1983.

(D) Funds appropriated under this subsection shall remain available until expended.

(2)(A) The funds authorized to be appropriated by this subsection shall be used by the Corporation, in a prudent and financially responsible manner, solely for its grants, contracts, and administrative costs,

(3)(A) The Corporation shall reserve for distribution among the licensees and permittees of public television and radio stations an amount equal to—

(i) not less than 40 percent of the funds disbursed by the Corporation from the Fund under this section in each fiscal year in which the amount disbursed is \$88,000,000 or more, but less than \$121,000,000;

(ii) not less than 45 percent of such funds in each fiscal year in which the amount disbursed is \$121,000,000 or more, but less than \$160,000,000; and

(iii) not less than 50 percent of such funds in each fiscal year in which the amount disbursed is \$160,000,000 or more.

(B)(i) The Corporation shall establish an annual budget according to which it shall make grants and contracts for production of public television or radio programs by independent producers and production entities and public telecommunications entities, for acquisition

of such programs by public telecommunications entities, for interconnection facilities and operations, for distribution of funds among public telecommunications entities, and for engineering and program-related research. A significant portion of funds available under the budget established by the Corporation under this subparagraph shall be used for funding the production of television and radio programs. Of such portion, a substantial amount shall be reserved for distribution to independent producers and production entities for the production of programs.

(ii) All funds contained in the annual budget established by the Corporation under clause (i) shall be distributed to entities outside the Corporation and shall not be used for the general administrative costs of the Corporation, the salaries or related expenses of Corporation personnel and members of the Board, or for expenses of consultants and advisers to the Corporation.

(iii) During each of the fiscal years 1981, 1982, and 1983, the annual budget established by the Corporation under clause (i) shall consist of not less than 95 percent of the funds made available by the Secretary of the Treasury to the Corporation pursuant to paragraph (2)(A).

(C) In fiscal year 1981, the Corporation may expend an amount equal to not more than 5 percent of the funds made available by the Secretary of the Treasury during such fiscal year pursuant to paragraph (2)(A) for those activities authorized under subsection (g)(2) which are not among those grant activities described in subparagraph (B).

(D) In fiscal years 1982 and 1983, the amount which the Corporation may expend for activities authorized under subsection (g)(2) which are not among those grant activities described in subparagraph (B) shall be 105 percent of the amount derived for the preceding fiscal year.

(4) Funds may not be distributed pursuant to this subsection to the Public Broadcasting Service or National Public Radio (or any successor organization), or to the licensee or permittee of any public broadcast station, unless the governing body of any such organization, any committee of such governing body, or any advisory body of any such organization, holds open meetings preceded by reasonable notice to the public.

(B) The funds reserved for public broadcast stations pursuant to paragraph (3)(A) shall be divided into two portions, one to be distributed among radio stations and one to be distributed among television stations. The Corporation shall make a basic grant from the portion reserved for television stations to each licensee and permittee of a public television station that is on the air. The balance of the portion reserved for television stations and the total portion reserved

for radio stations shall be distributed to licensees and permittees of such stations in accordance with eligibility criteria that promote the public interest in public broadcasting, and on the basis of a formula designed to—

(i) provide for the financial needs and requirements of stations in relation to the communities and audiences such stations undertake to serve;

(ii) maintain existing, and stimulate new, sources of non-Federal financial support for stations by providing incentives for increases in such support; and

(iii) assure that each eligible licensee and permittee of a public radio station receives a basic grant.

(7) No distribution of funds pursuant to this subsection shall exceed, in any fiscal year, 50 percent of a licensee's or permittee's total non-Federal financial support during the fiscal year second preceding the fiscal year in which such distribution is made.

(8) The funds distributed pursuant to paragraph (3)(A) may be used at the discretion of the recipient for purposes relating to the provision of public television and radio programming, including, but not limited to—

(A) producing, acquiring, broadcasting, or otherwise disseminating public television or radio programs;

(B) procuring national or regional program distribution services that makes public television or radio programs available for broadcast or other dissemination at times chosen by stations;

(C) acquiring, replacing, or maintaining facilities, and real property used with facilities, for the production, broadcast, or other dissemination of public television and radio programs; and

(D) developing and using nonbroadcast communications technologies for public television or radio programming purposes.

(9)(A) Funds may not be distributed pursuant to this subpart to any public broadcast station unless such station establishes a community advisory board. Any such station shall undertake good faith efforts to assure that the composition of its advisory board reasonably reflects the diverse needs and interests of the communities served by the such station.

(B) The board shall be permitted to review the programming goals established by the station, the service provided by the station, and the significant policy decisions rendered by the station. The board may also be delegated any other responsibilities, as determined by the governing body of the station. The board shall advise the governing body of the station with respect to whether the programming and other policies of such station are meeting the specialized educational and cultural needs of the communities served by the station,

and may make such recommendations as it considers appropriate to meet such needs.

. . .

DEFINITIONS

Sec. 397. [47 U.S.C.A. § 397.]

For the purposes of this part—

(1) The term “construction” (as applied to public telecommunications facilities) means acquisition (including acquisition by lease), installation, and modernization of public telecommunications facilities and planning and preparatory steps incidental to any such acquisition, installation, or modernization.

(2) The term “Corporation” means the Corporation for Public Broadcasting . . .

(3) The term “interconnection” means the use of microwave equipment, boosters, translators, repeaters, communication space satellites, or other apparatus or equipment for the transmission and distribution of television or radio programs to public telecommunications entities.

(4) The term “interconnection system” means any system of interconnection facilities used for the distribution of programs to public telecommunications entities.

. . .

(6) The terms “noncommercial educational broadcast station” and “public broadcast station” mean a television or radio broadcast station which—

(A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television, broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or

(B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.

(7) The term “noncommercial telecommunications entity” means any enterprise which—

(A) is owned and operated by a State, a political or special purpose subdivision of a State, a public agency, or a nonprofit private foundation, corporation, or association; and

(B) has been organized primarily for the purpose of disseminating audio or video noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast station, including, but not limited to,

coaxial cable, optical fiber, broadcast translators, cassettes, discs, microwave, or laser transmission through the atmosphere.

(8) The term “nonprofit” (as applied to any foundation, corporation, or association) means a foundation, corporation, or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(9) The term “non-Federal financial support” means the total value of cash and the fair market value of property and services (including, to the extent provided in the second sentence of this paragraph, the personal services of volunteers) received—

(A) as gifts, grants, bequests, donations, or other contributions for the construction or operation of noncommercial educational broadcast stations, or for the production, acquisition, distribution, or dissemination of educational television or radio programs, and related activities, from any source other than (i) the United States or any agency or instrumentality of the United States; or (ii) any public broadcasting entity; or

(B) as gifts, grants, donations, contributions, or payments from any State, or any educational institution, for the construction or operation of noncommercial educational broadcast stations or for the production, acquisition, distribution, or dissemination of educational television or radio programs, or payments in exchange for services or materials with respect to the provision of educational or instructional television or radio programs.

Such term includes the fair market value of personal services of volunteers, as computed using the valuation standards established by the Corporation and approved by the Comptroller General . . .

(11) The term “public broadcasting entity” means the Corporation, any licensee or permittee of a public broadcast station, or any nonprofit institution engaged primary in the production, acquisition, distribution, or dissemination of educational and cultural television or radio programs.

(12) The term “public telecommunications entity” means any enterprise which—

(A) is a public broadcast station or a noncommercial telecommunications entity; and

(B) disseminates public telecommunications services to the public.

(13) The term “public telecommunications facilities” means apparatus necessary for production, interconnection, captioning, broadcast, or other distribution of programming . . .

(14) The term “public telecommunication services” means non-commercial educational and cultural radio and television programs,

and related noncommercial instructional or informational material that may be transmitted by means of electronic communications.

(16) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(17) The term "system of public telecommunications entities" means any combination of public telecommunications entities acting cooperatively to produce, acquire, or distribute programs, or to undertake related activities.

FEDERAL INTERFERENCE OR CONTROL PROHIBITED; EQUAL EMPLOYMENT OPPORTUNITY

Sec. 398. [47 U.S.C.A. § 398.]

Sec. 398. (a) Nothing contained in this part shall be deemed (1) to amend any other provision of, or requirement under, this Act; or (2) except to the extent authorized in subsection (b), to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over public telecommunications, or over the Corporation or any of its grantees or contractors, or over the charter or bylaws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or public telecommunications entity.

(b)(1) Equal opportunity in employment shall be afforded to all persons by the Public Broadcasting Service and National Public Radio (or any successor organization) and by all public telecommunications entities receiving funds pursuant to subpart C (hereinafter in this subsection referred to as "recipients"), and no person shall be subjected to discrimination in employment by any recipient on the grounds of race, color, religion, national origin, or sex.

EDITORIALIZING AND SUPPORT OF POLITICAL CANDIDATES PROHIBITED

Sec. 399. [47 U.S.C.A. § 399.]

(a) No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

(b)(1) Except as provided in paragraph (2), each licensee which receives assistance under sections 390 to 399 of this title after August 6, 1973 shall retain an audio recording of each of its broadcasts of any program in which any issue of public importance is dis-

cussed. Each such recording shall be retained for the sixty-day period beginning on the date on which the licensee broadcast such program.

(2) The requirements of paragraph (1) shall not apply with respect to a licensee's broadcast of a program if an entity designated by the licensee retains an audio recording of each of the licensee's broadcasts of such a program for the period prescribed by paragraph (1).

(3) Each licensee and entity designated by a licensee under paragraph (2) which retains a recording under paragraph (1) or (2) shall, in the period during which such recording is required under such paragraph to be retained, make a copy of such recording available—

(A) to the Commission upon its request, and

(B) to any other person upon payment to the licensee or designated entity (as the case may be) of its reasonable cost of making such copy.

(4) The Commission shall by rule prescribe—

(A) the manner in which recording required by this subsection shall be kept, and

(B) the conditions under which they shall be available to persons other than the Commission.

giving due regard to the goals of eliminating unnecessary expense and effort and minimizing administrative burdens.

END OF VOLUME

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