

**INTERPRETING FCC  
BROADCAST RULES &  
REGULATIONS: Volume 3**

No. 603  
\$6.95

# INTERPRETING FCC BROADCAST RULES & REGULATIONS

VOLUME 3

**By the Editors of BM/E Magazine**



**TAB BOOKS**

Blue Ridge Summit, Pa. 17214

FIRST EDITION

FIRST PRINTING— MAY 1972

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Printed in the United States  
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International Standard Book No. 0-8306-2603-4

Library of Congress Card Number: 68-58244

The material contained herein was originally prepared for BM/E Magazine by the law firm of Pittman, Lovett, Ford, Hennessey & White, Washington, D.C.

# Preface

Since the second volume of this work was published in late 1968, several important decisions have been made and precedents set regarding many of the operational aspects of broadcasting and CATV. The following material, originally published as a series of articles in BM/E Magazine, further clarifies some of the controversial questions which have plagued station operators during the past decade.

This material is drawn from more than 20 articles and covers a wide range of subjects—in-depth views on Section 315 and “Personal Attack” rules, community leader and public surveys, lotteries, multiple ownership, the new CATV rules, and more. Each topic was carefully researched and thoroughly checked prior to original publication and the articles are arranged according to subject matter to follow a natural sequence. As with the previous two volumes, this one contains all new material; it is not a revised edition.

The Editors

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# Responsibility in Programming

The recent brouhaha over the Commission's pronouncements concerning broadcast licensee responsibilities to review records before broadcast—especially as they relate to drugs—highlights a troublesome area for many broadcasters and the Commission. A look at programming, censorship, and the obligations of broadcasters and the Commission is appropriate.

## Censorship and Programming

At the heart of the controversy is the pronouncement of the United States Congress embodied in the Communications Act. Specifically, in Section 326 of the Act, Congress has stated,

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.

While it is clear that the Commission may not censor material broadcast by stations, it is equally clear that licensees are responsible for program material broadcast over their facilities, except, of course, for statements made by political candidates.

In its 1960 *Programming Policy Statement*<sup>1</sup> the Commission noted that broadcasters are required to program their stations in the "public interest, convenience, and necessity." Therefore, despite the Congressional restrictions on censorship and First Amendment freedoms of speech, a

broadcaster's freedom to program is not absolute. As the Commission has declared,

The licensee is not a bookstore, but a public trustee of an inherently limited resource who is fully responsible for its operation in the public interest.

\* \* \*

It is nonsense to assert that the licensee can be indifferent to [the responsibility of material broadcast over his facilities]. If a person approaches a station to buy time to attack his neighbor, or simply to let loose a torrent of vile language, he will not be presented.<sup>2</sup>

But Commission restraints on materials that may be broadcast must be carefully circumspect. The Commission's role as a practical matter, as well as a legal matter, cannot be one of program dictation or program supervision. As Supreme Court Justice Douglas noted,

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. " . . . political philosophy which one radio sponsor espouses 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 the government. Tomorrow it may be a dominant, political or religious group. . . . Once a man is forced to submit to one type of a program, he can be forced to submit to another. It may be but a short step from a cultural program to a political program. . . . The strength of our system is in the dignity, resourcefulness and the intelligence of our people. Our confidence is in their ability to make the wisest choice. That system cannot flourish if regimentation takes hold."<sup>3</sup>

Frederick W. Ford, then-Chairman of the Federal Communications Commission, noted in 1960 before a Senate Subcommittee that,

When it comes to questions of taste, unless it is downright profanity or obscenity, I do not think that the Commission has any part in it. I don't see how we could possibly go out and say this program is good and that program is bad. That would be a direct violation of law.<sup>4</sup>

More recently, the Courts have provided further insight into the Commission's authority to dictate program fare. The famous *Red Lion* case makes it clear that the public has a right to listen and view without intervention or restraint by Congress or the Commission.

It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which are crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.<sup>5</sup>

The Courts have also indicated that where speech is to be banned from the airwaves, it must be banned with precision so that the ban will not have a "chilling effect" beyond its scope. The Court of Appeals, in two separate cases, has warned the Commission accordingly:

There is high risk that [public interest rulings relating to specific program content] will reflect the Commission's selection among tastes, opinions and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards.<sup>6</sup>

\* \* \*

The Commission must be cautious in the manner in which it acts; regulations which are vague and overboard create a risk of chilling free speech . . .<sup>7</sup>

An examination of the foregoing reveals several salient aspects of the Commission's authority relating to programming, as well as to broadcast licensee's responsibilities. First, the Commission may not censor nor dictate program material under the strict provisions of the Communications Act and the First Amendment, unless generally recognized exceptions to censorship apply: for example, obscenity, profanity, indecency, programs inciting to riots, programs designed or inducing toward the commission of crime, lotteries, and the like. Second, it is the broadcast licensee's duty to furnish program material attuned to the "public interest, convenience, and necessity." Common sense guidelines generally apply; indeed, most licensees would not broadcast program material

falling in the above-mentioned censorship exemption categories.

Yet, in spite of the supposedly clear guidelines set forth over the years, certain unique situations may arise where the ambiguity of Commission pronouncements are brought into disturbingly sharp focus. The most recent example of this concerns the Commission's policy statement regarding broadcast licensee responsibilities to review records before broadcast.

### The Drug Records

On March 5, 1971, the Commission released its *Public Notice concerning Licensee Responsibility to Review Records Before Their Broadcast*.<sup>8</sup> The Commission noted that they had received a number of complaints concerning the lyrics of records played on various stations relating to the use of drugs. The avowed thrust of the *Notice* was to "simply" notify licensees that they must make a judgment whether some of the records played on their stations "tended to promote or glorify" the use of illegal drugs, and that stations could not follow a policy of playing such records without someone in a responsible position (i.e. a management level executive at the station) knowing the content of the lyrics. The Commission ominously declared that,

Such a pattern of operation is clearly a violation of the basic principle of the licensee's responsibility for, and duty to exercise adequate control over, the broadcast material presented over his station.

*It raises serious questions as to whether a continued operation of the station is in the public interest . . .*  
(Emphasis supplied.)

The reaction of the industry was quick in arriving. Like the proverbial scatological material caught in an implement for creating a current of air or a breeze, the Commission received a fallout of abuse. "Stations Told to Halt Drug-Oriented Music" and "FCC Bars Broadcasting of Drug-Linked Lyrics" were the newspaper headlines of the day. One of the more well-reasoned reactions

was a Petition For Reconsideration filed by the Federal Communications Bar Association (an association of some 670 attorneys specializing in, or having an interest in, communications law).

The Association posed several pertinent questions to the Commission in its Petition, including the following:

Does a song "tend to promote or glorify the use of illegal drugs": (1) only if it contains explicit advocacy of such use, or does a song fall into that category if it does no more than describe in a favorable way a person's sensations on using drugs?; (2) if it expressly advocates repeal of laws making the use of drugs illegal? (If so, would the Commission view adversely the broadcast of such a song but view differently an interview with a law enforcement official or doctor who favored the repeal of certain laws against the use of drugs?); (3) if it is viewed by a part of the audience as favorable to the use of drugs and by another part as unfavorable?; (4) if the reference to illegal drugs is concealed and is in what amounts to code, so that the average person, including the average devotee of popular songs, is not aware of the reference? (5) if when it originally was published it had no such connotations but later came to be understood in some quarters as making favorable reference to the use of illegal drugs? If, for example, "How High The Moon" became popular with drug users because of its title, and came to mean to them a favorable view of drug use, would it then come to be a song which tend[s] to promote or glorify the use of illegal drugs?

Other organizations and licensees filed timely comments with the Commission. The FCC quickly responded with its *Memorandum Opinion and Order* adopted and released on April 16, 1971.<sup>9</sup> In its *Order*, the Commission said its initial *Notice* "simply reflected the well-established concept of licensee responsibility" and was erroneously otherwise depicted by the media. The Commission also specifically noted that whether or not to play a particular record relating to drugs does not raise an issue as to which the Government may intervene. However, the FCC did make clear, again, that broadcasters *could jeopardize their licenses by failing to exercise "licensee responsibility" in this area.*

A licensee should know whether his facilities are being used to present again and again a record which urges youth to take heroin or cocaine. . . . The point is that such records are not withdrawn from the area of license responsibility.

The Commission's *Order* did not directly address itself to many of the questions posed in various comments filed in response to its *Notice*. However, a somewhat clearer picture of the Commission's attitude in this area emerged. In sum, broadcasters who willfully and repeatedly broadcast records which obviously and blatantly tend to glorify or encourage the use of drugs will have their licenses placed in jeopardy. Responsible broadcasters, who mistakenly broadcast blatant records in the above-mentioned category, or who broadcast records with obviously ambiguous or questionable lyrics on an irregular basis as a part of their normal program format, will not be encouraging Commission disfavor. Again, common sense in programming should prevail.

## **Conclusion**

The Commission is theoretically proscribed from censoring program material except in carefully designated areas. However, incidents like the statement concerning "drug records" highlight the pervasive Commission influence on its licensees. Purists may rightly argue that the Commission has taken it upon itself to legislate morals in contravention of Congressional and Constitutional mandates. Nonetheless, the "marginal" station operator, the operator who scoffs at many of the rules and regulations, will probably be the only licensee subjected to searching Commission inquiry concerning his stewardship. Nevertheless, if you have questions concerning this troublesome area, your counsel should be consulted.

1. 20 RR 1901 (1960).
2. FCC 71-428 (released April 16, 1971).
3. **Public Utilities Commission v. Pollak**, 343 U. S. 451.
4. 20 RR 1901 at 1907.
5. **Red Lion Broadcasting Co. v. FCC**, 395 U. S. 367.
6. **Banzhaf v. FCC**, 405 F. 2d 1082, **cert. denied**, 396 U. S. 842.
7. **National Association of Theatre Owners v. FCC**, 420 F. 2d 194, **cert. denied**, 397 U. S. 922.
8. FCC 71-205, March 5, 1971.
9. FCC 71-428, April 16, 1971.

# Program Logs

Commission requirements for disclosure of programming information have long been a source of tedium to broadcasters. In its 1968 Program Logging Rules<sup>1</sup> amending the AM and FM rules designed to "streamline" log keeping and remove archaic requirements, and to conform requirements to provisions of the TV rule, the Commission endeavored to insure that information required by the revised "reporting" forms would be contained in station program logs. Yet, despite these clarifications, Commission sanctions against broadcasters appear to have measurably increased since promulgation of its 1968 Rules.

Forfeitures imposed upon broadcast licensees for "logging" violations have ranged as high as \$9000, depending upon 1) the nature of the violation, and 2) the licensee's financial condition. In some cases, "logging" violations serve as one of several grounds for denial of license renewal, particularly when part of a course of "willful, fraudulent conduct." In a series of decisions, the Commission has declared that violations which occur through "ignorance or oversight" and/or those committed by "officers or employees" of the licensee are not excusable. Also, corrective action taken subsequent to Commission citation, though a "mitigating" factor, does not rectify the original violation. Because of the increase in the number of Commission sanctions and the possibility of severe punishment, a review of pertinent elements of the "Program Logging Rules" is in order.

## Programs

For each *program*, the Commission requires entries identifying 1) its name or title, 2) its time slot, 3) its type, and 4) its source. (For programs presenting political candidates, an entry must be made showing the candidate's name and political affiliation.) Licensee classifications as to *type* and *source* are often the subject of Commission challenge. Hence, a brief definition of each classification follows.

The definitions of the following eight *types* of programs (a) through (h) are intended *not* to overlap each other and will normally include all the various programs broadcast. Definitions (i) through (k) are sub-categories, and programs falling under one of these three sub-categories will also be classified appropriately under one of the first eight categories. There may be further duplication within types (i) through (k)—a program presenting a candidate for public office, prepared by an educational institution, for instance, would be within both Political (POL) and Educational Institution (ED) sub-categories, as well as within the Public Affairs (PA) category. Program definitions are:

- a) Agricultural (A) includes market reports farming, and other information specifically related to the agricultural population. (Too many licensees improperly place agriculture-type fare in the public affairs category.)
- b) Entertainment (E) includes all programs intended primarily as entertainment, music, drama, variety, comedy, quiz, etc.
- c) News (N) includes reports dealing with current local, national, and international events, including weather and stock market reports; and commentary, analysis and sports news, when an integral part of a news program.
- d) Public Affairs (PA) includes talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national, and international public affairs. *A public affairs program is one which deals with public issues.* The licensee should expect the Commission to challenge the PA classification of a program which does not have this essential characteristic.

e) Religious (R) includes sermons or devotionals, religious news, and music, drama, and other types of programs designed primarily for religious purposes.

f) Instructional (I) includes programs (other than those classified under Agricultural, News, Public Affairs, Religious or Sports) which deal with the discussion or appreciation of literature, music, fine arts, history, geography, and the national and social sciences; and programs devoted to occupational and vocational instruction, and hobby programs. (Here again, too many licensees erroneously classify "instructional" fare as "public affairs.")

g) Sports (S) includes play-by-play and pre- or post-game related activities, as well as separate programs of sports instruction, news or information—fishing opportunities, golfing instructions, etc.

h) Other (O) includes all programs not falling within categories (a) through (g).

i) Editorials (EDIT) includes programs presented for the purpose of stating opinions of the licensee.

j) Political (POL) includes those which present candidates for public office or which express (except in station editorials) views on candidates or on issues subject to public ballot.

k) Educational institution (ED) includes any program prepared by, on behalf of, or in cooperation with educational institutions, educational organizations, libraries, museums, PTAs or similar organizations. Sports programs are not included.

Program *sources* are classified as either 1) local, 2) network, or 3) recorded, as defined by the following rules.

1) A *Local Program* includes any program which is primarily or wholly produced by the station, taped or recorded, so long as live talent is employed more than 50 percent of the time. In addition, the following programs shall be classified as "local:" a) local program fed to a network, b) non-network news program, and c) identifiable units of programs primarily featuring records or transcriptions which are *live* and separately logged. Yet programs featuring *recorded* records and transcriptions must be classified accordingly even though a station announcer appears in connection with such material.

2) A *Network Program* (NET) is any program furnished to the station by a network (national, regional or special). This includes delayed broadcasts of programs originated by networks.

3) A *Recorded Program* (REC) is any program not otherwise defined—including, without limitation, those using recordings, transcriptions, or tapes.

### **Commercial Matter**

For all *commercial matter* (CM), the Commission requires entries identifying 1) the sponsor(s) of the program, 2) the person(s) who paid for the announcement, or 3) the person(s) who furnished materials or services. In addition, any entry or entries must be made showing the total duration of commercial matter in each hourly time segment or the duration of each commercial message in each hour.

Commercial matter includes "commercial continuity" (CC) i.e., the advertising message for which a charge is made or consideration is received. Included in the latter are 1) "bonus spots," 2) trade-out spots<sup>2</sup>, and 3) promotional announcements of a future program where consideration is received for such an announcement or where such announcement identifies the sponsor of a future program beyond mention of the sponsor's name as an integral part of the title of the program (e.g., where the agreement for the sale of time provides that the sponsor will receive promotional announcements, or when the promotional announcement contains a statement such as "Listen tomorrow for the—[program name]—brought to you by—[sponsor's name]—.")

*Exceptions* to the above classifications include:

- a) Promotional announcements, unless they fall in a CA classification;
- b) Station identification announcements for which no charge is made;
- c) Mechanical reproduction announcements;
- d) Public service announcements;

e) Announcements that materials or services have been furnished as an inducement to broadcast a political program or a program involving the discussion of controversial public issues; and

f) Announcements made pursuant to the local notice requirements ("pre-grant" and "designation for hearing").

Furthermore, it is incumbent upon the licensee to make an entry denoting as close an approximation to the *time consumed* (duration of commercial matter) as possible. Notable exceptions to this requirement are *religious* and *political* sponsored programs. Because of the difficulty in measuring the exact length of "commercial continuity" in such programs, the Commission does not require licensees to compute commercial matter.<sup>3</sup> The exception does not, of course, apply to any programs advertising commercial products or services, nor is it applicable to any commercial announcements. Since 1969, the Commission has imposed more forfeitures upon licensees for violations of commercial logging rules than for any other single category. One licensee was fined \$2000 for failure to log as "commercial time" the play time of records of artists which were played immediately before and/or after announcements promoting their appearances.<sup>4</sup> In another case, the Commission ruled that "where musical recordings were so combined with commercial announcements, either by the play of such recordings immediately before, immediately after, or simultaneously with voice announcements, that which might otherwise be considered entertainment was instead merely an extension or part of the advertising message of the program sponsor and should have been logged as commercial."<sup>5</sup>

Furthermore, the Commission held that the broadcasting of extraneous, or "ad lib," matter to promote a show or dance represents "commercial matter," and should be logged as such.<sup>6</sup> In light of Commission scrutiny into commercial logging practices, broadcasters would be well advised to exercise caution in reporting same.

## Public Service Announcements

For all public service announcements (PSA), the Commission requires an entry showing 1) that it has been broadcast, and 2) the name of the organization or interest on whose behalf it is made. By Commission definition, a PSA is "any announcement for which no charge is made and which promotes programs, activities, or services of federal, state or local governments (e.g., recruiting, sales of bonds, etc.) or the programs, activities or services of non-profit organizations (e.g., UGF, Red Cross, Blood Donations, etc.) and other announcements regarded as serving community interests, excluding time signals, routine weather announcements and promotional announcements."

The subject of certain Commission sanctions, PSAs have often been confused with "commercial" classifications. Indeed, the Commission sanctioned one licensee for logging as PSA spot announcements dealing with a drug information program, to be sponsored by industrial concerns in return for "institutional identification" at the beginning and close of the message.<sup>7</sup> Because the licensee is receiving consideration for broadcasting such announcements, he is required to log them "commercial." In an extension of this principle, the Commission held that 1) the fact that the licensee derived no substantial direct benefit from advertisements of a lottery to be held at a county fair, and 2) that his principal intention was to advertise the fair did not constitute a defense to his logging such announcements as PSA.<sup>8</sup> The Commission reasoned, "the very fact that one had to be present at the fair for which admission was charged" constituted a consideration for the announcement which placed it in the "commercial" category.

Because the Commission has, increasingly, been disposed to impose substantial forfeitures on licensees for logging violations, it is the wise broadcaster who exercises due care in meeting Commission requirements in this area. When necessary, broadcasters should 1) supply *extra information* for purposes

of clarifying their chosen logging classifications, and 2) *consult* with *communications counsel* when classification difficulties arise. No less an effort will suffice to meet Commission requirements.

1. 12 RR 1599 (1968).
2. Announcements broadcast in return for receipt of free transportation, prize merchandise or other goods or services are to be logged "commercial." 16 RR 2d 156 (1969).
3. Report and Order, Docket No. 14187.
4. KISD, Inc., 18 RR 2d 1187 (1970).
5. Old Dominion Broadcasting Co., Inc. 20 RR 2d 748 (1970).
6. KOKA Broadcasting Co., Inc., 21 RR 2d 981 (1971).
7. Chemung County Radio, Inc., 18 RR 2d 165 (1970).
8. 21 RR 2d 203 (1971).

# Broadcasters' Responsibility to Community Needs Re-emphasized

SINCE ITS 1960 TREATISE ON PROGRAMMING (Report and Statement of Policy re: Commission En Banc Program Inquiry, 20RR 1902) and its 1965 issuance of the program form (Parts IV-A and IV-B of the renewal, transfer and construction permit forms), the Commission has demonstrated an increasing interest in the licensees' efforts to seek out and meet the programming needs. On August 22, 1968, the Commission again manifested its concern in a Public Notice (FCC 68-847) captioned "Ascertainment of Community Needs by Broadcast Applicants." Therein, the Commission observed that broadcast applicants (for new licenses, renewals, transfers and assignments) frequently tender deficient showings in these areas.

The Commission restated its 1968 holding (*in Andy Valley Broadcasting*, FCC 68-290) that:

A Survey of community needs is mandatory and that Applicants, despite long residence in the area, may no longer be considered *ipso facto*, familiar with the programming needs of the community.

Apparently, numerous broadcast applicants fail to follow the edicts of the 1960 treatise on programming, the prolific case precedent, and/or, more saliently, do not respond fully to Parts IV-A and/or IV-B of the FCC forms.

In its determination to force broadcast applicants to provide this data, in its 1968 *Minshall Broadcasting* case (11 FCC 2d 796), the Commission articulated the four elements necessary to respond to Part I of the "new" (1965) Section IV-A and IV-B:

- (a) Full information on the steps taken to ascertain community needs;
- (b) Program suggestions received from listeners;
- (c) Applicant's evaluation of suggestions; and,
- (d) Programming to be offered in direct response to those needs.

Numerous broadcasters have charged that (1) the Commission is attempting, and has practically accomplished, a "back-door" entry into control of their program content and (2) promulgation of the aforementioned notice further undermines their basic rights of free speech. It appears that the 1960 Program Inquiry, the 1965 issuance of new program forms (Parts IV-A and IV-B), and the August 1968 Public Notice all portray an inexorable trend towards ultimate governmental control of programming. In any event, it is important that all licensees understand (1) their responsibilities and (2) analyze the Commission's requirements as to broadcaster's programming.

### **Analysis of the Commission's reemphasized programming goals**

The Commission's August 1968 reemphasis of the importance of ascertaining community needs should not be taken lightly. For years, the Commission has gradually intensified its interest in this area and augmented its determination that licensees will comply. To wit, the foundation of the American system of broadcasting was laid in the Radio Act of 1927; therein, Congress placed the basic responsibility for all matter broadcast in the hands of the station licensees. That obligation was carried forward to the Communications Act of 1934, and remains unaltered and undivided.

In the sense that his license to operate his station imposes upon him a nondelegable duty to serve the public interest in his community, the licensee is, in effect, a "trustee."

In the 1960 programming treatise, the Commission stated that it had a statutory responsibility

to review and pass upon a licensee's program proposals. Section 307(b) of the Communications Act requires the Commission to "make" such distribution of licenses . . . among the several States and communities to provide a fair, efficient and equitable distribution of radio service to each of the same. Under this section, the Commission has consistently licensed stations with the end objective of either providing new or additional programming service *to* a community, area or state, or of providing an additional "outlet" for broadcasting *from* a community, area or state. Implicit in the former alternative is increased radio reception; implicit in the latter alternative is increased radio transmission and, in this connection, appropriate attention to local live programming is required.

Formerly, by reason of administrative policy, and, since September 14, 1959, by necessary implication from the amended language of Section 315 of the Communications Act, the Commission has had the responsibility for determining whether licensees "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Prior to 1960, this meant a review, usually in terms of filed complaints, in connection with the applications made each three year period for renewal of station licenses. However, that was a practice largely traceable to workload necessities, and was not limited by law. Today, the Commission examines renewals in depth—with or without complaints.

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 responsibilities.\*

### **Major elements to meet local needs**

The major elements usually necessary to meet the public interest, needs and desires of the community include: (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, and (14) entertainment programming. While the Commission does not intend these elements as all-embracing or constant, nor does it claim to dictate the amount that

\*Historically, it is interesting to note that in its review of station performance, the Federal Radio Commission sought to extract the general principles of broadcast service which should (1) guide the licensee in his determination of the public interest and (2) in evaluating the licensee's discharge of his public duty. The Commission attempted no precise definition of the components of the public interest; it left the discernment of its limit to the practical operation of broadcast regulation. It required existing stations to report the types of service which had been provided and called on the public to express its views and preferences as to programs and other broadcast services. It sought (1) information from as many sources as were available in its quest of a fair and equitable basis for the selection of those who might wish to become licensees and (2) the supervision of those who already engaged in broadcasting.

The spirit in which the Radio Commission approached its unprecedented task was to seek to chart a course between (1) the need of arriving at a workable concept of public interest in station operation, and (2) the prohibition laid on it by the First Amendment to the Constitution of the United States and by Congress in Section 29 of the Federal Radio Act against standards or guidelines which evolved from that process were adopted by the Commission and have remained as the basis for evaluation of broadcast service. They have mainly been incorporated into various codes and manuals of network and station operation. The Commission emphasized that these standards or guidelines in no sense constitute a rigid mold for station performance, nor are they considered as a Commission formula for broadcast service in the public interest. Rather, they should be considered as indicia of the types and areas of service which, on the basis of experience, have usually been accepted by the broadcasters as more or less included in the practical definition of community needs and interests.

licensees shall carry of each, the Commission has felt for years that licensees generally don't do an adequate job of meeting the local needs. As a result, the Commission has become more determined each year to force the licensee to ascertain community needs. Even the responses to the new program form have not proved, to the Commission's satisfaction, that licensees generally seek out and meet community needs—particularly as to local programming. The August 28th notice is further evidence of that concern.

### **Failure to provide enough detail may result in hearing**

The Communications Act provides that the Commission may grant construction permits and station licenses, or modifications or renewals thereof, only "upon written application" setting forth the information required by the Act and the Commission's Rules and Regulations. If, upon examination of any such application, the Commission shall find the public interest, convenience and necessity would be served by the granting thereof, it shall grant said application. If it does not so find, it shall so advise the applicant and other known parties in interest of all objections to the application, and the applicant shall then be given an opportunity to supply additional information. If the Commission cannot then make the necessary finding, the application is designated for hearing, and the applicant bears the burden of providing proof of the public interest. It is not inconceivable that, in the future, hearings may be ordered on the renewal questions concerning the sufficiency of program surveys.

### **The amount of necessary program survey data**

The Commission desires 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 second, consultation with leaders in community life. As to the latter, while the Commission's August 28th Notice does not define the degree of specificity required, it appears to expect renewal applications to (1) give the names and addresses of those personally contacted or surveyed and (2) list a respectable number of contracts. The desired number would vary with the size and affluence of the licensee; the number required can best be ascertained by consultation with your attorney.

To date, the Commission has applied an "even hand" on the tenuous dividing line that runs between its licensing responsibilities and the broadcasters' constitutional right to free speech. So long as the licensee can show reasonable effort to ascertain his local community's and service area's tastes, needs and desires, he will fulfill his obligations to the public and, hence, meet the Commission's requirements. Nevertheless, in light of the Commission's August 28th Notice, all licensees would be well advised to take another look at their policies regarding program surveys and consider possible expansions thereof. Consultation with appropriate attorneys is recommended.

# Ascertainment of Community Needs

On February 23, 1971, the Commission issued a major Report<sup>1</sup> clarifying the confusion that arose from its December 19, 1969, *Primer on Ascertainment of Community Needs*.<sup>2</sup> The Primer was designed to guide broadcasters preparing Part I ("Ascertainment of Community Needs") of Section IV of applications for new or changed facilities for license renewals or for assignments and transfers. The February 1971 Report will place in perspective the Primer and the matter of ascertaining community needs.

Part I of Section IV requires specific and explicit data regarding ascertainment of community needs and problems. For example, licensees are required to state the specific methods used to ascertain community needs, including (1) identification of representative groups, interests and organizations consulted, (2) identification of the communities or areas which the station will serve, (3) a listing of significant needs and interests to be served by the station, and (4) a listing of typical and illustrative programs which will be broadcast to meet these ascertained needs.

This seemingly innocuous, brief portion of various FCC application forms has engendered substantial problems for broadcasters and the Commission. One problem: Many broadcasters initially tried to respond to the questions in terms only of program needs. Unfortunately, many apparently still do. More troublesome however is this: The questions designed to require broadcaster inquiry into community needs have (perhaps be-

cause of their brevity) raised significant problems of interpretation. For example, how should a broadcaster actually go about ascertaining community needs; who should be interviewed; how many persons should be interviewed; what are "significant" needs; how many and what kind of programs should be broadcast?

## 1. The 1969 proposed Primer

To answer some of these perplexing questions, the Commission released its proposed Primer on Ascertainment of Community Needs in December 1969, "to clarify and provide guidelines as to the Commission's requirements and policies with respect to the ascertainment of community problems by broadcast applicants" and to solicit comments with respect to specific provisions of the Primer.

While most broadcasters are generally familiar with Commission requirements regarding ascertainment of community needs and the provisions of the 1969 Primer, there are some new developments to be found in careful study of the February 1971 *Report and Order in Docket No. 18774*.<sup>3</sup>

## II. 1971 Report (i.e. Primer Revisions)

While most of the provisions of the 1969 Primer remain unchanged in the 1971 Report, some significant portions have been revised:

(1) **Exemptions:** Educational organizations filing applications for noncommercial educational broadcast stations are now exempt from the provisions of the Primer. However, religious organizations applying for broadcast stations "cannot turn their backs on secular problems" and must ascertain community problems and devote portions of their programming toward those problems.

(2) **Changes in facilities:** Part I of Section IV must be completed by applicants for "major changes" in facilities, if the proposed change would result in the increase of the area of coverage by more than 50%, or if there is a proposed substantial change in programming.

Under the terms of the 1969 Primer, it appeared that a proposed change resulting in 55% increase of area, and a diminution of 10% of existing coverage area, would not require the submission of Section IV data since there would be only a *net* increase of 45%. To clarify this construction, the Commission now specifically states that Part I of Section IV is applicable and must be submitted,

[With a] construction permit for a change in authorized facilities when the station's proposed field intensity contour (Grade B for television, 1 mV/m for FM, or 0.5 mV/m for AM) encompasses a new area that is equal to or greater than 50% of the area within the authorized field intensity contours.

However, the Commission does note that if there is virtually no population in the gain area, a showing to that effect will relieve the applicant of the Primer's requirements.

(3) **Daytimers requesting fulltime facilities:** Under the provisions of the 1969 Primer, daytime AMs requesting fulltime authority had to submit Part I data (e.g., surveys, programs to meet needs) to Section IV-A. However, under the 1971 Primer, *this requirement has been deleted*. The Commission noted that at least two groups filing comments on the proposed Primer said it was obvious that the problems of the community do not change when the sun goes down.

(4) **Renewals:** *Different renewal standards are presently under consideration by the Commission.* The necessity of ascertaining community needs via the present complex process may be eliminated; however, until new rules are adopted, renewal applicants are required to comply with the present standards of the Primer.

(5) **Current information:** Some broadcasters expressed a desire to have the necessity of filing new Section IV "community needs" data eliminated—provided such data had been filed within the preceding 18 months. However, *the Commission has elected to retain its one-year standard*, noting that otherwise community-needs data would

not be current enough "for us to make an informed judgment." The 1971 Primer rule is that new Section IV data need not be compiled and submitted, thereby unnecessarily duplicating recent efforts, *if such data were submitted within the previous twelve months*. Applicants should also note that they may begin preparation of an application up to six months before filing.

(6) **Purpose of section IV:** The Commission has described the purpose of Section IV as (1) to show what the broadcast applicant has done to ascertain the needs and interests of the community to be served, and (2) to list the programs or other broadcast matter proposed to meet these needs and interests.

The Commission, especially before releasing the 1969 Primer, found that a large segment of the broadcasting industry "steadfastly interpreted community 'needs' to mean program preferences." For example, the Commission received applications indicating that some communities' principal needs were for more country and western music, or for more sports programs, and the like.

Following the release of the 1969 Primer, a review of applications indicated that true community needs and problems (as opposed to program preferences) were finally being ascertained. Despite the Commission's assurances that the word "problems" (as used in the Primer) was to be considered generally synonymous with "community needs and interests," however, many broadcasters believed the 1969 Primer to be a major shift of Commission policy. *This is not true*. The Commission believes that the diverse interpretations given the Primer by broadcasters are unwarranted; however, the Commission has conceded that obvious confusion exists (as opposed to the clarification hoped for from the 1969 Primer) and declared that some revision via its 1971 Primer was in order.

Among the clarifications made in the recently released *Report and Order*, the Commission succinctly states that the purpose of Part 1 of Section

IV is to ascertain community "problems, needs, and interests." The key is the phrase "problems, needs, and interests."

In answer to the Primer question, "What is the general purpose of Part I, Section IV-A or IV-B?" the Commission has said:

To show what the applicant has done to ascertain the *problems, needs and interests* of the residents of his community of license and other areas he undertakes to serve . . . and what broadcast matter he proposes to meet those *problems, needs and interests*, as evaluated. The word "problems" will be used as a short form of the phrase "*problems, needs and interests.*" The phrase "to meet community problems" will be used to include the obligation to meet, aid in meeting, be responsive to, or stimulate the solution for community problems. (Emphasis supplied.)

Obviously, among the major questions that continue to perplex broadcasters are: How should ascertainment of community problems be made? Who should be interviewed? Where should the interviews be made? What are the significant data to be obtained from the interviews? What programs to meet needs should be proposed?

#### **(1) Who should be interviewed?**

The Commission has made it clear that licensees must interview community leaders *and* members of the general public to ascertain community needs and problems. In its 1971 Primer the Commission has declared that members of the general public (laymen) *must* be interviewed, "for they may perceive community problems differently than community leaders."

#### **(2) Surveys outside community of license**

It should be remembered that a licensee's primary obligation is to the city of license and other obligations are secondary. However, if a station is licensed to two cities (e.g., Minneapolis-St. Paul) community needs and problems must be ascertained in both cities. In the 1971 Primer, the Commission has *removed* the 1969 Primer's

requirement that an applicant for a station licensed to a city within a Standard Metropolitan Statistical Area (SMSA) must ascertain community problems in each of the cities within that area. Explains the Commission:

First, many metropolitan areas have numerous political subdivisions. For example, there are more than 100 communities within the SMSA of New York City and Chicago. We do not, and cannot, require a station licensed to Chicago to present broadcast matter that is specifically responsive to the problems of each of those subdivisions. Second, as presently stated, an applicant for a station licensed to Joliet, Illinois, part of Chicago's SMSA, would be required to ascertain community problems in all the political subdivisions surrounding and including Chicago, if its signal actually encompassed that area. That, too, is an unnecessary result, since it would apply a more stringent requirement as to applicants for stations licensed to suburban communities than to those in the central city.

We are adopting, instead, a somewhat different limitation on the discretion of all applicants, as to the communities in which an ascertainment of community problems must be made. That is that an applicant will be required to submit a showing as to why he does not undertake to serve a particular major city that falls within his service contours, up to a maximum of a 75-mile radius from the transmitter site.

In those outlying areas which applicants decide to survey, consultations with community leaders who can be expected to have a broad overview of community problems will be sufficient to ascertain community problems. Thus, *it is clear that survey efforts in outlying areas need not be nearly as extensive as those for the city of license.*

### **(3) Determining composition of city of license**

This is the area most perplexing to broadcasters attempting to complete a comprehensive and meaningful survey of community problems. The Commission has declared that data relating to the composition of the community (demographics) must be submitted with the application and that a statistically reliable sampling must be

made. "The applicant is expected to choose [and interview] members from each of those broad groups that reflect the compositions of the city of license." *A random sample is not sufficient!* Each applicant is expected to contact leaders of "each significant group" within the community.

After attempting to conduct a "statistically reliable" survey of his community and trying to compile data relating to the community's composition, few broadcasters will find solace in the Commission's pronouncement that, "in our view, the ready availability of the sources of that information make such studies easily within the resources of all broadcast applicants."

The 1971 Primer clearly states that each applicant is required to submit, in exhibit form, a study of the composition of the community (demographic data):

The applicant must submit such data as is necessary to indicate the minority, racial, or ethnic breakdown of the community, its economic activities, governmental activities, public service organizations, and any other factors or activities that make the particular community distinctive with respect to its composition.

The Commission notes that reliable demographic data are available from such sources as the U.S. Census Bureau and local Chambers of Commerce. As an example of available data, the Commission makes reference to the Census Bureau's periodically-issued *County and City Data Book—A Statistical Abstract Supplement*.

This publication does not contain the most detailed information published by the Census Bureau. However, the following partial listing of data set forth there as to cities is indicative of the extensive information that is readily available: total population; land area; population density; percent non-white; percent Negro; percent foreign born; total foreign born; country of origin as a percent of total foreign stock; median age; percent under 18 years of age; percent 65 years of age and over; the median number of school years completed, the percent completing less than 5 years of school; . . . total income; median family income; . . . hospitals; total general city revenue and breakdown as to source; total city expenditures and a breakdown as

to disposition, including public welfare, education, highways, health and hospitals, police protection, fire protection, sewerage, other sanitation, parks and recreation, interest on general debt, outstanding debt, and city payroll. This information is given for every city with a population over 25,000. Similar information is given for each county, with more agricultural data, so that cities less than 25,000 would be included in the county portion of the publication. More detailed information or source of information as to other areas may be found in the following government publications which may be available in local libraries or can be purchased from the Government Printing office: *Statistical Abstract of the United States; Directory of Federal Statistics for Local Areas, A Guide to Sources; Directory of Federal Statistics for States, A Guide to Sources.*

While the partial list above seems ominous in terms of the wealth of available data, the Commission has declared that it is not concerned with minutia, and those challenging an applicant's showing must demonstrate that the applicant has failed to recognize a significant group. For example,

It should be noted that if an applicant finds that there are ten labor unions in the community, the group we consider significant is that of unions generally, each union is not considered a separate group.

#### **(4) Consultations with community leaders**

In its 1971 Primer, the Commission has reaffirmed that the applicant's principals and management should consult with community leaders for survey purposes. The reason: If non-decision-making personnel, or some organization or person other than the applicant, conducted the survey, the information gathered would go through a "filtering process" that might exclude many valuable details. Notes the Commission:

It is doubtful that a written report can fully convey the nuances of any extensive conversation, or the extent of the sincerity, frustration or anger that may be associated with some community problems. Moreover, the person-to-person interview with the

management of the station is more likely to establish a contact with the station in the interviewee's mind. Thus, a community leader knows someone to call if he believes there are matters that warrant further discussion.

However, joint consultations—such as lunches, group meetings, and the like—may be used by the principals or key management personnel in communicating with community leaders.

### **(5) Consultations with the general public**

The broadcaster has a wider choice in determining who may conduct consultations with the general public, and the Commission has revised the Primer to make it clear that an applicant's *employees below management level* may conduct consultations with laymen. Also professional research or survey services may be used; however, all such consultations (whether by nonmanagement personnel or research services) must be supervised by principals, management-level employees, or prospective management-level employees.

The Commission continues its less-than-enthusiastic endorsement of the use of professional survey organizations, even for consultations with members of the general public. The FCC's attitude is best summed up in the Primer with a response to the question "To what extent may a professional research or survey service be used in the ascertainment process?"

Answer: A professional service would not establish a dialogue between decision-making personnel with the applicant and community leaders. Therefore, such a service may not be used to consult community leaders. However, a professional service . . . may be used to conduct consultations with the general public. A professional service may also be used to provide the applicant with background data, including information as to the composition of the city of license. The use of a professional research or survey service is not required to meet Commission standards as to ascertaining community problems. The applicant will be responsible for the reliability of such a service if it is utilized.

## **(6) How many persons should be consulted?**

The Commission still refuses to designate a specific number of community leaders and/or members of the general public to be interviewed. The Commission says it is not a question of numbers, but whether the applicant has consulted leaders of the significant groups found within the community. Therefore, in response to the specific question "How many should be consulted," the FCC has declared:

No set number or formula has been adopted. Community leaders from each significant group must be consulted. A sufficient number of members of the general public to assure a generally random sample must also be consulted. The number of consultations will vary, of course, with the size of the city in question and the number of distinct groups or organizations. No formula has been adopted as to the number of consultations in the city of license compared to other communities falling within the station's coverage contours. Applicants for stations in relatively small communities that are near larger communities are reminded that an ascertainment of community problems primarily in the larger community raises a question as to whether the station will realistically serve the smaller city, or intends to abandon its obligation to the smaller city.

Suppose, however, that after surveying the area the broadcaster discovers he has had limited success in eliciting data, or that there appear to be few community problems. Is it safe to assume that only a few problems exist? The Commission's answer is no:

The assumption is not safe. The applicant should re-examine his efforts to determine whether his consultations have been designed to elicit sufficient information. Obviously, a brief or chance encounter will not provide adequate results. The person interviewed should be specifically advised of the purpose of the consultation. The applicant should note that many individuals, when consulting with broadcast applicants, either jump to the conclusion that the applicant is seeking programming preferences, or express community problems in terms of exposure or publicity for the particular group or groups with which they are affiliated. The applicant may properly note these comments, but should ask

further questions designed to elicit more extensive responses as to community problems.

## (7) Listing of problems

The December 1969 Primer was unclear as to whether *all* community problems ascertained had to be listed, or whether "significant" problems would suffice. The Commission has made it clear that *all ascertained community problems should be listed*, whether or not the broadcaster intends to include them in program fare; however, those comments that are clearly frivolous need not be listed.

Following the listing of all community problems, the applicant must evaluate all responses and decide which problems are the most significant—the problems that will be treated via proposed program fare. However, in listing the most significant problems and proposed programs to be broadcast in response thereto, the applicant must avoid overly broad descriptions. He must specifically show *what* broadcast matter is proposed to meet *what* problem:

The applicant should give the description, and anticipated time segment, duration and frequency of broadcast of the program or program series, and the community problem or problems that are to be treated by it. One appropriate way would be to list the broadcast matter and, after it, the community problem or problems the broadcast matter is designed to meet. Statements such as "programs will be broadcast from time to time to meet community problems," or "news, talk and discussion programs will be used to meet community problems," are clearly insufficient. Applicants should note that they are expected to make a positive, diligent and continuing effort to meet community problems. Therefore, they are expected to modify their broadcast matter if warranted in light of changed community problems. If announcements are proposed, they should be identified with the community problem or problems they are designed to meet.

1. FCC 71-176, \_\_\_\_\_FCC2d\_\_\_\_\_, released February 23, 1971.
2. 20 FCC2d 880 (1969).
3. *Id.* fn. 1.

# Program Surveys – Recent Cases

From its beginning, the Commission has been concerned with the licensee's efforts to satisfy "local tastes, needs and desires." This has been part of the Commission's statutory responsibility. However, where does the Commission's responsibility end and where does it begin to transgress on the licensee's right to make independent programming judgments? In other words, do the Commission's "local needs" criteria mark "the beginning of the end"—the eventual government control of programming?

In the Minshall case [11 FCC 2d 796 (1968)], the Commission set forth the four elements required by Part I of the "program forms" (Section IV-A and IV-B):

- (a) Full information on the steps taken to ascertain Community needs;
- (b) A record of program suggestions received from listeners;
- (c) Applicant's evaluation of these suggestions;
- (d) Programming to be offered in direct response to the suggestions.

## Section IV (A or B), Part I

In Andy Valley Broadcasting System, Inc., 12 RR 2d 691 (1968), the Commission held, ". . . The new form now makes a program survey mandatory. Applicants, despite long residence in the area, may no longer be considered, ipso facto, familiar with the programming needs and interests of the community." Therefore, a broad-

caster—even a long-standing member of the community—will have to show evidence that he has surveyed the community, consulting with public officials, educators and leaders in other areas of community life—*i.e.*, religion, entertainment media, agriculture, business, labor, the professions and eleemosynary organizations, as well as others who represent the interests of the community.

So the question has become, how does a licensee apply the four “guides” set forth by the Minshall Case? The answer must start with a general outline of their essential elements:

### **Consultations with community leaders.**

These consultations help determine the needs of the community as seen by the groups represented. A representative range of groups and leaders are needed to give the applicant a better basis for determining the total needs of the community. Interviewees should be identified by name, position and organization. The consultations should elicit constructive information about community needs, not mere approval of existing or pre-planned programming. Whether the survey be by direct mail, telephone, on-the-street interviews and/or any combination of the foregoing with others, the program form application *must* indicate the licensee’s method(s). While the *number* of consultations required varies with the size of the market, it is reasonably safe to assume that *the names and addresses of at least 15 interviewees should be stated in the renewal.*

### **Suggestions received.**

The application should include the *significant suggestions* as to community needs received from community leaders—whether or not the applicant proposes to treat them through its programming service. The applicant must also explain his choice of “significant” needs by *retaining material supporting* the basic evaluation. For example, suggestions that occur in nine out of ten interviews are certainly significant. However, a suggestion

that has appeared twice in one hundred interviews is definitely *not* significant.

### **Licensee's evaluation.**

The applicant is expected to evaluate the relative importance of those suggestions and consider them in formulating the station's over-all program service. The applicant should explain his "modus operandi" or methods used in analyzing the surveys. For example, the applicant may convene round-table discussions between announcers, program directors and management to analyze each survey, keeping a brief memo of the discussions in his program-survey files.

### **Programming service proposed to meet the needs as evaluated.**

The fourth element set forth in Minshall should be the response to Question 1.C. or 1.D. It calls for the applicant to relate his program service to the needs of the community as evaluated —*what* programming service is proposed to meet *what* needs. In other words, this response is the logical answer to the needs established in the preceding responses.

### **Gradual Emergence of Indirect Censorship**

The Commission's zeal in determining the adequacy of the licensee's efforts to meet "local" needs may gradually emerge as a form of censorship and/or program dictation.

As to censorship, Section 326 of the Communications Act of 1934, as amended, provides that:

"Nothing in this chapter (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."

In Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 (1959), the Supreme Court stated succinctly:

“. . . expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication.”

And as to program dictation, the Commission's role as a practical (as well as a legal) matter *cannot be one of program supervision or choice*. Supreme Court Justice Douglas commented most adequately about this problem in Public Utilities Commission v. Pollak, 343 U.S. 451, 468, as follows:

“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 please 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.”

So it seems that broadcasters have nothing to fear from the Commission when responding to Section IV (A or B), Part I. However, the earlier discussion of programming to be offered in response to needs offers a tempting opportunity for the Commission to substitute its own judgment. Commissioner Lee Loevinger poignantly commented about this very problem.

"The traditional FCC approach has been to demand minimum amounts of programming in various specified categories. Licensees have been required to report the percentage of programming falling in such categories as entertainment, religion, agricultural, educational, news, discussion, talks, and miscellaneous. The 1960 program policy statement, *supra*, listed 14 categories, including some of the foregoing and additional ones such as programs for children and editorials.

"This approach is based upon certain implicit assumptions which, simply stated, are these: The public interest in broadcasting is composed of a number of elements, principally those specified in the FCC program reporting forms. Each licensee should serve the public interest. It is the function of the FCC to require each licensee to serve the public interest or else forfeit his license. In order to serve the public interest, each licensee must provide all, or most, of the elements which the FCC specifies as serving the public interest. Therefore, each licensee must provide some programming of each type specified by the FCC (or, in exceptional cases, of most but not all types), or risk losing his license.

"An important point to note in analyzing this approach is that it is based altogether on category classification and has nothing whatever to do with excellence or merit. A program is classified as "talk" whether it is Einstein discoursing on relativity, Niebuhr discussing morality, or the local bartender talking about the proper proportions for a martini. A program is classed as "entertainment" regardless of whether it is based upon pornography, contemporary crime and violence, or classical drama. Hence, it is apparent that a statistical supervision of program categories has about the same relation to a program merit as a requirement for hiring employees on the basis of geographical origin does to a civil service merit system. This approach ultimately rests upon an assumption that category diversity is per se a desirable quality in broadcast programming.

"The hope that excellence, merit or even genuine diversity might be provided by the requirement of a statistical 'balance' or distribution among prescribed categories of programming has been frustrated by experience. For while the FCC has officially insisted on the necessity for such statistical balance virtually since inception, its insistence has neither discouraged or prevented bad programs nor provided or encouraged good programs.

"A final issue with respect to mandatory or rewarding action by the government to require or

encourage program quality is that of determining the kind of action to be taken. The only reward or inducement that the government has to offer, however, is the grant of continuance of a license. As a consequence, the practical distinction between mandatory or rewarding action and prohibitory or punitive action is difficult to see. For if the rewarding action consists of the grant or continuance of a license, we are merely saying the same thing in different words. Further, as noted above, *once the FCC takes action either to grant or to deny a license on the basis of specific programming, all those who are subject to its licensing power are, in effect, compelled to comply with the standard stated or implied by that action.* If the standard is based upon the broadcasting of a desirable program other licensees are in effect required to broadcast the same or similar programs." (Emphasis added.)

Of course, there is still no ready answer to the question, "Is the Commission merely exercising its statutory responsibility when it applies its 'criteria,' or is it intruding into the licensee's right of free speech?" It does seem that *the broadcaster must expect greatly increased scrutiny of his programming presentations.* Every licensee must expect the Commission to review thoroughly Section IV-A, Part 1, to determine whether he has completed enough "spadework" in support of the program he proposes as meeting "ascertained" needs, interests, and desires.

Every licensee should guard against being coerced (in any fashion) into making programming decisions merely to satisfy the Commission; such decisions by any licensee would truly threaten the foundations of free broadcasting in this country. No matter how erudite, intellectual, or well educated the Commission's staff may be, not one of them is in nearly as good a position as the licensee to make rational, considered and supportable decisions on programming needs in the licensee's community. So far, the Commission's staff has not exceeded its statutory limitations. It has taken great pains to be certain it is not substituting its own "programming judgment." However, the Commission has assumed a more stringent attitude towards broadcasters disclosing "weak"

efforts to determine their community needs. For example, numerous renewals have been deferred—pending receipt of additional information requested by the Commission's staff concerning responses to Section IV (A or B), Part I.

To minimize the Commission's intrusion in this area and to avert inquiry into your practices, you should make more frequent and more detailed surveys of the tastes, needs and desires of your audience. Telephone surveys, street-corner interviews, conferences with civic leaders, post-card surveys, lengthy questionnaires, surveys by your staff of their own social clubs (Elks, Lions, etc.) are a few of the many techniques available. Surveys should be made *every* year and should be *documented*. *Staff meetings*, to analyze results, should be held regularly. And, at the moment, the most important survey is the survey of civic leaders in your service area. In any event, if you have the slightest doubt concerning the responses to the questions therein, consult with your attorney.

# The Licensee's Programming Responsibility and Conflict of Interest

THE FIRST AMENDMENT OF THE CONSTITUTION provides all licensees with the basic right to communicate ideas without abridgement. Section 326 of the Communications Act of 1934 specifically prohibits censorship. The fact that one may not engage in broadcasting without first obtaining a license does not mean that the terms for holding that license may unreasonably restrict or abridge the free speech protection of the First Amendment and the Act. While the Commission must determine if program service is reasonably responsive to the needs and interests of the public, 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. Therefore, the responsibility for the selection and presentation of broadcast material ultimately falls upon the individual station licensee.

However, since broadcasters are required to program their stations in the public interest, convenience and necessity, the broadcaster's freedom is far from absolute. The Commission may not grant, modify, or renew a broadcast license without finding that the operation of the station is in the public interest. Thus, the licensee must make a diligent, positive, and continuing effort to discover and fulfill the tastes, needs, and desires of the public it serves.

**The anomaly.** On the one hand, the Commission is prohibited from dictating programming to licensees; on the other, it is compelled to make certain the public interest is being served.

This dichotomy has resulted in a gray area that has been the source of great confusion and concern to many licensees. Of course, the Commission has a natural proclivity to expand its indirect control of programming.

Many of the questions which cause broadcast licensees the greatest concern relate to programming. What precisely is the licensee's program control responsibility? Exactly, what is the extent of the Commission's control over programming?

Superficial and casual attention by licensees to these questions may well lead to a deferred renewal, hearing, severe fine, or something worse. To compound the problem, as is customarily the case with regulatory agencies, there are no easy answers to the questions. The licensee can keep out of trouble by understanding the development of the Commission's position, the current trends, and by endeavoring to offer somewhat more than is required.

### **Licensee and/or employee conflict of interest**

All broadcasters realize that the Commission holds them strictly accountable for the content of their programming. However, what sanctions will the Commission apply? If the licensee's employee is at fault, to what degree will the licensee be held responsible? As stated previously, there is no written rule; the broadcaster must look to all the circumstances and employ its good faith judgement; and the Commission will employ the identical criteria. For example, if the violation concerns serious violations of the Communications Act and/or the Criminal Code (as exemplified by the "payola" and "plugola" scandals of the late 50's), the Commission will assess a very large fine and/or order a hearing looking towards revocation of the broadcaster's license. (See letters to WMEX, WILD and WORL, Boston, and WHIL, Medford, all in Massachusetts, March 1, 1960, Report No. 3498, 85075.);

Alternatively, if the facts indicate that the licensee was (1) acting in good faith, (2) the violation is minor and the first mistake, the Commission will most likely ask only for a letter of explanation from the licensee. (See letter to KGFJ, Los Angeles, California, February 1, 1968, Report No. 7000, 12027.) Both of the preceding Commission investigations concerned record selection procedures by disc jockeys; however, the Massachusetts station's procedures reflected gross derogation of their responsibility to supervise their employees, and the KGFJ letter merely reflected concern that the licensee might not be exercising proper supervision of its disc jockeys. What does the Commission consider to be "adequate" supervision by a broadcaster of its employees engaged in programming decisions? At what time is the licensee required to inform its listeners that it has an economic or other interest in the subject matter of a program—such as a newscast or a station editorial? Review of several relevant cases and policy decisions should aid the broadcaster to make such a determination.

### **Conflict of interest precedents**

In a case investigating possible payola violations (where a nonpublic hearing was held), testimony indicated that (1) the licensee was not aware of any violations until informed thereof by the Commission, and (2) the recurrence from time to time of some violations raised a question as to the licensee's diligence in implementing the station's procedures regarding acceptance by certain employees of favors, loans, extraordinary forms of entertainment, and information regarding "outside" business ventures which might create a conflict of interest with their roles as employees of the station.

For example, a careful reading of the no-payola statements the broadcaster required of employees and outside record promoters to sign would have revealed ambiguities in some of the

statements which should have been resolved at the time. This would have demonstrated greater desire on the station's part to make these measures really effective; also, it would have enabled the station to make its policies clear where misunderstanding may have existed. Furthermore, although it appears that the station investigated a number of payola complaints against employees, by memorandum, the President suggested that such complaints not be accepted thereafter over the telephone. Allegations involving such serious violations should have been accepted and investigated. Additionally, such investigations—especially when reports of payola continued to be received—should have been conducted with great thoroughness. In some instances the station resorted to independent sources to dispose of reports of improper practices, in others, the station seemed to have accepted the self-serving statements of the individuals involved without further confirmation. The only way a licensee can avoid imputation of knowledge of improper conduct on the part of its employees is to investigate fully all reports or other indications of misconduct.

A licensee has an obligation to exercise special diligence to prevent improper use of its radio facilities when it has employees in a position to influence program content who are also engaged in outside activities which may create a conflict between their private interests and their roles as employees of the station.

Receipt of unusual favors or gifts of more than nominal value should obviously be prohibited. Further, if conflicts of interest in the form of outside economic interests of station personnel are not prohibited, then the personnel involved should be insulated from the process of program selection. When complete insulation cannot be effected, a licensee should take extraordinary measures to insure that no program matter is presented as a result of such practice. In this case, the Commission decided

that the derogation of responsibility by the licensee was not so serious as to foreclose the proposed assignment of license of the station to a new owner. See *Crowell-Collier Broadcasting Corp.*, 8 RR 2d 1080 (1966).

In an inquiry concerning conflict of interest by the broadcaster, a station owned an airport restaurant which was involved in a controversy with the airport authorities. The station broadcast several editorials advancing the arguments of the restaurant; the broadcaster stated that it emphasized the restaurant's arguments because the local newspaper had presented "the other side of the story"; however, the station had not revealed its ownership of the restaurant to its listeners. The Commission found that a licensee's obligation to serve the public interest does not preclude it from editorializing on matters in which it has a significant personal interest; however, its decision to do so imposes a responsibility to reveal to the broadcast audience the extent and nature of its private interest. See *Gross Telecasting Inc.*, 13 RR 2d 1067; 14 FCC 2d 239 (1968). The Commission decided that the circumstances of the case did not warrant assessment of a fine or forfeiture; however, the questions raised as to the licensee's qualifications would be considered with the next application for renewal of license of the station.

#### **Current policies espoused in NBC-Huntley case**

In another case, where an NBC news commentator (Chet Huntley) attacked a federal meat inspection law, and the commentator had investments in cattle business, the network failed in its responsibility to take the appropriate action to reveal the facts to its listeners. Additionally, since the matter discussed was "a controversial issue of public importance," the network was responsible under the Fairness Doctrine to afford a reasonable opportunity for the presentation of conflicting viewpoints. See *National Broadcasting Company*, 14 RR 2d 113 (1968). After taking

all the circumstances of NBC's and Huntley's virtually unblemished records of good broadcasting into consideration, the Commission decided that it would only require NBC to submit a statement concerning revision of its procedures to guard against any further conflicts of interest. However, the Commission considered the matter of such importance, it issued a statement discussing the licensee's responsibilities in its new operations and any other potential conflicts of interest situations:

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 judgements as to the nature of any conflicts and the remedial action, if any, called for.

Similarly, we do not believe it appropriate for this agency to specify the particular route to be taken by a licensee in order to exercise reasonable diligence in this area. One method which might be used would be to require periodic statements of the interests of the employees, with the obligation to keep them current. The licensee, particularly in small broadcast operations, might pursue other methods (e.g., making clear the principle against undisclosed conflicts of interest and requiring dis-

closure in any doubtful situation). Here again, the choice is one for reasonable, good faith judgement of the licensee. However, where a conflict matter is or clearly should be known to the licensee, it has a special duty to take appropriate steps to ascertain the full facts and to take whatever remedial action is called for.

# Renewal Competition and Community Needs

The spectre of competition haunts every station operator at license renewal time. The past few years have raised this fear with the WHDH debacle in Boston (where an existing operator's license was awarded to a competing applicant), and with the plethora of recently-filed applications contesting the present licensee's continued operation.

The much-debated "Pastore Bill" (S. 2004) seeks stringent restrictions on competing applications filed against existing licensees. It is cogently argued, however, that this Bill practically eliminates competition in the broadcast services (already tainted with a monopolistic aura). Controversies between Congress and the FCC—as recently demonstrated by the FCC's refusal to give Congress its files in the WIFE case—have stymied, if not foreclosed, favorable action on S. 2004.

Certain members of the public, the Congress, the FCC, Department of Justice and the Administration have all demonstrated support for public competition in renewals and for a restructuring of the broadcast industry. But under the WHDH case, it seemed likely that the competitors would prevail in most cases—even over broadcasters with good and/or exceptional broadcast records. This inherent risk threatened the stability of the entire industry and placed in jeopardy the licenses of good, as well as bad, broadcasters. Thus, even the proponents of competitive renewal hearings apparently agreed that a compromise should be reached. And a new policy—to protect good broadcasters—was formulated.

The Federal Communications Commission has attempted to set forth guidelines for existing broadcast licensees (and potential applicants for presently authorized facilities) by issuing its Policy Statement On Comparative Hearings Involving Regular Renewal Applications. Many have misinterpreted the new policy and have concluded that the days of renewal challenges are over. Clearly, this is NOT the case.

The Statement does, however, indicate changes in the Commission's disposition as to the treatment of applications filed in competition with regular renewal applications.

### **Background Considerations**

The "public interest" has always been uppermost in the Commission's mind when considering broadcast applications. And so, in issuing its policy statement, the Commission has balanced the interests of (1) existing licensees (whose expenditures, especially in television, approach astronomical proportions) and (2) the public need for free competition.

The Commission has reaffirmed the desirability of the limited license term (3 years) and has declared that it will permit review of the broadcaster's "stewardship" at regular intervals to determine whether the public interest is being served. Also, the Commission will give new parties a chance to demonstrate, in public hearings, that they will serve the public better.

In other words, the Commission believes that the "public interest" will be benefited most if both elements—the "statutory or competitive spur" of a potential license challenge and the practical consideration of "predictability and stability" for existing broadcast operations—are sanctioned.

### **Specific Policy Statements**

The Commission's new policy (largely formulated some years ago,<sup>1</sup> but now specifically stated)

provides comfort for the existing licensee who has truly operated in the public interest. For the operator who has relied on a diet of entertainment fare and commercials, however, there is little solace.

The Commission has declared:

If the applicant for renewal of license shows, in a hearing with a competing applicant, that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operator of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his renewal will be granted.

The statement is worthy of being engraved in stone and affixed to your program manager's wall.

The Commission's declaration appears to mean that an existing licensee, who truly and substantially serves the public needs and interests of the communities in his coverage area, need have no fear that his license will be taken away and given to a competing applicant. But it's open season on those without substantial public interest fare.

The policy for treatment of renewals and competing applications (1) encourages good faith competing applications; (2) forces the broadcast renewal applicant to run on his past record; (3) increases, for broadcasters with marginal operations, the risk that their licenses will not be renewed; and, happily, (4) provides a sanctuary for all broadcasters that truly ascertain and serve community needs.

### **Community Needs Surveys—the Primer**

As any knowledgeable broadcaster can readily testify, the most onerous portion of the application is that in Section IV, dealing with "Ascertainment of Community Needs." Commission policy regarding adequate response to this section

has changed perceptibly over the past few years. It now culminates in the "Primer."

The most salient features of the Primer (and those that most directly affect the renewal applicant) relate to a clarification of the phrase "community needs and interests." The Commission states that "needs and interests" are to be considered generally synonymous with "community problems." These are not, repeat not, program needs and interests. "Problems" is the key word. The main thrust of the applicant's response should be directed to this end and the licensee must propose and broadcast programs to serve these "community problems."

The applicant must ascertain and identify the problems of his community. This must be accomplished by consultations with leaders of a representative range of groups and with members of the general public from communities throughout the area served. The Commission now requires that applicants actually determine what constitutes a "representative range of groups." He must determine the kinds of groups involved in the total makeup of the community.

The representative cross-section must be both societal and geographical. It is incumbent upon the applicant to indicate, by cross-sectional survey, statistically reliable sampling, or some 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. Guesswork or estimates based upon alleged familiarity of the area are inadequate.

Professional research organizations may not be hired to do the major portion of the survey. While a professional service could be used to provide background data, the individuals primarily responsible for consultations with community leaders are the principals or top-level employees or prospective employees of the applicant.

Community leaders are considered to be the prime repository of knowledge of community problems; however, members of the general public must be consulted as secondary sources.

When the surveys are complete, the applicant is expected to list, in exhibit form, all significant community problems, whether or not he proposes to treat these problems through proposed programming. Then, the applicant is expected to determine on a good faith basis which of the problems merit treatment by the station, and how they are to be treated. There must be an exhibit linking programs and problems. The applicant is expected to state the title, time segment, duration, frequency of broadcast, and description of the program and to describe the community problem which it deals with.

Short announcements, editorials and news programs may be proposed as secondary programming to meet community problems, but the perceptive applicant and operator is one who produces and presents actual program fare to meet community problems.

## **Conclusion**

The renewal hearing policy does not eliminate the risks of competing applications. It encourages good faith challenges. Marginal and poor programming may well result in a grant of the competing application. Only the good broadcaster has been insulated from any meaningful threat of losing his license. The "bad" broadcaster has been thrown to the wolves.

The nuances and semantics of "good" and "bad" programming are yet to be defined by case law. The new Primer on Ascertainment of Needs shows how to become a "good" broadcaster: ascertain needs and respond to them with some substantial programming.

Renewal applicants now have guidelines to follow in protecting their existing operations. The Commission seeks to promote "conscientious and

good faith substantial service" to the public—not a "triennial flirtation with such service."

The perceptive broadcaster who plans ahead will protect his investment and continue to operate under Commission aegis. His plan: diligent, continuing surveys of the communities served by the station; programming to meet community problems; and programs responding to community problems.

The new policies will tend to discourage spurious and frivolous competitors. But they may well encourage good faith challenges against mediocre and poor broadcasters!

1. See Hearst Radio, Inc., 15 FCC 1149 (1951) and the *Policy Statement on Comparative Broadcast Hearings*, 4 FCC 2d 393 (1965).

# Renewal: Comparative Hearing and Existing Licensees

While only a few station operators must actually meet competition at license renewal time, *every* operator faces the possibility of challenge. The Commission has struggled for many years with the problems of relevant criteria and required performance in renewal applications. Currently, it is exploring pertinent standards for *television broadcasters*, who have, increasingly, been challenged at renewal.

The Commission and the courts have played havoc with renewal standards. Once yielding an "insuperable advantage" in comparative hearings to an incumbent broadcaster, the Commission has, over the past few years, steadily elevated its performance requisites. The television broadcaster has been an unwitting witness to these proceedings and, with the ensuing confusion, has been forced to exercise "guesswork" to determine exactly what performance is required of him.

## 1970 Policy Statement

In its 1970 "Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants,"<sup>1</sup> the Commission stipulated a two-part hearing process which made it difficult for challengers to gain "equal footing" with incumbents. The Statement said, in pertinent part, that a full comparative hearing which considers the merits of *both* incumbent and challenger would be granted if, and only if, the existing licensee could NOT demonstrate a past record of "substantial service without serious deficiencies." In other words, if the licensee demonstrated a "substantial" past performance at

this initial hearing, the Commission would not proceed to the second phase of the hearing but, rather, would grant the renewal application forthwith. The Commission elaborated:

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

### 1971 Court Decision

Spurred by the U. S. Court of Appeals' decision in *Citizen Communications Center v. FCC.*,<sup>2</sup> the Commission has been called to reevaluate its "pertinent standards." In effect, the Court is forcing the Commission to consider "superior" service as an alternative test to "substantial" service in granting renewals. In addition, the Court admonished the Commission for utilizing its two-stage hearing process. Stating that the Commission's policy had a "deadening effect" upon renewal challenges, *the Court reversed this guideline* and maintained that it violated the mandates of 1) Section 309 (a) of the Communications Act, and 2) Section 309 (e) of the Act, as interpreted in *Ashbacker*.<sup>3</sup> The Court declared:

The Act says nothing about a presumption in favor of incumbent licensees at renewal hearings. The Act provides, inter alia, that no license shall be construed to create any rights beyond its terms, conditions and period,

that an applicant waives any claim to a frequency because of previous use, that a renewal license may be granted for a term not to exceed three years, and that a license does not vest in the licensee any right in the use of the frequency beyond the license term. The Commission has in effect abolished the comparative hearing mandate by Section 309)(a) and (e) and converted the comparative hearing into a petition to deny proceeding.

The Court acknowledged the "greater burden" the challenger must sustain in order to prevail over his incumbent-opponent in a comparative hearing. Yet, the Court maintained this is a "substantive" burden and forbade the Commission from strewing the challenger's path with "procedural" obstacles. The challenger must be given a chance to meet the incumbent on "equal ground;" *he must be given a full, comparative hearing.*

### **Performance Required**

For the television broadcaster, what constitutes a "substantial" or "superior" performance? What criteria will the Commission evaluate at renewal? What are "serious deficiencies?" How can a broadcaster assure favorable and expeditious treatment by the Commission at renewal? How does the Commission balance the need for stability in the industry with the need for a competitive spur?

The Commission is currently wrestling with all these problems. At hearing, the incumbent broadcaster is held to a performance test of "substantial" or "superior" service to the needs and interests of his area. The Commission and the Court of Appeals (*Citizen* case) are engaged in a battle of semantics over just what these tests mean. The Commission uses "substantial" in the sense of a solid or strong performance as contrasted with a service only minimally meeting the needs and interests of the area. The Court uses "superior" in the sense of a performance surpassingly good or comparatively better. As confusing as this is to the broadcaster, he need only heed the warning of this semantic battle: *The Court is steadily forcing the Commission to grant licenses at renewal to the group that would provide the "best possible" service.* As the Court put it:

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.

However, in its "Further Notice of Inquiry"<sup>4</sup> issued in August 1971, the Commission asserted "... it did not intend to overturn the policy that 'a plus of major significance' should be awarded to a renewal applicant whose past record warrants it." Hence, if the broadcaster renders full performance in the public interest and presents his past record at renewal in an ample, solid fashion, he should warrant such a "plus." "Full performance" means a conscientious service throughout the three-year period and not an upgrading of same during the third year because of the imminence of possible challenge. The Commission forbids such a "triennial flirtation" with the public interest.

Insisting that it is impossible to delineate with mathematical precision what constitutes "substantial" service, the Commission, nevertheless, has proposed such guidelines in two selected areas of television programming: 1) local programming and 2) informed electorate programming (i.e., News and Public Affairs).<sup>5</sup> The proposed figures, as general guidelines constituting "substantial" service, are as follows.

1) With respect to local programming, a range of 10-15% of the broadcast effort (including 10-15% in the prime time period, 6-11 p.m., when the largest audience is available to watch).

2) The proposed figure for news is 8-10% for the network affiliate, 5% for the independent VHF station (including a figure of 8-10% and 5%, respectively, in the prime time period).

3) In the public affairs area, the tentative figure is 3-5%, with, as stated, a 3% figure for the 6-11 p.m. time period.

It should be noted that these figures are general, tentative, and not applicable to "unprofitable" stations and independent UHF's. The burden is on the existing licensee to show the inapplicability of these guidelines. In addition, stations with "lesser revenue figures" are not held to as strict a standard as pro-

posed in these guidelines. Rather, each station would be bracketed according to revenues, ranging from stations (top 50 markets) with revenues 1) over \$5,000,000, 2) between \$5,000,000 and \$1,000,000 and 3) below \$1,000,000. Standard of performance in local and informed electorate programming would be judged according to financial ability to develop same.

The Commission recognizes the existence of an infinite number of variables in proposing these guidelines. It believes that only individual inspection, perhaps in the hearing process, could definitively delineate whether substantial service was being rendered by the broadcaster. Consistently, these guidelines would not be automatically definitive either for or against the renewal applicant. If the applicant did not meet the guidelines, he could argue that his service was "substantial" or "superior," citing, perhaps, "an exceptional qualitative effort." A showing of an "exceptional" dedication of funds, staff, and other resources would likely compensate for a lesser quantitative showing.

In sum, *these percentage guidelines will likely be adopted by the Commission on the basis of its notice.* For the television broadcaster, they will be more relevant than the current quarrel as to what constitutes "substantial" or "superior" service. Most saliently, they would give a general indication of what is called for, at least *quantitatively*, to meet public interest requirements in two critically important areas.

The Commission further holds that "serious deficiencies" in an incumbent's past performance constitute damaging, if not controlling, evidence against his renewal case. Commission examples of "serious deficiencies" are: overcommercialization, fraudulent practices as to advertisers, violation of racial discrimination rules, violations of the Fairness Doctrine, rigged quizzes,<sup>6</sup> plus numerous others. However, precise standards being impossible to define in this area, all matters relating to alleged "deficiencies" in the incumbent's operations must be explored in the hearing process.

In its *Citizens* decision, the Court also raised for the Commission's consideration certain additional criteria for evaluating an incumbent's performance. These criteria include: 1) elimination of excessive and loud advertising; 2) delivery of quality programs; 3) the extent to which the incumbent has reinvested the profit from his license to the service of the viewing and listening public; 4) diversification of ownership of mass media; and, 5) independence from government influence in promoting First Amendment objectives."7 Indeed, the Court suggested that a "plus" in the overall weighing process be accorded the incumbent meeting these criteria.

### **Suggestions:**

The broadcaster is clearly caught in the middle by the prevailing uncertainty. The performance standard he is required to meet is, at best, ephemeral. Yet he would be wise, both as a matter of conscience and skillful management, to practice, where economically practicable, the following:

1) *Programming*: Operators should develop substantial local, public service programming designed to meet the particular tastes, needs, and interests of the community they are licensed to serve. Increasingly, the Commission is encouraging "localism" in the areas of news and public affairs programming. *A special effort to meet the "percentage guidelines" proposed by the Commission should be made.* Although it has not ruled on the "profits reinvestment" issue, the Commission will give same greater consideration in renewal hearings in the future. Indeed, the operator who shows a substantial investment of profits into service may well nearly insure his license against challenge.

2) *Advertising*: Operators should refrain from putting on an excessive number of commercials in the broadcast day. In addition, loud and vexatious commercials should be eliminated. A balance between sound economics and audience appreciation is advised. In any event, a wise operator will keep thorough records on the amount and nature of ad-

vertising in order to justify his advertising practices at renewal.

3) *Diversification of control*: Operators should be aware that the Commission will consider diversification as "a factor to be properly weighed and balanced with other important factors, including the renewal applicant's prior record at a renewal hearing." At this "inquiry" stage, the Commission seems to be saying that multiple mass media ownership will have a demerit effect upon a renewal applicant's case, but it may be offset by showing a superior operating performance or it may be "cured" by divesting during the comparative hearing process.

1. 22 FCC 2d 424 (1970).
2. Case No. 24,471, decided June 11, 1971.
3. **Ashbacker Radio Corporation v. F.C.C.**, 326 U.S. 327 (1945).
4. FCC 71-826, Docket No. 19154.
5. Notice of Inquiry, FCC 71-159, Docket No. 19154.
6. 22 FCC 2d at 426.
7. Slip Opinion at 25, n. 35; at 26 n. 36; at 28.

# Commission Policy and Proposals: Programming

In its *Notice of Inquiry and Notice of Proposed Rule Making*<sup>4</sup> relating to license renewals, the Commission set out certain proposals designed to promote the fulfillment of public interest obligations by the licensee. Indeed, these proposals elaborated upon and extended the 1970 "Comparative Hearing Policy Statement" and raised the spectre of Commission sanctions in event of non-compliance. Said the Commission:

Programming is the essence of service to the public, the principal ingredient of which is the diligent, positive and continuing effort by the licensee to discover and fulfill the needs and interests of his area.

Although relatively few broadcasters face competition at renewal, this fact does not eliminate the very real threat of facing Commission sanctions, which include: 1) letter of censure, 2) monetary forfeiture, 3) short-term renewal, or in rare instances, 4) a revocation proceeding, or 5) a combination of two or more of the above. Sanctions are generally levied for violations of Commission rules in the broad area of programming, employment practices and advertising.<sup>3</sup> Such sanctions are imposed by the Commission to both spur the licensee to a better performance and spur potential competitors to challenge by weakening the existing licensee's standing before the Commission.

Efforts to determine community needs must be adequately documented. Leaders and individuals consulted must be identified by name, position, and organization. There must be sufficient material avail-

able to assure that a careful investigation of the community was made and that meaningful results were obtained. Experience of an applicant or interviewers in a particular community or in broadcasting in general is insufficient unless coupled with an adequate survey or investigation of the community.

As a second element of the showing on community needs, an applicant is required to list in his application all *significant suggestions about community needs received through consultations with community leaders and individuals*, whether or not it is proposed to treat them in the proposed programming service. The listing of suggestions as to community needs should include those which the applicant decides not to meet in preparing his program schedule.

The third step required of an applicant in making a programming showing is to make some subjective evaluation of the various suggestions received in the investigations made with respect to community needs. An applicant may be required to justify the evaluation of the relative importance of suggestions received and how these evaluations are reflected in the formulation of program proposals. Initially, at least, it is not essential to show why some community needs found will be treated in a proposed programming service and why others were not. Applicants should be prepared to do so in the event there is need to respond to a request for enlargement of issues.

The fourth requirement of a proposed programming showing is relating *what* programming service is proposed to meet *what* needs. In other words, a relating of the programming service to the needs of the community as they have been evaluated by the applicant.

The Commission has stated that an applicant may wish, in addition, to survey his listening public as to the types of *programs* they prefer. Once again, it is emphasized that this is *supplementary to* and apart from the survey of community needs. Here again, valid sampling methods are expected. The Commission indicates that the latitude a station has to

specialize in one type of entertainment programming (such as classical, country and western, rock 'n roll, soul music, talk and discussion) increases as the number and diversity of stations in its community increase.

Pursuant to the goals espoused by adoption of the "Programming Section" (IV-A), the Commission has also adopted rules to require 1) *broadcast notice* of the manner in which the public may express opinions about broadcast service and 2) the maintenance of a *local public file* of opinions received by licensees.<sup>5</sup> In addition, it has revised publication rules (Sec. 1.580) so that the public will have increased opportunities to participate in the formulation of licensees' programming decisions.

The Commission stated that it:

. . . does not condone the practice of community groups waiting until long after an application for renewal of license has been filed before raising any complaints they may have concerning a station's policies or program practices. Complaints concerning a licensee's hiring or employment practices should be brought to the attention of the licensee and/or Commission immediately upon their occurrence, and this can be done any time during the license period. Likewise, community groups can and should take any complaints they may have concerning a licensee's programming or program policies to the licensee at any time during the license period. Such practices should serve to encourage better relationships between the licensee and concerned community groups. The practice of waiting until long after a renewal application is filed before seeking correction of alleged past derelictions of a licensee (which it has been given no prior opportunity to consider) is disruptive of the Commission's processes.

Hence, the Commission has and is currently taking affirmative action in order to stimulate broadcasters to both promise more and meet their promises with performance. In its actual renewal processes, the Commission will likely pay particular attention to the following: 1) the applicant's fulfillment of community tastes, needs and interest, and, particularly, his attention to community feedback; 2) the applicant's performance during the past renewal period in the critical programming categories (e.g., local pro-

grams, news, public affairs, etc.); 3) the applicant's programming proposals in his past renewal application as compared to his actual programming during the past renewal period; and 4) any information suggesting violation of the Act and/or Commission rules and policies.

### **Policy and Proposals: Employment Practices**

Aside from the broad programming requirements, the Commission may, via its forfeiture power, impose sanctions for discriminatory practices in employment. The Commission has adopted rules which require that all broadcast stations with *five or more full time employees* establish, maintain, and carry out a positive, continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice.

To implement this latter provision of its Rules, the Commission requires that each of its permittees and licensees adopt programs which will:

- a) Define the responsibility of each level of management to insure positive application and vigorous enforcement of the policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;
- b) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation;
- c) Communicate the station's equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion or national origin, and solicit their recruitment assistance on a continuing basis;
- d) Conduct a continuing campaign to exclude every form of prejudice or discrimination based upon race, color, religion or national origin from the station's personnel policies and practices and working conditions;
- e) Conduct continuing review of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity

In addition, it is contemplated that broadcast application forms be revised so as to provide specific

sections wherein applicants for renewal or new facilities or for acquisition of facilities will have to state what specific practices will be followed in order to assure equal employment opportunity for Negroes, Orientals, American Indians and Spanish surnamed Americans in each of the following aspects of employment practice: recruitment, selection, training, placement, promotion, pay, working conditions, demotion, layoff and termination. The "employment" section need not be filled in if the station has less than five full time employees or if it is in an area where the relevant minorities are represented in such insignificant number that a program would not be meaningful, in which case a statement of explanation will be required.

### **Commission Policy and Proposals: Advertising**

Commission sanctions might also be taken at renewal, though not limited thereto, for a station's failure to eliminate any "false, misleading or deceptive advertising." In this regard, the Commission directs particular attention to the fact that licensee responsibility is "not limited merely to a review of the advertising copy submitted for broadcast, but 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."<sup>6</sup> Though it does not like to make judgments whether particular broadcast advertisements are false or misleading and generally defers on these matters to the FTC, the Commission may act in a clear, flagrant case. An Advertising Primer, outlining deceptive advertising regulations, is currently being explored with the FTC and would be of immense value to broadcasters.

Moreover, the Commission operates under a commercial policy which stipulates a normal commercial content of *18 minutes in each hour* with specified exceptions permitting up to 20 minutes in each hour during no more than 10 percent of the total weekly hours of operation. A further exception would per-

mit up to 22 minutes where the excess over the 20 minute ceiling is purely political advertising.

<sup>1</sup> 22 FCC 2nd 424 (1970).

<sup>2</sup> Especially *Citizens Communications Center v. FCC*, Case No. 24,471, decided June 11, 1971.

<sup>3</sup> Technical violations are also sources of Commission sanction. Because they are so varied and numerous, technical violations will not be treated in this article.

<sup>4</sup> Docket No. 19153, Adopted: February 17, 1971, Released: February 23, 1971.

<sup>5</sup> Educational broadcasters would be exempted from these proposed rules.

<sup>6</sup> FCC 61-1316, 11839 (§11:402).

# Personal Attack

Of concern to broadcasters are the Commission's Rules governing "fairness"—the licensee's broad obligation to air all sides of a controversial issue of public importance.

Generally, the "Fairness Doctrine" requires that the broadcast licensee: 1) encourage, implement and foster the carriage of programming designed to expose public issues; and 2) afford a reasonable opportunity for all sides of important, controversial issues to be aired by the licensee's station.

## The Rule

Specifically, the Commission's Rules (Section 73.123 for AM; 73.300 for FM, and 73.679 for TV) relating to the personal attack provisions of the Fairness Doctrine require that:

(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 one 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).

(c) Where a licensee, in an editorial, (1) endorses or (2) 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 (a) notification of the date and the time of the editorial; (b) a script or tape of the editorial; and (c) 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.

The Commission believes licensees must act affirmatively to achieve compliance with the "Fairness Doctrine." However, the licensee has considerable discretion in choosing the particular form of affirmative action to be used. It is not a matter of choosing one method and rigidly adhering to it; the licensee's analysis of a particular situation and selection of the means to achieve "fairness" is what counts. Specifically, the Commission has stated (in a letter to *Mid-Florida Television Corporation*) that,

The mechanics of achieving fairness will necessarily vary with the circumstances and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often a combination of various methods. Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds a contrasting viewpoint with respect to a controversial issue presented or to be presented, communicate to the individual or group a specific offer of the use of their facilities for the expression of contrasting opinion, and send a copy or summary of material broadcast on the issue . . . As stated, it is within the discretion of the licensee, acting reasonably and in good faith to choose the precise means of achieving fairness.

In practice, however, what do the various provisions of the rule mean?

## Specific Rule Provisions

The personal attack provisions of the rule state that 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 must, among other things, offer a reasonable opportunity to respond over his facilities.

The most significant problem with the rules is the *interpretation* of its provisions; that is, what is meant by "views of a controversial issue of public importance?" Additionally, it may be asked what is the definition of "an attack upon the honesty, character, or integrity of a person or group?"

In adopting personal attack provisions for "Fairness Doctrine" rules (Docket No. 16574, July 1967), the Commission stated that "we stress that the personal attack principle is applicable only in the discussion of a controversial issue of public importance." However, the Commission pointed out that some comments had been received which,

[I]ndicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance requiring the invocation of the "Fairness Doctrine." This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public interest issues, but such issues are not the focus of the "Fairness Doctrine."

In establishing these personal attack provisions, the Commission additionally noted that the purpose of establishing the rules was to clarify and make more precise the procedures which licensees are required to follow in personal attack situations:

The long-applied standard of what constitutes a personal attack remains unaffected . . . [T]he personal attack principle is applicable where there are statements, in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character,

or honesty or like personal qualities, and not when an individual or group is simply named or referred to . . . Thus, no matter how strong the disagreement as to views may be, the personal attack principle is not applicable; it becomes applicable only where in the context of the discussion of a controversial issue of public importance, there is an attack on an individual's or group's integrity, etc., as noted above.

The Commission, however, also recognized that in some circumstances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance, or whether the group or person attacked is "identified" sufficiently in the context to come within the rule.

Succinctly, however, the Commission declared that,

The rules are not designed to answer such questions. When they arise, licensees will have to continue making good faith judgments based on all of the relevant facts and the applicable Commission interpretations. In appropriate cases, licensees can and should promptly consult the Commission for interpretation of our rules and policies. This would be the appropriate procedure should there arise a question of the applicability of the principle of a factual situation.

Therefore, in answer to the questions raised above concerning interpretation of the rule, the best course of action, in doubtful personal attack situations, is to *consult the Commission (either through your counsel or directly) for interpretation of its rules and policies.*

### **Specific Examples**

Consider the following hypothetical cases to help your understanding of "Fairness Doctrine" and personal attack rule applicability: First, suppose your station *sells* time to an individual who uses your station to discuss a controversial issue of public importance. During his broadcast, he attacks a group opposing his point of view. May you restrict a reply to *purchased* time on your facility? **No.** Even if the first individual purchased time, you would be re-

quired to 1) notify the group attacked, within one week, of the date, time, and identification of the broadcast; 2) provide a script or tape of the broadcast attack; and 3) offer a reasonable opportunity to respond over your facilities.

Second, consider the following situations involving specific candidates or public-office holders: Suppose your station sells time to Candidate A, his authorized spokesman, an individual, a group, or an organization supporting Candidate A to urge his election. Candidate A does not appear personally on any of these broadcasts; however, issues in the campaign and/or the candidate are discussed. Then an authorized spokesman, an individual, a group, or an organization supporting Candidate B requests "fairness" time under the FCC's existing policies. Does the "Fairness Doctrine" apply? **Yes.** The Commission has held that the "Fairness Doctrine" is applicable and, in answering this question, the Commission reiterated "Fairness Doctrine" requirements: When a licensee presents one side of a controversial issue of public importance, he must afford a reasonable opportunity for the presentation of contrasting views.

Would free time have to be provided to Candidate B's spokesmen or supporters? The Commission has held that the public's "right to know" cannot be defeated by the licensee's inability to obtain paid sponsorship for presentation of a contrasting viewpoint *even where the initial presentation was made under paid sponsorship.* However, when spokesmen or supporters of Candidate A have purchased time, the Commission feels *it would be inappropriate to require licensees to, in effect, subsidize the campaign of an opposing candidate by providing Candidate B's spokesmen with free time.*

Suppose your station sells time to an individual, a group, or an organization supporting Candidate A and the time is used to criticize Candidate B or his position on the issues of the campaign. Authorized spokesmen, an individual, a group, or an organization supporting Candidate B request fairness time under the FCC's policies. Must you furnish time on

your station? The Commission says the "Fairness Doctrine" is applicable here; however, you would not be obligated to provide *free time* to authorized spokesmen for Candidate B, or to those associated with him in the campaign, *if authorized spokesmen for Candidate A, or those associated with him in the campaign, had used paid time on your station to criticize Candidate B or his position on the campaign issues.*

In other words this latest statement of Commission policy means if your station *sells time* to Candidate A, or to an individual, a group, or organization supporting Candidate A, and, 1) Candidate A does not appear personally on the program, but issues in the campaign and/or the candidate are discussed, or 2) the broadcast time is used to criticize Candidate B or his position on the issues of the campaign, *then the "Fairness Doctrine" does apply* and time must be made available; however, *you would not be obligated to provide free time.*

## **Conclusion**

Obviously, the problems presented by the "Fairness Doctrine" and its rules relating specifically to personal attack are many. When specific factual situations arise which may cause potential trouble for your station, you should contact your counsel at once.

# The Fairness Doctrine

In general, this doctrine requires that the broadcast licensee: (1) encourage, implement and foster the carriage of programming designed to expose public issues; and (2) afford a reasonable opportunity for all sides of important, controversial issues to be aired by the licensee's station.

## Evolution of the Fairness Doctrine

The Fairness Doctrine has grown out of a series of cases. Its definitive policy statement appeared in the Federal Communications Commission's 1949 *Editorializing Report*,<sup>1</sup> and was the subject of the 1969 landmark case, *Red Lion Broadcasting Company, Inc. v. FCC*.

As noted in its *Editorializing Report*, the Commission has always believed that the full implementation of the Fairness Doctrine places an *affirmative* obligation on broadcast licensees:

If . . . 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 chose 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.

In a letter to *Mid-Florida Television Corporation*, the Commission further explained the "affirmative obligations" of broadcast licensees:

The mechanics of achieving fairness will necessarily vary with the circumstances and it is within

the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often a combination of various methods. Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds a contrasting viewpoint with respect to a controversial issue presented or to be presented, communicate to the individual or group a specific offer of the use of their facilities for the expression of contrasting opinion, and send a copy or summary of material broadcast on the issue. . . . As stated, it is within the discretion of the licensee, acting reasonably and in good faith to choose the precise means of achieving fairness.

Thus the Commission believes *licensees must act affirmatively* to achieve compliance with the Fairness Doctrine. However, the licensee has considerable discretion in choosing the particular form of affirmative action to be used. It is not a matter of choosing one method and rigidly adhering to it; the licensee's analysis of a particular situation and selection of the means to achieve "fairness" is what counts.

In *Red Lion* the Supreme Court noted the broadcast licensee's duty, as pronounced by the Commission, to give adequate coverage to public issues and, in so doing, to meet the requirements of the Fairness Doctrine. The Court also pointed out that "this must be done at the broadcaster's own expense, if sponsorship is unavailable," and "the duty must be met by programming obtained at the licensee's own initiative if available from no other source."

### **Fairness Doctrine refinements**

In its letter of June 3, 1970, to Nicholas Zapple, Communications Counsel, Committee on Commerce, United States Senate, the Commission presented hypothetical cases to explain its more restrictive applications of the Fairness Doctrine.

Consider the following situation: Your station

sells time to candidate A, his authorized spokesman, an individual, a group, or an organization supporting candidate A to urge his election. Candidate A does not appear personally on any of these broadcasts; however, issues in the campaign and/or the candidate are discussed. Then an authorized spokesman, an individual, a group, or an organization supporting candidate B requests "fairness" time under the FCC's existing policies. Does the Fairness Doctrine apply?

Yes. The Commission has clearly held that the Fairness Doctrine is applicable<sup>2</sup> and, in answering this question, the Commission reiterated what the Fairness Doctrine requires: When a licensee presents one side of a controversial issue of public importance, he must afford a reasonable opportunity for the presentation of contrasting views.

Where a spokesman for, or a supporter of Candidate A, buys time and broadcasts a discussion of the candidates or the campaign issues, there has clearly been the presentation of one side of a controversial issue of public importance. It is equally clear that spokesmen for or supporters of opposing Candidate B are not only appropriate, but the logical spokesmen for presenting contrasting views. Therefore, barring unusual circumstances, it would not be reasonable for a licensee to refuse to sell time to spokesmen for or supporters of Candidate B comparable to that previously bought on behalf of Candidate A.

Would *free time* have to be provided to candidate B's spokesmen or supporters? The Commission has held that the public's "right to know" cannot be defeated by the licensee's inability to obtain paid sponsorship for presentation of a contrasting viewpoint *even where the initial presentation was made under paid sponsorship*.<sup>3</sup> However, when spokesmen or supporters of Candidate A have purchased time, the Commission feels *it would be inappropriate to require licensees to, in effect, subsidize the campaign of an opposing candidate by providing Candidate B's spokesmen with free time*.

Suppose your station sells time to an individual, a group, or an organization supporting Candidate A and the time is used to criticize Candidate B or his position on the issues of the campaign. Authorized spokesmen, an individual, a group, or an organization supporting Candidate B request fairness time under the FCC's policies. Must you furnish time on your station?

The Commission says the Fairness Doctrine is applicable here; however, you would not be obligated to provide *free time* to authorized spokesmen for Candidate B, or to those associated with him in the campaign, *if authorized spokesmen for Candidate A, or those associated with him in the campaign, had used paid time* on your station to criticize Candidate B or his position on the campaign issues.

In other words this latest statement of Commission policy means if your station *sells time* to Candidate A, or to an individual, a group, or organization supporting Candidate A, and (1) Candidate A does not appear personally on the program, but issues in the campaign and/or the candidate are discussed, or (2) the broadcast time is used to criticize Candidate B or his position on the issues of the campaign, *then the Fairness Doctrine does apply* and time must be made available; however, *you would not be obligated to provide free time.*

### **Proposed new rules**

The Commission is now considering whether it should place licensees under an *even more compelling obligation to actually seek out appropriate spokesmen* to represent one side of a controversial issue of public importance.

Last year the Commission considered a case where a licensee, after presenting only one side of a controversial issue in an editorial, had rejected a spokesman for the other side as inappropriate. The Commission held that while such rejection

may come within the wide latitude given the licensee under the general provisions of the Fairness Doctrine, the licensee was under a *compelling obligation* to take steps to obtain an appropriate spokesman. Thus, the licensee could *not* rely on general announcements over the air but, instead, had to invite specific persons believed to be appropriate spokesmen to appear.<sup>4</sup>

The Commission now proposes that where a licensee presents only one side of a controversial issue in a *series of broadcasts* (more than one broadcast) within a "reasonable" time period (probably six to nine months or less), with no plans of its own to present other viewpoints, the licensee may rely upon the general announcement technique *only for the first presentation*. If no appropriate spokesmen come forward as a result of the on-the-air announcement and the same controversial subject is again discussed, the licensee must directly contact specific persons believed to be appropriate spokesmen to present the contrasting viewpoint.

These persons must be given the essence of what has been broadcast and offered a "clear and unambiguous opportunity" to respond.

Under the proposed rules, therefore, if a licensee broadcasts more than one "program" on a controversial subject, and no group or individual comes forward in response to the licensee's on-the-air invitation to present opposing viewpoints, then the licensee must actively go out and find "appropriate spokesmen" to present the opposing view—even if these "appropriate spokesmen" have neither seen nor heard the licensee's initial broadcast.

## Conclusion

The Commission continues to expand broadcaster's responsibilities under the Fairness Doctrine. The *Red Lion* case of 1969 has sharpened Commission sensibilities and, as a result, has

placed a greater burden on the broadcaster.

You and your staff should carefully consider all of the foregoing in planning your programming. If you have questionable areas of Fairness Doctrine applicability, get in touch with your counsel.

The Fairness Doctrine continues to generate voluminous mail each month to the Commission. Thoughtful planning and a genuine effort to broadcast all sides of controversial issues will, hopefully, free your station from Commission inquiry.

1. 3 FCC 1246 (1949)

2. Letter to Nicholas Zapple 19 RR 2d 421, (1970)

3. Cullman Broadcasting Company, 40 FCC 576, 25 RR 895 (1963)

4. Richard C. Ruff, 19 FCC 2nd 838 (1969)

# New Dimensions to "Fairness"

The United States Court of Appeals for the District of Columbia Circuit has just issued a decision which is reverberating around broadcast licensee's control rooms throughout the country. The Court has, in effect, added a new dimension to "fairness" by declaring that, as a general policy, a broadcaster *cannot* refuse to sell any of its advertising time to groups or individuals wishing to speak out on controversial public issues. That is, if a broadcaster sells time on its facilities to regular commercial advertisers, it must also sell time to groups or individuals who wish to speak on controversial issues.

There is still much controversy over the exact scope of the Court's order. However, the reality to you, the broadcaster, is that you may very well face some knotty legal questions in refusing to make time available to groups or individuals who wish to use your facilities to speak out on controversial subjects.

Before discussing the Court's pronouncements, a review of the broad precepts of the "Fairness Doctrine" is in order.

## **Basic Fairness Doctrine**

The Fairness Doctrine concerns a broadcast licensee's broad obligation to air all sides of a controversy of public importance. In general, this doctrine requires that the broadcast licensee: (1) encourage, implement and foster the carriage of programming designed to expose public issues; and (2) afford a reasonable opportunity for all

sides of important, controversial issues to be aired by the licensee's station.

The Fairness Doctrine has evolved out of a series of cases. Its definitive policy statement appeared in the Federal Communication's 1949 *Editorializing Report*, and was the subject of the 1969 landmark case, *Red Lion Broadcasting Company, Inc. v. FCC*. The Commission believes that the full implementation of the Fairness Doctrine places an "affirmative obligation" on broadcast licensees:

If . . . 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.<sup>1</sup>

What is meant by an "affirmative obligation?" The Commission attempted to explain its interpretation in a letter to *Mid-Florida Television Corporation*:

The mechanics of achieving fairness will necessarily vary with the circumstances and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often a combination of various methods. Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds a contrasting viewpoint with respect to a controversial issue presented or to be presented, communicate to the individual or group a specific offer of the use of their facilities for the expression of contrasting opinion, and send a copy or summary of material broadcast on the issue . . . As stated, it is within the discretion of the licensee, acting reasonably and in good faith, to choose the precise means of achieving fairness."

However, in view of the Court's recent decision, can it now be correctly stated that it is, in

fact, "within the discretion of the licensee . . . to choose the precise means of achieving fairness?"

### The Court's Decision

According to the decision of the Court of Appeals in *Business Executives' Move for Vietnam Peace v. FCC, et al*, the broadcaster still retains considerable discretion in methods of achieving fairness. The Court simply says that broadcasters may *not* refuse to sell advertising time to groups or individuals wishing to speak out on controversial issues. Obviously, many do not agree with the Court's "simple" pronouncement; industry reaction has been swift and vocal—much of it adamantly against the Court's decision.

The case arose before the Court as a result of The Business Executives' Move for Vietnam Peace attempt to *purchase* time on a station in Washington, D.C., for broadcast of several recorded one-minute announcements which it believed "offered the public a unique viewpoint on what is no doubt one of the great political and moral issues of our time."

The announcements urged "immediate withdrawal of American forces from Vietnam and from other overseas military installations," and featured statements by leading businessmen and retired military officers.

The Washington radio station, over a period of eight months, repeatedly refused to sell any time to the business executives. According to the Court, the station cited no particular objection to the planned announcements. Rather, the station relied solely upon an across-the-board policy barring all editorial advertisements, recognizing "its long-established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues."

In essence, the Federal Communication Commission agreed with the station. Before the Court, the Commission argued that it is permissible for

a licensee to follow a general policy of rejecting all editorial advertisements, because (1) the fairness doctrine should be interpreted to all rejection of paid controversial advertisements since licensees have a broad leeway to exercise their professional judgment as to the format for presentation of controversial issues. Therefore, acceptance of the particular format of paid advertising was by no means compulsory; and (2) the First Amendment was equally permissive and to do otherwise would create chaos in broadcasting.

Noting that the broadcast media "function as both our foremost forum for public speech and our most important educator of an informed people," the Court rejected the arguments set forth and noted that the narrow question at hand was whether such groups or individuals have a limited right of access to radio and television for *paid* public issue announcements, and whether the Commission's ruling that a *total exclusion* of such announcements was permissible.

In response to the argument that chaos would result from non-exclusion of paid advertisements, or that those groups with the most amount of money would tend to dominate the airwaves (since they could afford to purchase more air time), the Court indicated that regulations must be developed by the Commission and broadcasters. But in so doing, basic guidelines of immediate importance to broadcasters were developed. The Court declared,

Clearly, for example, broadcasters are entitled to place an outside limit on the total amount of editorial advertising they will sell. To fail to impose some such limit would be to deny the public the other sorts of programming which it legitimately expects on radio and television. Similarly, "reasonable regulation" of the placement of advertisements is altogether proper. No advertiser has a right to air his presentation at any particular point in an evening's programming. Nor does he have a right to clog a particular time segment with his messages. A relegation of all editorial advertising to 'non-prime time' or any other major discrimination in the placement of editorial advertisements

would no doubt go too far. But there is still room for broad exercise of the broadcasters' discretion.

We need not define the precise control which broadcasters may exercise over editorial advertising. Rather, the point is that by requiring that some such advertising be accepted, we leave the Commission and licensees broad latitude to develop "reasonable regulations" which will avoid any possibility of chaos and confusion. The spectre of chaos and "mike grabbing" raised by the Commission and intervenors here is, as petitioners say, a "bogus issue." Broadcasters, after all, have dealt quite successfully with the scheduling problems involved with commercial advertising. We require only that non-commercial advertisers be treated in the same evenhanded way. Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted.

Beyond the mistaken suggestion of administrative apocalypse, the Commission and intervenors have raised a more plausible and important claim, involving the danger that a few individuals or groups might come to dominate editorial advertising time. Of course, the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely. It takes more money to operate a magazine or newspaper—or, for that matter, a broadcast station—than to buy a segment of time for an editorial advertisement. Yet we are not reluctant to provide strict First Amendment protection for the operators of magazines, newspapers and broadcast stations. The real problem, then, is not that editorial advertising will cost money, but that it may be dominated by only one group from one part of the political spectrum. A one-sided flood of editorial advertisements could hardly be called the "robust, wide-open" debate which the people have a right to expect on radio and television.

Again, however, invalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting some editorial advertisements, there is room for the Commission and licensees to develop such guidelines. For example, there could be some outside limits on the amount of advertising time that will be sold to one group or to representatives of one particular narrow view-

point. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. However, we are confident of the Commission's ability to set down guidelines which avoid that danger."

In a scathing slap at the industry, the Court, in conclusion, declared as follows:

The principle at stake here is one of fundamental importance: it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. More specifically, it concerns the application of that right to the substantial portion of the broadcast day which is sold for advertising. For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines. As a result, a cloying blandness and commercialism (sometimes said to be characteristic of radio and television as a whole) have found an especially effective outlet. We are convinced that the time has come for the Commission to cease abdicating responsibility over the uses of advertising time. Indeed, we are convinced that broadcast advertising has great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.

Under attack here is an allegedly common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with "non-controversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Commission's view, an attack on the permissibility of this practice "goes to the heart of the system of broadcasting which has developed in this country."

We disagree. The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an extreme form of control which totally excludes controversial public debate from broadcast advertising time.

We hold specifically 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. We do not hold, however, that the planned announcements of the petitioners—or for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many “editorial advertisements” will be put on the air.

L-3 FCC 1246 (1969)

# The Supreme Court Speaks On Fairness

The widely-heralded Red Lion—RTNDA case was decided by the U.S. Supreme Court on June 9, 1969. In this case, a consolidation of two conflicting lower court decisions granted certiorari, the Court finally settled the constitutionality of the Fairness Doctrine and Personal Attack Rules.

## The Fairness Doctrine

The Fairness Doctrine requires that broadcast licensees: (1) encourage, implement and foster the carriage of programming designed to expose public issues and (2) afford a reasonable opportunity for airing all sides of important, controversial issues carried over the broadcaster's station.

The Cullman Broadcasting Co. case, 25 RR 895 (1963), required the broadcaster to provide *balanced* exposure of controversial issues—at his own expense, if necessary. Another series of cases—including Metropolitan Broadcasting Corp., 19 RR 602 (1959)—required broadcasters to carry all sides of such issues, at their own expense, if necessary, and to initiate special programming when necessary in order to provide balanced coverage of controversial issues. In 1959, the United States Congress amended the “equal time for political candidates” requirements of Section 315 of the Communications Act. Almost parenthetically in that amendment Congress alluded to “. . . the obligation imposed upon them (broadcasters) under this Act . . . to afford reasonable opportunity for the discussion of conflicting views on issues of

public importance." The Commission viewed this language as a statutory approval of the Fairness Doctrine. And now, so do the courts.

Since its first formal articulation in the Commission's 1949 *Report on Editorializing*, 13 FCC 1246, the Fairness Doctrine has thus acquired substantial support from the Commission's policy statements and case precedent, and received indirect approval from the United States Congress. But until Red Lion—RTNDA, there was, nevertheless, extensive controversy as to the legal validity of the Fairness Doctrine.

The Fairness Doctrine was held constitutional in a June, 1967, decision by the U.S. Circuit Court of Appeals for the District of Columbia. But then, in September, 1968, one aspect of the Fairness Doctrine—the Personal Attack Rules—was held unconstitutional by the U.S. Court of Appeals for the Seventh Circuit (Chicago). It was this conflict that brought the Supreme Court to consider the question.

### **The Personal Attack Rules**

Unfortunately, there is an unavoidable overlap between the Fairness Doctrine and Section 315 of the Communications Act. Section 315 pertains *only* to political candidates. The Fairness Doctrine, however, concerns the licensee's *broad* obligation to air all sides of a controversy of public importance. Obviously, a hotly contested campaign for public office (normally covered by Section 315) might also constitute a "matter of public importance," apparently falling under the Fairness Doctrine and obligating the broadcaster to offer "free" time, if necessary, for "fair" coverage of all sides of the controversial matter.

Into this overlap the personal attack rules began to emerge in the early 1960's. Personal attacks tend to arise from discussions of extremely controversial issues and/or discussions by one political candidate (or his spokesman) about another political candidate. The Fairness Doctrine,

because of its breadth, would be applicable to both situations. A logical extension of the Fairness Doctrine would (the Commission decided) require broadcasters to provide the person or group attacked with an opportunity to respond—not on an equal time basis (pursuant to Section 315 of the Act), but on a reasonably comparable time basis (pursuant to the Fairness Doctrine).

After the considerable delay typical of its gradual, back-door approach to major new regulation, the Commission proposed in 1966 to adopt Personal Attack Rules. On July 5, 1967, the Commission revised its Rules by adding Section 73.300 (AM), 73.598 (FM), and 73.679 (TV) to provide, in substance that:

(1) If during program presentations of controversial issues, an attack is made upon the honesty, character, or integrity of an *identified* person or group, the licensee shall (within a week after the attack) provide the parties attacked with the specifics of the attack (a script or tape of the attack or, if neither be available, an accurate summary of the attack) and offer a reasonable opportunity to respond on-the-air. This principle would be applicable to a statement by a representative of a political candidate whenever an attack is lodged against the opposing candidate. (Naturally, if a political candidate is the one launching the attack, Section 315 of the Act comes into play. The broadcaster is required to provide the opposing candidate with "equal time.")

(2) The provisions of the Personal Attack Rules have not been made applicable to attacks by foreigners or to comments made on bonified newscasts.

(3) In the case of editorials, in which the licensee endorses or opposes legal candidates, notice and an offer of time must be given within 24 hours.

In the 1967 Red Lion case, the complainants launched an unsuccessful challenge against the entire Fairness Doctrine. In the 1968 RTNDA case, the Chicago appellate court, while not ruling that the *entire* Fairness Doctrine was unconstitutional, did hold that the Personal Attack Rules would inhibit broadcast dissemination of views on political candidates and controversial issues, that

the Commission's Personal Attack Rules were too vague, that the First Amendment of the Constitution applies equally to the press and the broadcast media, and that the Personal Attack Rules contravene the First Amendment and as such are unconstitutional. The Chicago Court concluded that the Commission's Order adopting the Personal Attack Rules must be "set aside."

### **The Fairness Doctrine and Personal Attack Rules—the Court's Dicta**

The Supreme Court stepped in to resolve the issues, pointing out in Red Lion—RTNDA dicta that:

(1) The United States Congress has authorized the Fairness Doctrine and the Commission's Rules on personal attacks and political editorial.

(2) Such Rules and policies do not abridge the freedoms of speech and press protected by the First Amendment but, instead foster those objectives; accordingly, they are legally valid and constitutional.

(3) Wherever a personal attack has been lodged against the person involved in a public issue, the Fairness Doctrine and the Commission's Rules require that the individual attacked be offered an opportunity to respond.

(4) The Fairness Doctrine compels broadcasters to provide adequate coverage of issues and to be fair in its treatment and exposition of opposing views. Such opposing views must be offered, even if it must be done at the broadcaster's own initiative and expense.

(5) If one candidate is endorsed in a political editorial, the other candidates must be offered time to reply either personally or by spokesman. (In effect, the Supreme Court has made it most imprudent for any broadcaster to carry an editorial endorsing a political candidate, because the opposing candidate will then be able to claim the opportunity to appear personally.)

(6) The Commission has broad power ("not niggardly, but expansive") to make sure that broadcasters operate in the public interest. Arguments that the Personal Attack Doctrine and/or the Fairness Doctrine in general contravene the basic freedoms of speech and press were vastly outweighed, the Court decided, by the broad mandate Congress has given the FCC.

(7) The Court explained at length the statutory background of the Fairness Doctrine, so as to assert the legal basis of the Commission's powers in this area.

(8) The public-interest language of the Communications Act, the Court noted, authorizes the Commission to *require* licensees to use their stations for discussion of public issues. The Commission is free to implement this requirement by reasonable rules and regulations, as long as it does not abridge freedom of speech and press and is not performing censorship as proscribed by Section 326 of the Act. (Unfortunately, the language is not helpful in outlining what boundaries, if any, limit the Commission in dictating the amount and content of public issue and/or other programming that must be carried by licensees. In fact, the dicta of the case may well be read some day as the foundation of program censorship and control by the Federal Government. Many current regulatory powers of the Commission were once viewed as equally ludicrous.)

(9) Perhaps the decision implies that the First Amendment standards (and protections) are different for broadcasters than they are for the public. The Court noted that where there are substantially more individuals who might seek broadcasting facilities than there are frequencies to allocate, it would be inane to accord the broadcasters with full First Amendment rights. (This observation seems inconsistent with a number of cases decided by lower federal appellate courts and appears to give the Commission the broadest sanction it could have hoped for.)

10) It is the right of viewers and listeners which is paramount, not the right of broadcasters.

(11) The Commission could require broadcasters to share their frequencies with others. The First Amendment confers on broadcasters no right to prevent others from broadcasting on their frequencies and no right to an unconditional monopoly of the scarce resource.

(12) There is at least a possibility that the Personal Attack and Political Editorial Rules will lead to elimination of coverage of controversial issues. However, the Commission has the power to insist that licensees give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees as trustees for the entire community, obligated to give suitable time and attention to matters of great public concern.

(13) Despite the Court's extremely broad language, it did not ratify every past and future decision by the Commission with regard to programming. It did, however, create the impression that there are no effective prohibitions against greatly increased regulation of broadcasting by the Commission.

## **Conclusion**

Ostensibly, this case stands for little more than the premise that the Fairness Doctrine and related Personal Attack Rules are legally valid and constitutional. Unfortunately, the overtones of the case appear to transcend the relatively narrow boundaries of the Fairness Doctrine. In effect the Red Lion—RTNDA case gives the Commission a "green light" to adopt virtually any regulation that appears feasibly related to the ephemeral concept of public interest. Clearly, it is a case you should pay close attention to and review with your legal counsel.

# Boundaries of "Obscene or Indecent" Language Over-the-Air

The question as to the scope of permissible language over-the-air has been the subject of heated debate in the courts, at the Commission, and a problem of great dimension to broadcasters. How does a broadcaster best balance the interests of a specialized audience's right to hear speech which is "like it is" with the general audience's right to be free from listening to language which offends their personal standards of decency? To what limits may a broadcaster allow an interviewed guest to come forth with spontaneous utterances of salty language? Will a broadcaster's restrictions on the type of language used inhibit or enhance the desired "robust and wide-open debate"<sup>1</sup> encouraged by the FCC?

In a series of forthright opinions on free speech, U.S. Courts have proscribed certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace<sup>2</sup>. In all cases, the courts have set standards for proscribed speech which take into account the considerations which gave birth to the nomenclature—the nature of the speech and the circumstances under which it was uttered.

With both the constitutional imperative and historical case precedents in mind, Congress, in 1948, passed legislation which prohibited "obscene, indecent, or profane language by means of radio communication" and imposed a punishment of up to \$10,000 fine or imprisonment of up to two years<sup>3</sup>. Its language was derived from Section 326 of the 1934 Federal Communications Act which expressed, to a substantial degree, that this prohibition was *not* to be construed as giving the Commission the power of censorship over programming.

The few opinions construing the U.S. Code 1464 prohibition have, when taken together, involved a mixing of principles which tend to obliterate any clear demarcation or distinction. Like the "freedom of speech" cases before them, the FCC and the courts have imposed no semantic straitjacket in defining a standard for "obscene, indecent, or profane language." *Per contra*, in the few pertinent cases, they have attempted to balance a number of considerations, including the following:<sup>4</sup>

- 1) Whether to the average person, applying contemporary community standards, the dominant theme of the language taken as a whole appealed to prurient interests;<sup>5</sup>
- 2) the subject matter of the program, the context in which the utterance was made, and the value or relevance of the utterance to the segment of listeners to which it was directed;
- 3) whether the questionable language was essential to the integrity or reality of the presentation;
- 4) the time of the broadcast, the likelihood that children might be in the audience, and the mitigating fact of cautionary announcements;
- 5) whether the broadcaster had an opportunity to control the content of the speech, whether the utterance was spontaneous, and whether the program presented was live or filmed.

Like the criterion established in the general "obscenity cases" (*Roth, Jacobellis, Memoirs, Ginsburg*), the prevailing limits of permissible language

over-the-air is, at best, confusing. An attempt to cite the perimeters of free speech, in order to give broadcasters some boundaries for judging their own problems in this area, follows.

Marginal or objectionable language, which falls into the category of "obscene, indecent, or profane," often occurs over-the-air during the "talk show" or "personal interview." Such language usually appears in the form of the curse expletive ("hell," "damn," "God damn it!") or the sexual expletive ("f. . .," "m.f.," "s. . ."). In the *WUHY-FM* case, the FCC found the personal interview comments of Jerry Garcia of the rock music group, "The Grateful Dead," to fall within the 1464 prohibition. Garcia's use of sexual expletives interspersed with his comments were found objectionable to the FCC because of the following:

a) Although such language is commonly used in the average person's everyday personal life, it is not commonly used in public (e.g., on an elevator, when testifying in court).

b) Such language has no redeeming social value, is patently offensive, and conveys no extension of thought or meaning to the interviewee's comments.

c) The use of such language has very serious consequences to the "public interest in the larger and more effective use of (broadcast media)."<sup>6</sup>

The Commission distinguished between "obscene" and "indecent" in finding Garcia's language objectionable. Finding that his use of sexual expletives had no "dominant appeal to prurience or sexual matters," and, hence, was not obscene, the Commission found such language "indecent." By this, it meant the "vulgar, coarse and offensive use of sexual terminology in a manner far exceeding the bounds of common decency."<sup>7</sup> Hence, the broadcaster must be cautious in permitting guest interviewees who tend to use such language to appear lest he be faced with (a) a law suit or (b) the loss of part of his viewing audience.

In another recent case, the courts found the spontaneous use of curse expletives by an interviewed guest not prohibited by 1464.<sup>8</sup> Here, the words "God damn it" uttered in a moment of anger were held not to be "obscene, indecent or profane." Determinative factors in *Gagliardo* were:

a) The words were delivered in the heat of debate and were not a matter of course.

b) The interviewee's intent to use the words uttered could not be proved.

Thus, a distinction emerged which appears to permit the spontaneous utterance by an interviewed guest, but not the voluntary expression—for voluntariness implies the power of choice. It is the duty of the broadcaster to control the language content of his programs. Analysis of the foregoing cases reflects the following general guidelines:

a) If a broadcaster has an interview containing objectionable language on tape or film, he'd be wise to refrain from broadcasting same. That the interviewee has spoken spontaneously no longer prevails as the issue; the *broadcaster* has had time to consider the interview's contents and, unlike the interviewee, can choose not to air it.

b) It is not so much the words used as the manner and context in which they are utilized which is determinative. If used spontaneously and without warning to the broadcaster, he is not charged with the burden of control.

c) The broadcaster will be held accountable for objectionable language by interviewed guests unless he can show that such language was essential to the integrity or reality of the presentation. In this case, the broadcaster is usually protected if the presentation is limited to readings from classics or descriptions of works of art.

Obviously, the Commission possesses great latitude in proceeding in this area under the "public interest" standard. Heretofore, it has yielded free

speech a "preferred position" and given nearly all language full protection of the guarantees. It would prefer not to be responsible for interpreting and applying 1464 at all. Relying on the principle in *Burstyn*,<sup>9</sup> the Commission regards the interpretation of 1464 as "a matter of first impression which can only be definitively settled by the courts."<sup>10</sup> With the boundaries of permissible language inconstant and the value varieties utilized by the Commission and the courts for determining language that is "obscene, indecent, or profane" so ephemeral, the broadcaster would be wise to seek the advice of counsel whenever a 1464 problem arises.

1. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367.
2. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), 86 L.Ed. 1031, 1035, 62 S.Ct. 766, opinion by J. Murphy.
3. 18 U.S.C. §1464.
4. See *In re WUHY-FM*, 24 FCC 2d 408 at 410.
5. *Roth v. U. S.*, 354 U.S. 476, at 479, 77 S.Ct. 1304, at 1311 (1957).
6. Section 303(g).
7. The Commission relied heavily on *U. S. v. Limehouse*, 285 U.S. 424, 52 S.Ct. 412, 76 L.Ed. 843 (1932) which held that the word "filthy" included language that was "course, vulgar, disgusting and indecent and plainly related to sexual matters."
8. *Gagliardo v. U. S.*, 366 F.2d 720 (1966).
9. *Burstyn v. Wilson*, 343 U.S. 495, 502-503 (1951).
10. *In re WUHY-FM*, *supra*, at 342.

# Seven-Day Rule Amended

A recent FCC news release reads, in part:

Complaints to the Commission from the public during April [1970] totaled 3,298 . . . .

Because of numerous local and state primary elections, there were a considerable number of complaints and inquiries regarding Section 315 of the Communications Act . . . .

All broadcast and cable licensees have an obligation to provide "equal time" to opposing candidates for public office. As the news release quoted above indicates, the "equal time" provisions of the Communications Act cause much concern and many problems.

The Commission, of course, has to balance the interests of the candidates with the interests of the licensee: the broadcaster must be able to plan his airtime and other schedules beforehand. Thus, to bring about advance notification to the broadcaster of his obligations to opposing candidates, the FCC adopted in 1959 what has become known as the "Seven Day Rule." It forces candidates to file their "equal time" requests early. This rule has been further refined and amended in 1970.

## Seven Day Rule Examined

Suppose Candidate X purchased and used many hours of broadcast time during his entire

campaign. Could his opponent, Candidate Z, wait until the last week before election day and then present his claim for equal time on your station? According to the Commission's "Seven-Day Rule" (before amendment in 1970), "a request for equal opportunities must be submitted to the licensee within one week of the day on which the prior use occurred."<sup>1</sup>

Under this rule, Candidate Z could not request equal time for those broadcasts that occurred *more than seven days before his request*. So, if Candidate X has purchased and used 18 hours during three months of his campaign, but used only one hour in the week preceding Candidate Z's request, Z would be *entitled* to only one hour of broadcast time under the "Seven-Day Rule" of the equal time provisions.

Suppose, however, Candidate X broadcasts a campaign speech on September 23. Within seven days, Candidate Y requests "equal time." Candidate Y's appearance is announced on the air before broadcast time. Candidate Z, learning of Y's forthcoming broadcast, makes a request for equal time, some 17 days *after* Candidate X used his air time. Has Candidate Z filed his request in time? Do the "equal time" provisions apply? Or, has Z been cut off by the "Seven-Day Rule?"

Before answering these questions, it would be appropriate to review Section 315 and examine its pertinent provisions.

### **Section 315 in General**

Briefly, Section 315 provides that any broadcaster who allows the "use" of his facilities by any legally qualified candidate must provide "equal opportunities," without censorship, to all other such candidates with comparable times, rates, and treatment.

A "legally qualified candidate" is defined as one for whom the electorate can vote. If *write-in* candidates are permissible under your state or

local law, then these individuals must be considered legally qualified candidates.

The term "use" of a broadcaster's facilities by a candidate is broadly defined as any and all appearances by a candidate *other than* for a bona fide newscast, news interview, news documentary, or on-the-spot coverage of a news event.

"Equal opportunities" is defined as comparable time, rates, and treatment. Comparable time does not necessarily mean the exact day, hour, and show, but, rather, about the same amount of time in a time segment of equal commercial value.

Keep this in mind and the simple statements of Section 315 and pertinent Commission rules become more meaningful. Of course, broadcasters must remember the most important rule: A station need not carry *any* political broadcast. However, if the station permits the use of its facilities by one candidate, it must afford equal opportunities to all candidates for *that* office during *that* campaign.

### Amendment to "Seven-Day" Rule

Returning to our situation above, it is interesting to note that the Commission construed its Rule to hold that Candidate Z had "timely filed" his request for equal time, even though such request was filed some 17 days after Candidate X had first "used" the broadcast facilities.<sup>2</sup>

A television station had argued that the "prior use" terminology of the "Seven-Day Rule" referred to the original telecast by Candidate Z. Declared the TV station:

To reach any other conclusion would make possible a *chain* of "equal time" requests which would go on and on, each succeeding request triggered by a preceding grant of "equal time" and would negate completely the one-week cut-off which obviously is the underlying reason for . . . [the Rule].

Not so, replied the Commission. *The FCC's reasoning: The rule provided merely that the broadcaster must receive a request for equal time within one week of the day on which the prior use occurred.* "To have the restrictive effect urged . . . the rule would have to be explicitly worded in terms of "the prior first . . . use." (Emphasis supplied.)

The Commission also declared that the "Seven-Day Rule" allowed for sufficiently orderly planning by the broadcaster, supposedly fully effective in a two-candidate race, and "as a practical matter, [it] would appear to be effective in all races, since candidates usually desire time and do not let their Section 315 right depend on the action of their rivals."

Wrong. In little more than 19 months, *the FCC reversed its reasoning* and declared, "our further consideration of this problem leads us to the view that the [Seven-Day Rule] as presently written may well have an adverse effect upon the orderly planning of station activities in political broadcast situations."

The Commission has thus placed new emphasis on broadcasters' scheduling problems, recognizing that licensees should have specific knowledge about obligations under Section 315 within a reasonable time after opposing candidates have acquired rights to "equal opportunities."

No limitation has been placed on *when* a candidate must actually "use" his "equal time"—although timing clearly cannot be "unreasonable." The Commission has announced "we believe that the licensee should know of his Section 315 obligations not later than *seven days after they first arise.*"

Under this amendment to the "Seven-Day Rule," chain requests (contemplated in our situation above) would be eliminated. The FCC now recognizes that this problem is becoming increasingly significant, especially in view of the large number of multi-candidate races. In fact, where

the "equal time" appearance of a second candidate (Candidate Y above) takes place shortly before election day, the broadcast licensee may be unable to accord "equal opportunities" to all other candidates (Candidate Z and others, *ad infinitum*) in the time remaining before the election.

To avoid this undesirable situation, the "Seven-Day Rule" *has now been amended to read as follows:*

A request for equal opportunities must be submitted to the licensee within one week of the day on which the first prior use, giving rise to the right to 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.

The proviso in the amended rule means that any new candidate requesting equal opportunities could do so after he becomes a candidate and requests equal time within seven days of a subsequent use by his opponent.

The key words to the amendment are, of course, "the first prior use." These are precisely the words contemplated by the Commission in the 1968 situation noted above. By the addition of this term, chain requests for equal time have virtually been eliminated. The broadcaster may rest somewhat easier, now that he can expect to know (in almost every instance), within seven days of the first candidate's use of his facilities, how much "equal time" must be made available.

## **Conclusion**

Consider the following hypothetical situations:

1) Candidate A, seeking a U.S. Senate seat, comes to your station and requests broadcast time to make a speech on his behalf. He offers to pay your rate card price. Must you make time available? *No*, as long as you have not made time available to other candidates for the same office. Re-

member, your station need not carry any political broadcast—but if you permit the use of your facilities by one candidate, you must afford equal opportunities to all candidates for *that* office during *that* campaign.

2) Suppose Candidate A buys time on your station and broadcasts a speech on August 1. Candidate B requests “equal time” on August 6 for a broadcast on August 15. Must you make time available to Candidate B? *Yes*. Under both the old Seven Day Rule and the new amended rule, B has filed a timely request for equal time.

3) Under the situation given in (2) above, suppose Candidate C then hears B’s broadcast of August 15 and seven days later, on August 22, requests equal time. Is Candidate C entitled to equal time? *No*. The amended Seven-Day Rule, now in effect, eliminates this possible “chain” of requests. Candidate C (unless he had become a candidate after August 1, but before August 15, under the proviso of the Rule noted above) would be precluded from using your facilities by the way of a request for “equal time.”

The Commission’s amendment of the “Seven-Day Rule” permits easier scheduling and planning by the broadcaster. The licensee will now be able to ascertain the full scope of his equal time responsibilities within seven days after he first allows the use of his station by a candidate. The only exception, of course, would occur if a new candidate qualifies after the first use of the facility.

Election time is generally a lucrative period for broadcasters with sizable “off-the-rate-card” purchases, prepaid. The FCC’s elimination of those possible chain requests (arising under its old rules) now enables the broadcaster to plan his schedule well in advance.

1. Sections 73.120(e) (AM stations); 73.290(e) (FM); 73.590(e) (Educational FM); 73.657(e) (TV); 74.1113(d) (CATV).

2. Letter to William S. Green, 15 FCC 2d 96, 14 RR 2d 544 (1968).

# The Lottery Statute: Contests and Promotions

WITH MEMORANDUM Opinions and Orders<sup>1</sup> issued June 6, 1969, the Commission relieved three stations of forfeitures assessed in letters dated January 10, 1968. The forfeitures (\$2000 against both WNEP-TV and WBRE-TV, and \$1000 against WMUU) resulted from violations of Section 1304 of Title 18, United States Code, which prohibits broadcast of lottery information. The reason given in the June 6 action for lifting the assessments was that there had been no prior judicial or Commission decisions from which the licensees could reasonably have anticipated that their broadcasts violated Section 1304. All three cases dealt with the issue of "consideration" in the contests promoted by the stations.

To constitute a lottery within the legal prohibition, a promotional scheme must contain three essential elements—a *prize*, whose winner is chosen by *chance* from a group of contestants who have furnished *consideration* in order to be eligible for the prize. If the element of consideration is absent from a scheme, it is not a lottery and thus avoids the prohibition of the section. To eliminate this element from the contests, the Commission said, "Nonpurchasing contestants must be able to obtain chances in the same places at the same times, and in the same number as purchasing contestants, in a setting which does not otherwise encourage a purchase." Since this was not the case in the contests advertised on the three stations, the Commission assessed forfeitures for broadcasting lottery information. The result of the cases was to

expand the lottery rules somewhat, although the Commission decided it would not be appropriate to enforce the expanded interpretation of "consideration" against the three stations.

### **WMUU Case**

WMUU broadcast the following commercial announcement concerning a Pepsi-Cola "Bottle Cap" prize plan:

Pepsi is giving away 400 compact, portable tape machines in Greenville, Spartanburg, Laurens, Union and Cherokee Counties. If you're among the first 400 people to find the words 'transistor tape player' under a Pepsi cap, you'll be the proud winner of a tape player.

While paid chances were available wherever Pepsi-Cola was sold, free chances were available only from the local bottling company or local route salesmen. The standard, however, is that free chances must have "reasonable equal availability" with paid chances, and the Pepsi promotion did not meet it. Nonpurchasing contestants must be able to obtain chances in the same places at the same times as purchasing contestants in a setting which does not otherwise encourage a purchase. Thus, in any "on-product" merchandise-sales promotion (where some chances are attached to the product and other chances are given free), "reasonably equally available" means that such free chances can be readily obtained from *all or at least most* of the customary retail outlets for such products—such as grocery stores and supermarkets.

Although the licensee has a responsibility to review announcements carefully for completeness and accuracy, the WMUU broadcast did not mention that free chances were available. Any announcement of this kind of promotional scheme should adequately describe the availability of free chances and the locations, times and manner in which they may be obtained. The Commission found that such cryptic phrases as "no purchase

necessary” or “nothing to buy” do not meet this requirement. Further, the way the operation is carried out is as important as the way its rules describe it. The licensee must therefore make certain that the scheme is being carried out in accordance with the rules.

### WNEP-TV and WBRE-TV Cases

Here is an example of the promotions presented by WNEP-TV and WBRE-TV:

‘I won \$25.00 in cash.’

‘I won \$5.00 in cash.’

Yes, you can win cash from Vaughn’s bread. Look for the ‘win cash’ coupon in Vaughn’s white bread, in the thrifty king size, farm style and many more. If the number on your coupon ends in one or more zeros, you are a winner of up to \$25.00 in cash. Not only can you win cash but you’ll enjoy the finest loaf of bread baked. Notice the firm texture, taste the good flavor, taste the extra freshness. No wonder Vaughn’s bread is the No. 1 favorite. It is good for you and your health, and now, win cash. Choose Vaughn’s bread and look for your lucky ‘win cash’ coupon. No purchase necessary.

The Commission observed that *participating grocers had been instructed to limit free coupons “one to a customer,” whereas Vaughn bread purchasers could get as many coupons as they wanted* by purchasing loaves of Vaughn’s white bread. Also, they could obtain the free coupon by requesting it. In order to remove the element of consideration in an “on-product,” merchandise-sales promotion such as Vaughn’s, the Commission held that the number of chances a nonpurchaser can obtain must be *reasonably equal* to those available to a purchaser. In the Vaughn case, nonpurchasing participants could obtain only one chance, whereas the purchaser could obtain any number of chances. Such a limitation unreasonably disadvantages the nonpurchasing contestant and does not eliminate the element of consideration.

## Conclusion

In most promotional schemes of this sort which have come to the Commission's attention, a provision was made for free chances to be distributed at stores selling the product advertised. The supply of free chances, however, was often exhausted long before the distributor made his next delivery. It is the sponsor's responsibility to make sure stores do not run out of free chances. And while an isolated incident is not fatal, the Commission has warned licensees that *repeated failure of the sponsor or retail outlets to supply free chances will turn the scheme into a lottery.*

Nonpurchasing contestants are disadvantaged in schemes allowing only one free chance to each person applying for it, while the purchaser may get as many chances as he wants by buying the appropriate number of products, plus the one free chance. *In order to eliminate the element of consideration, nonpurchasing and purchasing contestants must be able to get an approximately equal number of chances.*

Licensees must exercise *reasonable diligence* to make sure that promotions advertised over their facilities are not lotteries. *The broadcaster may not always rely solely on the wording of the proposed advertisements or on other representations of the advertiser.* In order to assure himself that his facilities are not being used for unlawful purposes, he should take all reasonable steps to learn whether the promotion *in its actual operation* is being conducted as a lottery. *Licensees are also responsible for assuring themselves that announcements regarding such schemes are not otherwise false or misleading, and that the advertisements provide an accurate description of the contest which sets forth the pertinent rules so that the public will not be misled.* Finally, announcement of a promotional scheme (which depends upon the reasonably equal availability of free chances) should adequately describe the availability of such free chances and the locations, times and manner in which they may be obtained.

Such cryptic messages as "no purchase necessary" or "nothing to buy" do not meet this requirement.

In view of the Commission's increased attention to violation of the lottery rules (and the possible stringent forfeitures that may result from violations), each broadcaster should scrutinize all such promotions with extreme care, and when questions arise, consult expert counsel.

1. FCC 69-608, FCC 69-609 and FCC 69-610.

# Public Inspection of Network Affiliation Contracts

ON MARCH 25, 1969, the Commission released a Report And Order (FCC 69-289, Docket No. 14710), effective May 1, 1969, amending the rules to permit Public Inspection of Network affiliation contracts. Most broadcasters have felt at first that the Orwellian "Big Brother" has taken another step towards absolute control of the broadcast industry. However, many are not familiar with the reasons behind the new FCC rules. In fact, most smaller broadcasters may be surprised to learn that the Commission adopted these rules to give them a better competitive position in the market place.

## Background

On July 16, 1962, the Commission released a Notice Of Proposed Rule Making (FCC 62-745, Docket No. 14710) and proposed public inspection of network affiliation contracts, agreements or understandings filed with the Commission pursuant to Section 1.613 of the Rules.<sup>1</sup> The Notice was quite brief. It included the Antitrust Subcommittee of the House Committee on the Judiciary<sup>2</sup> recommendation, in 1957, that the Commission "consider the advisability of making public the network affiliation contracts filed with it." Also it noted the Staff Report of the Senate Committee on Interstate and Foreign Commerce<sup>3</sup> recommending that affiliation contracts should be a matter of public record to improve competitive conditions in the industry and promote "fair and

uniform treatment for all affiliates." The House Committee stated that its study of affiliation agreements:

"... reveals widespread, arbitrary and substantial differences in the terms accorded by each network to its individual affiliates, particularly in respect to station compensation for network broadcasting services, which differences primarily favor large multiple station licensees vis-a-vis the small independent operators."

Finally the Notice included the Commission's Network Study Staff Report<sup>4</sup> in 1967, suggesting that the Commission enact a rule making the network affiliation contracts public.

Most commentators feared that public disclosure of affiliation contracts, particularly network rates, would result in competitive injury to licensee-affiliates without any compensating benefit to the public. They pointed out that such information is normally confidential and saw no reason for treating it differently in broadcasting. In effect, they argued that the same tests should be applied, *ipso facto*, to the retention and disclosure of information in the field of broadcasting as in ordinary commercial enterprise.

As to the "confidentiality" argument, the Commission found that business aspects of broadcasting, including rates, are established by private initiative and regulated by the interplay of competitive forces rather than by government fiat. However, a broadcaster's responsibility as a licensee is not discharged merely with adequate commercial competition. The Commission concluded that, while an ordinary commercial entrepreneur may withhold information from his competitor and the public at his "whim or caprice," a broadcaster may be required to disclose information which he considers to be competitive—if the public interest (of which he is trustee) will be served by such action. Publication of affiliation contracts will serve public interest by making "a major contribution towards fostering and maintenance of a national competitive broadcast structure. It will enhance and intensify competition

among broadcasters and equip licensees as well as the public with additional information."

As to such information as details of the network-station compensation arrangements, including percentage returned to the station and "free hours" (if any), the Commission's Network Study Staff concluded in 1957 that disclosure would be in the public interest. It would aid stations in their bargaining with the networks by making information available to both sides instead of just one. Also, *it would tend to decrease unjustified variations in compensation arrangements*—for example, variations based on a no-longer existing scarcity of facilities.

Furthermore, opening this type of information to the scrutiny of informed persons may help the Commission remove unfair competitive barriers and adopt appropriate regulations. The Commission (exercising its "expertise") believes these matters are related to the nature and quality of broadcast service. For instance, if the decision by a licensee to affiliate with a particular network (or to present a particular network program) were made solely on the basis of the compensation received, the public interest would not be served. Indeed, a broadcaster who chooses a network *solely on the basis of a clearance auction among networks* ". . . abandons his responsibility and violates his trust as a community broadcaster. The public is entitled to have access to information bearing on the extent to which this may be a consideration in program selection."

An affiliation contract contains other terms and conditions which may materially affect the broadcast service provided to a particular community. These include (1) means of interconnection and the delivery of programs to the community, (2) the acceptance or rejection of programming by licensees as well as the use of sustaining programs, (3) presentation of national and local commercial messages, (4) delayed broadcast arrangements, (5) provision for preemption of programming under certain conditions and (6) a number of other matters which have a direct

bearing on the amount and type of network service which the community will receive. Also, in the radio field, these contracts define the amount and placement of option time being used by a particular station. The Commission believes the public has a legitimate interest in knowing the terms upon which its network service is provided.

The basic public right of access to information kept by government agencies (unless there are very substantial reasons to the contrary) was emphasized by Congress in adopting the 1966 "Public Information" amendments to the Administrative Procedure Act. The particular importance of an informed public in broadcast regulation has been emphasized recently in decisions such as United Church of Christ v. FCC,<sup>5</sup> as well as by Congress in adopting the 1960 amendments to the Communications Act concerning legal notice. In light of these principles, the Commission did not find the arguments raised in favor of confidentiality substantial enough to be controlling here.

Finally, incidental, competitive or commercial injury resulting from exercise of the Commission's duty to protect the public interest in broadcasting cannot be pleaded as a bar to the Commission's exercise of its statutory authority to make public information deemed essential or relevant to the public interest. This is in accord with long established principles of administrative law.

### **Practical Effects of New Rules**

In any event, it does not seem that making these contracts public will unduly damage networks and licensees in their legitimate competitive contest. The "competitive advantage" which will be gained by smaller affiliates through disclosure of "preferred" affiliates' rates and arrangements appears exaggerated. A principal argument is that "less-advantaged" affiliates, seeing the "preferred" terms, would demand equal treatment and net-

works would be materially injured. However, it is doubtful that the legitimate competitive bargaining ability of affiliates will be affected to the public harm by disclosure of rate and compensation arrangements. It is well known in the industry that in some markets—so-called two-VHF communities, for instance—licensee affiliates enjoy favorable bargaining positions and can command “premium compensation,” fewer or no “free hours,” *etc.* The Commission has commented at length on this situation in various opinions and these markets have been identified. In fact, within the industry there is a “kinship” among affiliates and broadcasters, and they can tell “pretty accurately” what happens. Affiliates are reasonably well informed as to one another’s compensation arrangements. Hence, disclosure of some affiliates’ premium rates and freedom from free hours will not (except, perhaps, as to the detail) be a shock, or even “news,” to their competitors. Competitive advantage based on physical restrictions on the spectrum cannot be removed by publicity.

## Conclusion

The Commission decided *not* to make public, retroactively, the material already filed under the safeguard of the former rules. Nonetheless, every contract initially filed after the effective date (May 1, 1969), *must be composed of one document without reference to other papers by incorporation or otherwise.* Subsequent filings may simply set forth renewal, extension, amendment, as the case may be, of any prior one-document contract filed after May 1, 1969.

Section 0.455(b) of the Commission’s Rules and Regulations was thus amended by adding a new subparagraph (3) as follows:

“§0.455 Other locations at which records may be inspected.

“(b) Broadcast Bureau . . .

“(3) Contracts relating to network service filed on or after the 1st day of May 1969, under §1.613 of this chapter.”

Section §1.613 of the Commission's Rules and Regulations was amended by striking out the first sentence of paragraph (a) thereof and substituting the following:

"§1.613 Filing of contracts:

"(a) Contracts relating to network service: All network affiliation contracts, agreements or understandings between a station and a national, regional or other network shall be reduced to writing and filed. Each such filing on or after May 1, 1969, initially shall consist of a written instrument containing all the terms and conditions of such contract, agreement, or understanding without reference to any other paper or document by incorporation or otherwise. Subsequent filings may simply set forth renewal, extension, amendment, or change as the case may be, of a particular contract previously filed in accordance herewith . . ."

The requirement that network contracts be included in the Commission's *public* files from May 1, 1969 forward should help reduce the unequal treatment of network affiliates and should raise the competitive position of smaller affiliates. For details, consult your attorney.

1. Formerly §1.342. By Order August 2, 1945 in Docket 6572 the Commission ordered that "network and transcription contracts" should not be open to public inspection. All other contracts and agreements required to be filed under the section (now §1.613) are public.
2. Report of Antitrust Subcommittee of House Committee on the Judiciary 85th Cong., 1st Sess., March 13, 1957, page 141.
3. The Television Inquiry Staff Report Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., June 26, 1957, page 95.
4. Network Broadcasting, Report of the Network Study Staff to the Network Study Committee, FCC, Washington, D.C., 1957, printed as House Report No. 1297, 85th Cong., 2nd Sess., Report of the Committee on Interstate and Foreign Commerce (page 467).
5. Office of Communication of the Church of Christ v. FCC, 359 F 2d 994,123 U.S. App. D.C. 328, 337, 7 R R 2d 2001 (1966).

# Nondiscrimination in Employment Practices

The Federal Communications Commission became the first federal agency to adopt formal rules designed to assure nondiscrimination in employment practices.

Under the new rules, *each* licensee (with five or more full-time employees) must file an *Annual Employment Report* (FCC Form 395)—the first being due May 31, 1971. Also, as of January 4, 1971, an exhibit delineating specific practices, to be followed to insure nondiscrimination in employment, must be completed and filed by applicants for (1) a new broadcast facility (FCC Form 301); (2) renewal of license (FCC Form 303); and (3) an assignment of license or transfer of control (FCC Form 314 or 315).

## Background

In early 1967 the United Church of Christ filed a petition asking the Commission to adopt a rule precluding grant of a license to any station which discriminated in employment practices on the basis of race, color, religion, or national origin.

In establishing a rulemaking proceeding (Docket No. 18244) to consider adopting such a rule, the Commission noted that "there is a national policy against discrimination in employment on the basis of race, religion, sex or nationality." The Commission recognized that Title VII of the Civil Rights Act of 1964 made it unlawful for employers of 25 or more persons in an industry affecting interstate commerce to discriminate

against potential employees. The Act is administered by the Equal Employment Opportunities Commission (EEOC).

The Commission noted that "a significant number of broadcast licensees" (by their estimate, 80% of the TV and 10% of radio stations) came within the nondiscriminatory requirement of the Civil Rights Act, thus falling under the jurisdiction of EEOC. Nonetheless, the Commission believed that it, too, had a duty to insure against discrimination by broadcast licensees; that it could grant an application for a broadcast authorization *only* after finding that the "public interest, convenience and necessity" would be served;<sup>1</sup> that its decision as to issuing a license must take into account whether an applicant has violated the laws of the United States. The Commission's conclusion: There would be "full exploration" of any Petition or Complaint raising substantial issues of fact concerning discrimination in employment practices in a particular station before granting a license.

In an order issued July 3, 1968, the Commission officially recognized the "serious national problem" of discrimination in employment practices, declaring that in passing on broadcast applications, it would consider complaints alleging such discrimination. The Commission recognized, however, that such action would not sufficiently alleviate the problem of discrimination in broadcast employment. Therefore, it proposed rulemaking to establish *a positive program of reporting and planning by licensees of equal employment opportunities.*

New rules have become effective now to require each broadcast licensee, with five or more full-time employees, to (1) file an Annual Employment Report and (2) prepare exhibits (when filing appropriate applications) delineating specific equal employment opportunities, plans and programs.

### **Annual Employment Report**

On or before May 31 of 1971 and of every year thereafter, *each* licensee or permittee of a

commercial or noncommercial AM, FM, or TV broadcast station (with five or more full-time employees) is required to file an Annual Employment Report on FCC Form 395.

A *separate* Annual Employment Report must be filled for *each* AM, FM, or TV station; however, a *combined* report may be filed for an AM-FM combination if both stations are owned by the same licensee and both stations are assigned to the same community. A separate report must be filed for *each* "Headquarters Office" of multiple station owners, where employees perform duties solely related to the operation of more than one broadcast station.

The Report is designed to provide statistical data relating to the number of minority-group employees on the staff of each broadcast station. Its announced purpose is to detect discrimination in employment. Statistical data are expected to provide a clear initial indicator of discrimination. For example, if a station, in a community with a population 30% Black and 20% Oriental, files an Annual Employment Report showing that no Black and Orientals are employed, then serious questions would arise as to the station's policy of recruiting and hiring members of minority groups.

The new FCC Form 395 has tables designed to ascertain the number of minority-group employees in each of several job categories that cover the entire range of positions from officials to service workers.

The job categories are the same as those used in EEO-1 forms. Thus many of the categories do not specifically relate to uniquely broadcast positions (e.g. "comboman," "on air talent"); however, the Commission is including full instructions with each Form 395 to ease the broadcaster's burden of specifically categorizing broadcast positions.

Full statistical data are what the Commission wants from each broadcast station (with five or more full-time employees) regarding employment of minority-group individuals. Citing the "urgent

national need" in eliminating discrimination in employment the Commission intends to insure that broadcasters do their share—hence the decision to get statistical information. This information will give the Commission a profile of the broadcasting industry, and will be useful in indicating noncompliance with rules forbidding discrimination in employment. In adopting its new rules, the Commission quoted portentously from *State of Alabama v. United States*<sup>2</sup>: "In the problem of racial discrimination, statistics often tell much, and courts listen."

### **New application forms**

In all applications filed on or after January 4, 1971, for construction permit, assignment or transfer of license, or renewal, the applicant will be required to complete a *new Section VI*. The new Section VI will require that applicants adopt an *affirmative written program* designed to remove any vestiges of discrimination in employment practices, and to show specifically:

The applicant's equal employment opportunity program, indicating specific practices to be followed in order to assure equal employment opportunity for Negroes, Orientals, American Indians and Spanish Surnamed Americans, in each of the following aspects of employment practice: recruitment, selection, training, placement, promotion, pay, working conditions, demotion, lay-off and termination. . . .

There are *two exceptions* to the preparation of such an exhibit. The exhibit need not be submitted if (1) the station has less than five full-time employees or (2) the station is in an area where the relevant minorities are represented in such insignificant number that a program would not be meaningful; in the latter situation, however, a statement of explanation should be filed.

Assignors, transferors and renewal applicants must submit *two additional exhibits*:

**I.** Submit a report as Exhibit \_\_\_ indicating the manner in which the specific practices undertaken pursuant to the station's equal employment opportunity program have been applied and the effect of these practices upon the applications for employment, hiring and promotions of minority group members.

**II.** Submit as Exhibit \_\_\_ a brief description of any complaint which has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the applicant, including the persons involved, the date of filing, the court or agency, the file number (if any), and the disposition or current status of the matter.

### **Guidelines for nondiscrimination**

To assure nondiscrimination in (1) recruiting, (2) selection and hiring, (3) placement and promotion and (4) all other areas of employment practices, the Commission has established the following guidelines *which must be reflected in appropriate exhibits in the new Section VI.*

**1. To assure nondiscrimination in recruiting:**

- a. Post notices in station employment offices informing applicants of their equal employment rights and their right to notify the Federal Communications Commission or other appropriate agency if they believe they have been the victim of discrimination.
- b. Place a notice in bold type on the employment application informing prospective employees that discrimination because of race, color, religion or national origin is prohibited and that they may notify the Federal Communications Commission or other appropriate agency if they believe they have been discriminated against.
- c. Place employment advertisements in media which have significant circulation among minority-group people in the recruiting area.
- d. Recruit through schools and colleges with significant minority-group enrollments.
- e. Maintain systematic contacts with minority and human relations organizations, leaders and spokesmen to encourage referral of qualified minority applicants.

- f. Encourage present employees to refer minority applicants.
- g. Make known to all recruitment sources that qualified minority members are being sought for consideration whenever the station hires.
- 2. To assure nondiscrimination in selection and hiring:**
  - a. Instruct personally those of your staff who make hiring decisions that minority applicants for all jobs are to be considered without discrimination.
  - b. Where union agreements exist:
    - (1) Cooperate with our unions in the development of programs to assure qualified minority persons of equal opportunity for employment;
    - (2) Include an effective nondiscrimination clause in new or re-negotiated union agreements.
  - c. Avoid use of selection techniques or tests which have the effect of discriminating against minority groups.
- 3. To assure nondiscriminatory placement and promotion:**
  - a. Instruct personally those of the station staff who make decisions on placement and promotion that minority employees are to be considered without discrimination, and that job areas in which there is little or no minority representation should be reviewed to determine whether this results from discrimination.
  - b. Give minority group employees equal opportunity for positions which lead to higher positions. Inquire as to the interest and skills of all lower-paid employees with respect to any of the higher-paid positions, followed by assistance, counselling, and effective measures to enable employees with interest and potential to qualify themselves for such positions.
  - c. Review seniority practices and seniority clauses in union contracts to insure that such practices of clauses are nondiscriminatory and do not have a discriminatory effect.
- 4. To assure nondiscrimination in other areas of employment practices:**
  - a. Examine rates of pay and fringe benefits for present employees with equivalent duties, adjusting any inequities found.
  - b. Advise all qualified employees whenever there is an opportunity to perform overtime work.

## **Conclusion**

These new rules relating to nondiscrimination in employment practices are of extreme impor-

tance to all broadcasters. However, many small stations will undoubtedly believe that the task is impossible. The Commission has disclosed that small stations need not formulate elaborate or formal programs in hiring, promotion, and the like. "All that is required is that where the small station is operating in an area with a substantial minority, it takes appropriate and practical steps . . . to assure that it does afford an equal opportunity to minority groups to obtain employment and advance."

Each broadcaster (whose station employs more than five full-time employees) must (1) prepare and file an Annual Financial Report on or before May 31 of each year, and (2) prepare and file exhibit data relating to nondiscrimination in employment with each renewal, transfer or assignment, or construction permit application.

Obviously many problems will arise in this troublesome area; consult legal counsel.

1. 47 USC 307; 47 USC 309.
2. 304 F. 2d at 586.

# FCC Fees

After being in effect for several months the Federal Communication Commission's new fee schedule has resulted not only in substantial fees on all broadcasters and CATV operators, but also in many questions as to the new rules' applicability in certain situations.

## Background

The Commission first adopted a schedule of fees in 1963. Delegation to the Commission of legislative power to impose fees was held constitutional in 1964.\*

The only unresolved question regarding the Commission's authority to require fees is whether the new fee schedule is arbitrary or exceeds the Commission's authority under the empowering statute, the Independent Authorization Act of 1952. However, it is doubtful that a challenge to the legality of the fees would be successful.

The first Commission fee schedule produced revenues of about 25% of the FCC's annual budget. The new fee schedule, however, "reflects estimated fee revenues which generally approximate our budgetary request for fiscal year 1971. . . ." The fees are expected to bring in nearly \$25,000,000—the total FCC budget for fiscal 1971.

The FCC described the rationale behind the new schedule as giving recognition to the "value to the recipient" of the privileges granted, "as well as the public interest served and the direct

and indirect cost to the Government." This rationale has resulted in (1) fees for CATV systems; (2) separate fees for the *grant* of broadcast CPs; (3) fees for filing and approval of assignments or transfers of control; and (4) *annual license fees* for all broadcasters.

## **Broadcast fees**

**Annual License Fee.** With the adoption of its 1963 Fee Schedule, the Commission required all license renewal applicants to file a nominal filing fee with the renewal application. This filing fee has now been abolished.

Instead each broadcast licensee is required to pay an *Annual License Fee*. This *yearly* fee is based on the station's rate card. For AM and FM stations it equals *24 times the highest one-minute rate*. If the station's highest priced one-minute commercial announcement is \$100, then the yearly license fee would be \$2400. For television stations the annual license fee equals *12 times its highest 30-second spot rate*. A television station with a top-priced spot of \$1000 would pay \$12,000.

In place of the abolished "license renewal" filing fee, therefore, will be total annual license fees of *three times* the above figures over a regular renewal period.

*Annual operating fees for broadcast stations are now payable on the anniversary date of the expiration of the license.* If your station's license was issued on February 1st of a given year, your annual fee will be due *each* February 1st. During the first year under the new fee schedule, the fee is to be prorated over the number of full months of operation beginning on August 1, 1970, until the next payment date. If your total annual operating fee is \$1200, and the next anniversary date of your license is February 1, 1971, you would have to pay \$600 for the six-month period of operation between August 1, 1970 and February 1, 1971.

Licensees are required to file with the Commission a copy of their rate card in effect on the preceding June 1. *The rate card must be filed yearly, at the time the annual operating fee is payable.*

There are certain *minimums* to the Annual License Fees which must be paid. For AM and FM stations the Annual License Fee must not be less than \$52, regardless of the "highest one-minute rate." For television stations, the minimum fee is \$144.00.

What about Annual License Fees for joint AM-FM operations, where a substantial amount of programming is duplicated? *Joint AM-FM operation annual fees are 24 times the highest one-minute JOINT rate.* The FCC does not propose that any allocation be made between the AM and FM stations. Similar provisions apply to satellite television stations.

**Assignments and Transfers.** All applications for assignments and transfers (FCC Form 314 and 315) now require an *initial application fee of \$1000*—plus an additional grant fee to be paid *after the transaction is consummated.* This fee will equal *two percent (2%) of the total consideration paid.* A sale price of \$500,000 would result in a \$10,000 fee upon consummation.

Obviously, many problems will arise in the area relating to grant fees. Many station sales contracts make provisions for services rendered, promises not to compete and the like. To establish an exact dollar value for such provision will be difficult; yet the Commission will make the attempt.

With these substantial new grant fees, sellers and buyers of broadcast facilities should consult legal counsel early during negotiations. Critical terms of a sales contract can result in substantial savings on fees.

Who is responsible for paying the grant fee of 2% to the FCC? The Commission has declared that the financial burden of the fee may

be allocated between the parties by contract; however, *the assignee/transferee is liable to the Commission for payment.*

What would the grant fee be in a situation where an assignment or transfer is made by *gift*? This is a question that has yet to be answered by the Commission. Normally, in a gift situation, no money or other consideration is involved. Just how the Commission intends to levy a grant fee under these circumstances remains to be seen.

**Construction Permits.** The new FCC Fee Schedule provides for an enormous "jump" in fees. For example, construction permits for new facilities now consist of a *filing fee* and a *grant fee*. The filing fee is to be paid when an FCC Form 301 is submitted to the Commission; the grant fee is to be paid *within 45 days after the Commission* authorizes construction. The new fees are scaled for (1) vhf and uhf television stations in the Top 50 Markets, (2) vhf and uhf television stations in the Next 50 Markets, and (3) vhf and uhf television stations in the remainder of the television markets. Similarly, rates are scaled for Class A, and Class B and C FM stations, as well as for daytime and unlimited-time AM stations, according to power. Filing fees plus grant fees range from a total of \$50,000 for a vhf television station in the Top 50 Markets to total fees of \$250 for a 250-W AM daytimer.

If a construction permit for a standard broadcast station is filed requesting a different power for day and night operation, *the applicable fee will be for the highest power requested.* For example, if the application requests 250 W nighttime and 1 kW daytime, the fee for the 1 kW operation would be assessed.

**Other Applications.** All other applications (that is, for modifications, other than *major* changes in facilities and other general applications) will

require a filing fee of \$50—an increase of \$20 over the old fee. Applications for “short form” (FCC Form 316) assignments or transfers require a filing fee of \$250.00; there is no grant fee. An application to replace an expired construction permit (FCC Form 316) requires a single filing fee of \$500.00. Applications for a change of call letters require a one-time fee of \$100.

### **CATV fees**

*All CATV systems must now pay an annual fee on April 1 of each year for the preceding calendar year (or a prorated fee for part thereof). This fee is 30 cents per subscriber during the calendar year. The number of subscribers, for fee-computation purposes, is the “average number of subscribers” on the last day of each quarter of the calendar year. For example, if on March 31 your system had 5600 subscribers; on June 30 6000 subscribers; on September 30 6200 subscribers; and on December 31 7000 subscriber connections—then you would have an “average number of subscribers” of 6200, and your annual fee would be \$1860.*

*Explanation: This fee is determined by averaging the number of subscribers on the last day of each quarter of the calendar year. For the example above, add 5600, 6000, 6200 and 7000; divide by four; this equals an average of 6200 subscribers. Then, multiply 6200 by 30 cents to arrive at the annual fee (payable on April 1) of \$1860.*

Remember, the annual fee payable on April 1 is for *the preceding calendar year*. Since the CATV annual fee schedule went into effect on August 1, 1970, the amount payable on April 1, 1971, *will be prorated to apply only to the last five months of 1970*. The fee that you must pay on April 1, 1971, will be for the five-month period between August 1, 1970 and December 31, 1970. *To determine this fee, you must determine the annual fee for all four quarters of 1970 by*

*the procedure outlined above; then, a total of five-twelfths (the prorated fee) of your computed 1970 "Annual Fee" must be filed with the Commission on or before April 1, 1971.*

The Federal Communications Commission initially proposed to exempt from the annual fee all CATV systems with less than 200 subscribers. However, in adopting its final order the Commission *has eliminated this exemption; the annual fee is now required of all CATV systems.*

Similarly, in view of the administrative burden entailed by Petitions For Special Relief filed pursuant to Section 74.1109 of the Rules, the FCC originally proposed a filing fee of \$300 per petitioner. *That fee has now been reduced to \$25 per petition.*

\*Aeronautical Radio, et al. v. FCC, 2 RR 2d 2073 (1964).

# Amendments to the "Program Log" Rules

AMENDMENTS TO Sections 73.112, 73.282, and 73.670 (the a-m, fm and TV program log rules) were released by the Commission on March 15, 1968<sup>1</sup>, amending the a-m and fm rules to conform to provisions of the TV rule, and, additionally, clarifying the basic intent of certain parts of the TV rule. Because of frequent Commission challenges to licensee classifications as to program type and source, many readers will probably need a review of the basic elements of program logs—program type and source.

## Program Types

(a) **Agricultural (A)** includes market reports, farming, and other information specifically related to the agricultural population. (Too many licensees improperly place agriculture-type fare in the public affairs category.)

(b) **Entertainment (E)** includes all programs intended primarily as entertainment, music, drama, variety, comedy, quiz, etc.

(c) **News (N)** includes reports dealing with current local, national, and international events, including weather and stock market reports; and commentary, analysis and sport news, when an integral part of a news program.

(d) **Public Affairs (PA)** includes talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concern-

ing local, national, and international public affairs. *A public affairs program is one which deals with public ISSUES.* The licensee should expect the Commission to challenge the PA classification of a program which does not have this essential characteristic.

(e) **Religious (R)** includes sermons or devotionals, religious news, and music, drama, and other types of programs designed primarily for religious purposes.

(f) **Instructional (I)** includes programs (other than those classified under Agricultural, News, Public Affairs, Religious or Sports) which deal with the discussion or appreciation of literature, music, fine arts, history, geography, and the national and social sciences; and programs devoted to occupational and vocational instruction, and hobby programs. (Here again, too many licensees erroneously classify "instructional" fare as "public affairs.")

(g) **Sports (S)** includes play-by-play and pre- or post-game related activities, as well as separate programs of sports instruction, news or information—fishing opportunities, golfing instructions, etc.

(h) **Other (O)** includes all programs not falling within categories (a) through (g).

(i) **Editorials (EDIT)** includes programs presented for the purpose of stating opinions of the licensee.

(j) **Political (POL)** includes those which present candidates for public office or which express (except in station editorials) views on candidates or on issues subject to public ballot.

(k) **Educational institution (ED)** includes any program prepared by, on behalf of, or in cooperation with educational institutions, educational organizations, libraries, museums, PTAs or similar organizations. Sports programs are not included.

## Program Type Definitions

The definitions of the first eight types of programs (a) through (h) are intended *not* to overlap each other and will normally include all the various programs broadcast. Definitions (i) through (k) are *sub-categories*, and programs falling under one of these three sub-categories will also be classified appropriately under one of the first eight categories. There may be further duplication within types (i) through (k)—a program presenting a candidate for public office, prepared by an educational institution, for instance, would be within both Political (POL) and Educational Institution (ED) sub-categories, as well as within the Public Affairs (PA) category.

## Program Source Definitions

**A Local Program (L)** is any program originated or produced by the station (or which the station is primarily responsible for producing), *employing live talent more than 50% of the time*, even if taped or recorded for later broadcast. A local program fed to a network will be classified by the originating station as local. All nonnetwork news programs may be classified as local. Programs primarily featuring records or transcription will be classified as recorded programs (see below) even though a station announcer appears in connection with such material. However, within such recorded programs, identifiable units which are live and separately logged as such may be classified as local. If during the course of a program featuring records or transcriptions, for example, a nonnetwork two-minute news report is given and logged as a news program, the report may be classified as local. More local programming is expected of TVs than a-ns, the amount varying with the size of the station, its profitability and the vicissitudes of FCC policies (check with your lawyer periodically).

**A network program (NET)** is any program furnished to the station by a network (national, regional or special). This includes delayed broadcasts of programs originated by networks.

**A recorded program (REC)** is any program not otherwise defined—including, without limitation, those using recordings, transcriptions, or tapes.

### **ANALYSIS OF AMENDMENTS**

The Commission adopted new logging rules for a-m and fm, effective December 1, 1965<sup>2</sup>, and at the same time adopted a new a-m and fm program form (Section IV-A, statement of program service.) This form is to be filed as part of applications for renewal, for assignment and transfer of control, for new stations, and for major changes in facilities<sup>3</sup>. Because certain requirements of the a-m and fm logging rules were found unnecessary for the preparation of the program reporting form or for other Commission purposes, the logging rules for TV (effective December 1, 1966) differed from those previously adopted for a-m and fm<sup>4</sup>.

Meanwhile, unsure of the intent of the television logging rules, a number of licensees raised questions about paragraph (b) of Section 73.670 (dealing with network fare) and subpart (ii) of Section 73.670 (a) (2) (logging of commercials).

#### **Network Fare**

Under paragraph (b) of Section 73.670, TV stations carrying network programs needed to log only the name of the program and time the station joined and left the network (along with whatever nonnetwork matter had to be logged). Licensees generally relied upon the networks to supply other information necessary for the composite week, such as number and length of commercial messages. This section also required the station to save information furnished by the net-

work and attach it to the related pages of the program log. In adopting this rule, the Commission intended that only the information a network furnished its affiliates for completion of their composite weeks should be associated with the pertinent logs submitted with the application for license renewal. Licensees are not required to attach all the information furnished almost daily by the network.

### **Logging of Commercials**

Section 73.670 (a) (2) (ii) called for *an entry showing the total duration of commercial matter* in each hourly TV time segment beginning on the hour. But this did not mean that a licensee should stop logging the duration of each commercial. It is sufficient to log the length of each commercial message rather than logging an hourly total. The provision for logging an hourly total was intended as a convenience to licensees; however, they are free to do it in another way. The subparagraph was amended to clarify the requirement. However, *the log should be devised and kept so that it can be accurately divided into hourly segments for composite-week reporting purposes.* Paragraph (a) (2) (ii) of Sections 73.112 and 73.282 (a-m and fm commercial logging) were amended to conform to the language of Section 73.670 (TV commercial logging). Similarly, Paragraph (b) of Sections 73.112 and 73.282 (a-m and fm network fare) were conformed to TV's Section 73.670 as revised. Thus, the a-m, fm and TV logging rules on these points are now the same.

### **Sponsored Political and Religious Programs**

In adopting the Report and Order amending the lodging requirements for TV broadcast stations (Docket No. 14187), the Commission noted that *a special problem in logging commercials is raised by certain (e.g. political and religious) sponsored programs in which it is difficult to measure*

*the exact length of what would be considered commercial continuity.* For such programs, *the Commission decided not to require licensees to compute the commercial matter.* The programs could be logged and announced as sponsored. This exception is also applicable to a-m and fm broadcast stations. The exception does not, of course, apply to any program advertising commercial products or services; nor is it applicable to any commercial announcements.

No single log form exists that will meet the needs of all licensees. In fact, FCC staff members are the first to admit that the Commission has not adopted a uniform logging system. You are permitted to include in the log any information necessary. However, it is most important to review your logging procedures to determine whether it meets the Commission's requirements. For example, the log should include information concerning your own purpose (e.g., billing of accounts) in separate columns. The columns devoted to the Commission's logging rules should be maintained in the Commission's language as reviewed above.

Finally, of course, when you find it difficult to classify any of your programs, consult with your communications counsel.

1. Memorandum Opinion and Order, RM-1242, FCC 68-291.
2. Report and Order in Docket No. 14187, 1 FCC 2d 449.
3. Report and Order in Docket No. 13961, 1 FCC 2d 439.
4. Report and Order in Docket No. 14187, 5 FCC 2d 185; see also Report and Order in Docket No. 13961, 5 FCC 2d 175, dealing with the television program form (Section IV-B).

# Financial Qualification Form Revisions

The Commission has revised the Financial Qualifications Section (Section III) which must be submitted as part of FCC Forms 301 (application for new station or change in existing station), 314 (transfer application) and 315 (assignment application.)<sup>1</sup> Effective since October 15, 1969, the Commission no longer accepts applications accompanied by the old Section III Form. *Applicants should therefore destroy all old forms and secure new FCC Forms 301, 314 and 315.*

## Ultravision Revisited

Revised Section III is the Commission's latest attempt to ascertain an applicant's financial ability to operate a broadcast facility in the public interest.

During the 1930's and 1940's the Commission merely required applicants to meet costs of construction and expenses for operation of the station over "a reasonable extended period of time."<sup>2</sup> With the phenomenal growth of TV and fm in the 1950's, the Commission found it necessary to make the reasonable period of time more explicit by changing it to *the first three months' cost of operation.*<sup>3</sup> Then, as fm went stereophonic and the all-channel TV receiver legislation insured uhf reception on all new television sets, the Commission extended the period for meeting costs.

The famous decision in Ultravision<sup>4</sup> and subsequent actions by the Commission<sup>5</sup> established

strict financial standards requiring new-station applicants (whether a-m, fm, vhf or uhf) to demonstrate "their financial ability to operate for a period of one year after construction of the station."<sup>6</sup> This strict standard, however, confused applicants and increased the already burdensome administrative workload. Many applicants unfamiliar with the Ultravision standard, or unable to meet it, had their applications delayed in the administrative process as the Commission was forced to write and rewrite applicants for additional financial information. The Commission therefore revised Section III to break the log jam. The new form was adopted February 26, 1969, subject to approval by the Bureau of the Budget. This approval was granted by the Bureau, and *the revised Section III is now effective.*

### **Section III Revisions**

The most dramatic change in the three-page Section III revision is the striking "tabular format." The form has taken on the salient features of a regular balance sheet, requiring explicit and specific information about all items of construction costs, all possible sources of funds, as well as means and methods of financing the station.

The Commission believes that the new form (when properly executed) will *quickly tell the applicants whether or not they are financially qualified.*<sup>7</sup> This, the Commission hopes, should reduce the number of Commission requests for additional financial information from applicants.

### **Specific Item Analysis**

On page one of revised Section III, *separate* cost figures must be entered for each of the following: *Transmitter, antenna system, rf generating equipment, monitoring and test equipment, program originating equipment, land cost, building cost, legal fees, engineering fees, installation costs and other costs.*

Obviously, the revised form requires applicants to break down construction costs carefully. No longer may "lump-sum" amounts be entered under "miscellaneous costs." The *basis of estimates* (as entered in the appropriate portions described above) must be sufficiently explained in *exhibit form*. New station applicants must also submit an exhibit showing *the complete itemization of cost of operation for the first year, including cost of proposed programming*.

### **Proposed Financing**

Comparing the new and old Section III, applicants will readily see that much more complete information is now required as to *proposed financing*. The new provisions request not only available capital and loan information, but also specific details on deferred credit from equipment suppliers. The applicant must answer a series of direct questions about the specific amount of *down payment, first-year payments to principal and first-year interest*.

As in the past, applicants must submit exhibits setting forth the names of those individuals who will (or have) furnish funds for the operation and/or construction of the station.

Moreover, to get succinct information as to assets, the Commission now asks applicants to identify specific securities held, *the market or exchange on which they are traded, and their current market value*.

Accounts receivable may be treated as liquid assets; provided that such accounts have been aged and *certified collectable* within 90 days by a Certified Public Accountant. *However, only three-fourths of these certified-collectable accounts receivable may be treated as liquid assets*.

### **Conclusion**

The Commission's new Section III is the latest refinement of the Ultravision doctrine and clarifi-

cation of applicant financial requirements. Applications may now be granted without the delay caused by searching questions from the Commission. By properly executing the new section, an applicant should be able to avoid having a financial issue designated against his application if it is designated for hearing. Careful preparation should minimize many of the problems inherent in filing an application before a regulatory agency, as well as make the Commission's task of ascertaining financial qualifications relatively simple.

As in the past, the applicant must show that adequate funds are available to construct and operate the facility for *one full year without income*. If the applicant intends to rely on *projected revenues*, he must still provide accurate estimates and demonstrate the soundness of the figures submitted. All applicants (or potential applicants) for (1) a new station, (2) a change in existing station (especially where contemplated expenditures will exceed \$5000) or (3) transfer or assignment, should familiarize themselves with the new Commission revisions relating to financial qualifications. The revised Section III (and FCC forms incorporating it) is now available from the FCC's Forms Distribution Office, Room B-10, 1919 M Street, N.W., Washington, D.C. 20554, or from your counsel.

1. Rpt. No. 8472, September 18, 1969.
2. Radio Enterprises, Inc., 7 FCC 169 (1939).
3. Sanford A. Schafitz, 24 FCC 363; 14 RR 582 (1958).
4. Ultravision Broadcasting Co., 5 RR2d 343 (1965).
5. Clarification of Applicability of new Financial Qualifications Standard Concerning Broadcast Applications, FCC 65-659 (July 7, 1965).
6. Id.
7. Id., at Fn. 1.

# Ownership Reports

The Federal Communications Commission requires that every broadcast licensee file, at specified times, an Ownership Report (FCC Form 323).

The purpose of the Report is to fully disclose ownership of the broadcast station. Complete data is required regarding officers and directors, stock transactions and the like. Many licensees have a difficult time understanding and complying with these Commission requirements.

## **When should the report be filed?**

First, Section 1.615 of the Commission's Rules requires that an Ownership Report must be filed *at the time the application for renewal of station license is required to be filed*—generally, every three years. In situations where licensees own more than one TV, FM or AM station, only *one* Ownership Report must be filed at three-year intervals. Thus Corporation X, owning an FM and AM in one market, and a TV and AM in another market, must file only one Ownership Report every three years. The information reflected in the Report will be data regarding individuals constituting Corporation X.

Second, in addition to the above, *within 30 days of the grant of a construction permit* the permittee must file an Ownership Report.

Third, *upon grant of a transfer or assignment of a station*, the new operator must file an Ownership Report with the Commission.

Fourth, and perhaps most significantly, an Ownership Report must also be filed by each li-

censee or permittee *within 30 days after any change occurs in the information required by the Ownership Report*. It is in this category that many broadcasters neglect their duties as Commission licensees. Often minor stock transfers or other changes in ownership are not properly reported or disclosed. The failure to report such changes is clearly contrary to the Rules and the offending licensee can be subjected to substantial fines.<sup>1</sup>

### **What data is required?**

In the unusual situation where an individual or partnership is the licensee, the names and interests of the various parties must be fully disclosed on the Ownership Report. Because no shares of stock are involved, the Report is fairly uncomplicated.

More often, however, broadcast stations are owned by corporations. Limited liability and tax advantages usually dictate this commonly-accepted mode of ownership. In this case full disclosure of the individuals who constitute the corporate licensee is required.

The name, residence, citizenship and stockholdings of officers, directors and stockholders (as well as trustees, executors, administrators, receivers and the like) are required. Full information as to *family relationships or business associations between two or more officials and/or stockholders must be disclosed*.

Remember, however, that if the corporation has *more than 50 stockholders*, the information listed above need be filed only concerning stockholders who are officers or directors of the corporation *or* concerning other stockholders who have *one percent or more* of either the voting or non-voting stock. Information on stock held by stockholders must be filed only if shares are held in the stockbroker's name for more than 30 days.

Full information on capitalization of the corporation is required. A description of the *classes*

*and voting power* of stock authorized by the corporate charter, as well as a listing of the number of shares of *each* class of stock issued and outstanding, must be noted in the Ownership Report. Data must also be fully disclosed as to the *extent of interest and identity of any person* having any direct, indirect, or other interest in the licensee corporation or any of its stock.

How much information is to be filed? Consider the following example: Suppose Corporation X is the licensee of a broadcast station. However, Corporation X is controlled by Corporation Z. What ownership information regarding Corporation Z must be filed with the Commission? The FCC requires that where Corporation Z controls the licensee corporation (Corporation X), or holds 25% or more of the number of issued and outstanding shares of Corporation X's stock, the *same information* (that is, capitalization, officers, directors, stockholders, and the like) *must be filed for Corporation Z.*

## **Contracts**

Each licensee is required to *file* certain contracts with the Commission. A *list* of all contracts in effect at the time of filing of the Ownership Report, showing date of execution and expiration, must be included in the Ownership Report.

Here is a brief refresher of the types of contracts that Section 1.613 of the Rules requires each licensee to file with the Commission:

(1) Contracts relating to network service (affiliation agreements and the like);

(2) Contracts relating to ownership or control (articles of incorporation, bylaws, agreements for transfer of stock, proxies running for longer than one year, mortgages and similar agreements);

(3) Contracts relating to the sale of broadcast time to "time brokers" for resale;

(4) SCA contracts;

(5) Time sales contracts with the same sponsor for four or more hours per day;

(6) Certain personnel agreements.

Each licensee should keep his contract file current. Pertinent data required by the Ownership Report should be extracted and kept for ready reference in Ownership Report matters. Since it is not necessary to report some contracts that are common to the day-to-day operation of a broadcast station, a periodic review of Section 1.613 of the Rules would help.

### Transfer of control

A secondary purpose of Ownership Reports is to notify the broadcaster of possible transfers of control. Careful completion of all portions of the Report, before contemplated changes in stock ownership occur, may indicate that a transfer or assignment *requiring prior FCC approval* is being effectuated.

The Ownership Report cannot, of course, be used for reporting or requesting a transfer or assignment. It is the prime responsibility of the broadcaster to determine if a proposed transaction will constitute a prohibited transfer and, if so, to file a transfer or assignment application.

Consider the following situations: (1) X owns 51% of the licensee corporation's stock. He sells 1% to Y. Is this a transfer? *Yes*, and *prior Commission consent is required*.

(2) X Corporation, owned by A, B, C, and D (all members of one family), wants to reduce its outstanding stock by the purchase of treasury shares. This results in family member A's individual holdings being increased to more than 50% of the total number of issued and outstanding shares. Is this a transfer? *Yes*, a transfer has been effected and *prior Commission approval is required*.

(3) A and B, husband and wife, each own 50% of the licensee corporation stock—of a total

of 4000 issued and outstanding shares of stock, A holds 2000 and B holds 2000. A sells 10 shares to his wife, B. Is this a transfer? Is prior Commission consent required? *Yes*.

(4) Similarly, if A and B are partners in the ownership of their station, and A sells any part of his interest to B, or to a newcomer, C, *an assignment has been effected*, and prior FCC approval is necessary.

(5) Suppose you and B are partners, each owning an equal share in a station. You wish to limit your liability by incorporating. Would this be an assignment? *Yes*; when a partnership incorporates, an assignment is effected and prior Commission approval is necessary.

Particular attention should be given to page 3 of the Ownership Report. Although confusing on its face, its three columns (each divided into 17 separate lines) provides a clear indicator, when properly filled out, of transactions that may require prior FCC approval. Specific facts in the examples above can be applied to the Ownership Report and provide the licensee with an indication of possible FCC notification and/or application.

## Conclusion

Careful consideration of the information required by the Ownership Report will aid the broadcaster in evaluating proposed sales of stock and other transactions. Broadcasters are cautioned to report all applicable changes in the ownership structure of their facilities. The following checklist should prove helpful in determining such changes and should be consulted from time to time. *Have there been any of the following?*

- (1) Any change in the effective ownership of the station?
- (2) Any change of partners?
- (3) Any change in capitalization?
- (4) Any change in organization?

- (5) Any change in officers and directors?  
(Have new elections taken place?)
- (6) A transfer of stock?
- (7) An issuance of new stock?
- (8) Purchase of treasury stock by the corporation?

As to stock changes in corporations with more than 50 shareholders, information need be filed only with respect to changes involving

- (a) officers or directors *or*
- (b) shareholders who own one percent or more of voting or non-voting stock in the licensee corporation.

If you have doubts or questions regarding the troublesome area of Ownership Reports, be sure to consult your counsel.

<sup>1</sup> See, for example, Tri-County Broadcasting Co., 1 RR 2d 57 (1963); Carol Music Inc., 3 RR 2d 477 (1964); Shamrock Broadcasting, Inc., 6 RR 2d 964 (1966); Lester & Alice Garrison, 9 RR 2d 241 (1967).

## Fraudulent Billing

In 1965, the Federal Communications Commission adopted rules specifically prohibiting fraudulent billing practices by AM, FM, and TV station licensees.<sup>1</sup> As then formulated, the rules were directed specifically at "double-billing." The practice consists of misrepresentations to a manufacturer, distributor, advertising agent, or other party, that the quantity, content, or amount charged for cooperatively sponsored advertising was different from that actually agreed upon by the station and the local advertiser.

The Commission noted that most "double-billing" is designed to deceive and defraud manufacturers into paying a larger share of a local dealer's cooperative advertising expenditure than that originally stipulated in agreements with local dealers. But the Commission also stated that some manufacturers have reimbursed a dealer for a cooperative advertising bill which the manufacturer *knew* to be inflated or fictitious. Such a scheme violates the Clayton and Robinson-Patman Acts.<sup>2</sup> These acts make it unlawful for a manufacturer or distributor engaged in commerce to give discriminating discounts, rebates, or advertising allowances to its dealers. If such violations are found to exist, the Federal Communications Commission will refer its findings to the Federal Trade Commission for appropriate action. It is obvious that participation by a broadcast licensee in a scheme to violate a Federal statute reflects seriously upon the licensee's qualifications.

## 1965 Rules

In essence, the 1965 rules provided that "No licensee or . . . station shall knowingly issue to any local . . . advertiser any affidavit . . . which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such affidavit . . . is issued, or which misrepresents the nature, content or quantity of such advertising."

## 1970 Amendment

To make the rule more clearly applicable to *all* fraudulent billing situations, an amendment has recently been adopted.

Prior to May 1970, the fraudulent billing rules were primarily directed, as noted above, to "double-billing" situations. However, early in 1970 a broadcast licensee filed a petition for rule-making to amend the fraudulent billing rules. The intent was to prohibit the issuance of "bills" or statements by licensees misrepresenting (a) the time or the day on which spot announcements were broadcast or, (b) the number of announcements which were broadcast. It was asserted that such provisions were necessary to cover *all* situations and ban the issuance of *any* fraudulent bills.

In adopting the amendment, the Commission declared:<sup>3</sup>

We agree with . . . the strong public interest factors supporting the prohibition of misrepresentation by licensees in any and all billing practices. Any such misrepresentation certainly reflects adversely on the qualifications of a licensee and, to a degree, on the industry as a whole. The public interest, convenience and necessity clearly require reasonable ethical business practices . . . specifically on the part of individual broadcasters.

## The new rule and its sanctions

The amended rule regarding fraudulent billing practices is found in Section 73.1205 of the Commission's Rules, and reads as follows:

*Fraudulent billing practices*—No licensee of a standard, FM or television broadcast station shall knowingly issue to any local, regional or national advertiser, advertising agency, station representative, manufacturer, distributor, jobber or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such bill, invoice, affidavit or other document is issued, or which misrepresents the nature or content of such advertising, or which misrepresents the quantity of advertising actually broadcast (number or length of advertising messages) or the time of day or date at which it was broadcast. Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any document which would violate this section if issued by the licensee.

The Commission has imposed harsh sanctions on those broadcasters who violate this rule. For example, stations WPGA and WPGA-FM, Perry, Georgia, were recently ordered to forfeit \$7,500 for willful and repeated violations of the fraudulent billing rule.<sup>4</sup>

A \$10,000 forfeiture was imposed on another licensee for fraudulent billing practices, broadcasting a lottery, and several other violations. However, the Commission ominously noted that the fraudulent billing violations alone justified the forfeiture.<sup>5</sup>

Licensees also face the possibility of license revocation for fraudulent billing practices. Therefore, all broadcasters are admonished to carefully avoid any billing practices which might be construed as fraudulent.

The Commission, in Public Note FCC 70-513, has set forth examples of various (but not all-inclusive) fraudulent billing practices. Some of these examples follow:

1. A licensee issues a bill or invoice to a local dealer for 50 commercial spots at a rate of \$5 each for a total of \$250. In connection with the same 50 commercial spots, the station also supplies the local dealer or an advertising agency, jobber, dis-

tributor, or manufacturer of products sold by the local dealer, another affidavit, memorandum, bill, or invoice. The latter document indicates that the amount charged the local dealer for the 50 spots was greater than \$5 per spot.

*Interpretation:* This is fraudulent billing. The inflated bill tends to deceive the manufacturer, jobber, distributor or advertising agency as to the amount actually charged and received by the station for the advertising.

2. A licensee issues a bill or invoice to a local dealer for 50 commercial spots at \$5 each. The bill, invoice or accompanying affidavit indicates that the 50 spots were broadcast on behalf of certain cooperatively advertised products. However, some of the spots did not advertise the specified products. Instead, they were used by the local dealer solely to advertise his store, or to advertise products for which cooperative sponsorship could not be obtained.

*Interpretation:* This is fraudulent billing, even though the station actually received \$5 each for the 50 spots. By falsely representing that the spots advertised certain products, the licensee has enabled the local dealer to obtain reimbursement from the manufacturer, distributor, jobber or advertising agency for advertising which was not actually broadcast.

3. A licensee sends, or permits its employees to send, blank bills or invoices bearing the licensee's name or call letters, to a local dealer or other party.

*Interpretation:* A presumption exists that the licensee is tacitly participating in a fraudulent scheme which enables a local dealer, advertising agency or other party to deceive a third party as to the advertising rate actually charged by the licensee. The local dealer can thereby collect more advertising reimbursement than that specified by the agreement between the third party and the local dealer. It is the licensee's responsibility to maintain control over the issuance of bills and in-

voices in the licensee's name, to make sure that fraud is not practiced.

4. A licensee submits bills or invoices to an advertising agency, station representative, or other party indicating that licensee's rate per spot is \$50. However, the licensee actually receives only \$5 or \$10 per spot in actual payment from the agency, representative or other party. The licensee claims that the remaining 80 or 90 percent of its original invoice has been deducted by the agency as "commission" and therefore no "double billing" is involved.

*Interpretation:* This is fraudulent billing. The agency discount does not customarily exceed 15 percent. Therefore, supplying agencies with bills and invoices which indicate that the licensee is charging several times as much for advertising as he actually receives, constitutes participation in a fraudulent scheme.

5. A licensee submits a bill or invoice to a local dealer or other party for 50 commercial spots at \$5 each for a total of \$250. However, the bottom of the bill or invoice carries an addendum, so placed that it may be cut off without leaving any indication that it had been attached. The addendum specifies a "discount" to the advertiser based on volume, frequency or other consideration, so that the amount actually billed at the bottom of the page is less than \$5 for each spot.

*Interpretation:* The preparation of bills or invoices in such manner seems designed primarily to enable the dealer to deceive a cooperative advertiser as to the amount actually charged for cooperative advertising. This practice raises a presumption that the licensee is participating in a "double billing" scheme.

6. A licensee submits a bill or invoice to a local dealer for 50 spots involving cooperative advertising of a certain product or products at a rate of \$5 each, and actually collects this amount from the dealer. However, as a "bonus" the licensee "gives" the dealer 50 additional spots in which the product or products named on the original invoice

are not advertised. Thus the dealer actually obtains the benefit of 100 spots in return for payment to the station of the \$250 billed for the 50 cooperative spots.

*Interpretation:* If the 50 "bonus" spots were broadcast as the result of any agreement or understanding, expressed or implied, that the dealer would receive such additional advertising in return for contracting for the first 50 spots at \$5, the so-called "bonus" spots were, in fact, a part of the same deal. This means that the licensee, by his actions, is participating in a scheme to deceive and defraud a manufacturer, jobber, distributor or advertising agency.

7. A local appliance dealer agrees to purchase 1,000 spots per year from a station and thereby earns a discount which reduces his rate per spot from \$10 to \$5. During the course of the year, the dealer purchases from the station 100 spots which advertise both the dealer and "Appliance A" and for which the dealer pays \$5 per spot. Since the station's 100-spot rate is \$10 per spot, the dealer asks the station to supply him with an invoice for the 100 spots on behalf of "Appliance A" at \$10 per spot. The dealer claims that if the appliance manufacturer had purchased the 100 spots, or if the dealer himself had purchased only these 100 spots within the course of a year, the \$10 rate would apply. Therefore the dealer argues that the manufacturer should be required to reimburse the dealer at the \$10 rate.

*Interpretation:* This practice constitutes fraudulent billing unless the dealer can provide satisfactory evidence that the manufacturer of "Appliance A" is aware that the dealer actually paid only \$5 per spot because of the volume discount.

8. A licensee issues a bill or invoice to a dealer for commercial spots which were never broadcast.

*Interpretation:* This practice, prima facie, involves fraud, either against the dealer or against a third party which the dealer expects to provide

partial reimbursement for the non-existing advertising.

9. A licensee knowingly issues a bill or invoice to a local or national advertiser which shows broadcast of commercial announcements one minute in length, whereas in fact some of the announcements were only 30 seconds in length.

*Interpretation:* This is fraudulent billing. The invoice misrepresents the length of some commercials, a highly important element of the price charged for them.

10. A licensee knowingly issues a bill or invoice to a local or national advertiser which sets forth the time of day or the date on which commercial announcements were broadcast. But in fact they were presented at a different time or on a different day, or were not broadcast at all.

*Interpretation:* This is fraudulent billing. Time of broadcast is often highly important in its value and the price charged for it. Charging for advertising not broadcast is clearly fraudulent.

1. Report and Order, Docket No. 15396, October 20, 1965.
2. 15 U.S.C. 13.
3. Memorandum Opinion and Order, RM-103, May 13, 1970; 19 RR 2d 1506.
4. Perry Radio, Inc. 16 RR 2d 524 (1969).
5. Lawrence Broadcasters, Inc. 14 RR 2d 1 (1968).

# Provisional Radio Operator Certificates

DURING THE PAST YEARS, the Commission became aware that there was a shortage of licensed commercial radio operators in small market broadcast areas. Part of the difficulty appeared to stem from the inability of prospective operators to travel to the nearest FCC field office to be examined. Although the Commission schedules examinations at places away from the field office, such examinations are given infrequently and may not coincide with the immediate needs of the broadcast station or the financial circumstances of the prospective operator.

The holder of a Provisional Certificate for a Radiotelephone Third Class Operator Permit endorsed for broadcast use may be responsible for routine operation of (1) standard broadcast station with authorized power of ten kilowatts or less, and employing a nondirectional antenna; (2) an fm broadcast station with a transmitter power output not in excess of 25 kilowatts; or (3) a non-commercial educational fm broadcast station of 25 kilowatts or less output power. Small business should benefit from the new procedure since licensed radio operators will be more readily available and local people may find employment in the broadcasting industry, as operators.

Accordingly, after its September 1967 Notice of Proposed Rule Making, on January 17, 1968, the Commission adopted a Report and Order (FCC 68-61) amending Parts 1 and 13 of the Rules.

*The new rules provide for the issuance (by mail) of Provisional Radio Operator Certificates to applicants for Radiotelephone Third Class Operator Permits, endorsed for broadcast use, prior to the fulfillment of the examination requirements. The permit is to be valid for a period of twelve months only and will not be renewed. Before expiration of the permit, the holder is expected to appear at a regularly scheduled examination point and fulfill the examination requirements by successfully completing an examination before an authorized Commission employee.*

*The new rules were made effective as of March 15, 1968, and the amendments adopted were as follows:*

1. In §1.1117, a new type of application is added at the end of paragraph (a) to read as follows:  
“§1.1117 *Schedule of fees for commercial radio operator examinations and licensing.*

(a) \* \* \*

“Application for provisional certificate for a radiotelephone third-class operator permit endorsed for broadcast use . . .

2. §13.3 is amended to read as follows:  
“§13.3 *Dual holding of licenses.*

“(a) Except as provided by paragraph (b) of this section, a person may not hold more than one radiotelegraph operator license or permit and one radiotelephone operator license or permit at the same time.

“(b) A person may at the same time hold (1) both a temporary limited radiotelegraph second-class operator license and a radiotelegraph third-class operator permit, (2) both a provisional certificate for radiotelephone third-class operator permit endorsed for broadcast use and a radiotelephone third-class operator permit not so endorsed, (3) both a provisional certificate for a radiotelephone third-class operator permit endorsed for broadcast use and a restricted radiotelephone operator permit.

3. §13.8 is amended to read as follows:

“13.8 *Provisional Radio Operator Certificate.*

“(a) In circumstances requiring immediate authority to operate a radio station pending submission of proof of eligibility or of qualifications or pending a determination by the Commission as to these matters, an applicant for a radio operator license may request a Provisional Radio Operator Certificate.

“(b) Except as provided by paragraph (3) of this section, a request for a Provisional Radio Operator Certificate may be in letter form and shall be in addition to the formal application.

“(c) Except as provided by paragraph (3) of this section, if the Commission finds that the public interest will be served, it may issue such certificates for a period not to exceed six months with such additional limitations as may be indicated.

“(d) Except as provided by paragraph (3) of this section, a Provisional Radio Operator Certificate will not be issued if the applicant has not fulfilled examination or service requirements, if any, for the license applied for.

“(e) A request for a Provisional Radio Operator Certificate for a radiotelephone third-class operator permit endorsed for broadcast use shall be made on FCC Form 756C, which provides for a certification by the holder of a radiotelephone first-class operator license that he is responsible for the technical maintenance of a radio broadcast station, and that he has instructed the applicant in the operation of a broadcast station and believes him to be capable of performing the duties expected of a person holding a radiotelephone third-class operator permit with broadcast endorsement. If the Commission finds that the public interest will be served, it may issue such certificates under the following conditions:

“(1) the certificate is valid for a period not to exceed twelve months.

(2) the certificate is not renewable.

(3) the certificate may be issued to a person only once.

(4) additional limitations may be specified, as necessary.

(5) the certificate may be issued prior to the fulfillment of examination requirements for the radiotelephone third-class operator permit endorsed for broadcast use.

4. In the Appendix to Part 13, in §1.1117, a new type of application is added at the end of paragraph (a) to read as follows:

“§1.1117 *Schedule of fees for commercial radio operator examinations and licensing.*

“(a) \* \* \*

“Application for provisional certificate for a radiotelephone third-class operator permit endorsed for broadcast use . . .”

Clearly, the Commission relaxation of requirements for operator permits and experimental fm operation will prove beneficial to many operators and totally in the public interest.

# Multiple Ownership Rules

In March 1970, the Federal Communications Commission adopted far-reaching rules designed to restrict multiple ownership of broadcast facilities. Broadcaster reaction to these rules was swift. The Commission received a barrage of Petitions requesting the FCC to reconsider its actions.

In response to the hue and cry of the nation's broadcasters, the Commission modified its initial order restricting multiple ownership and adopted new, important rules.

Since all licensees are affected by the rules on multiple ownership, the following data should be carefully read and analyzed.

## **Background of New Rules**

The FCC's multiple ownership rules (§73.35, §73.240, and §73.636) are essentially divided into two parts: (1) the "duopoly" rule and (2) the "concentration of control" rule.

In effect, the "concentration of control" rule attempts to foster maximum competition in broadcasting and to promote diversification of programming sources and viewpoints by limiting one party's ownership of broadcast facilities to seven AM, seven FM, and seven TV stations (with no more than five VHF stations). The "duopoly" rule attempts to promote additional diversification and

competition by forbidding ownership of identical facilities (e.g., two AM's) with overlapping contours. For example, a party cannot own an AM station in community "A" if he already owns an AM station in community "A," or in an adjacent community if the two 1 mV/m contours overlap. More broadly, the duopoly rules prohibit the same party from owning, operating, or controlling more than one station *in the same broadcast service* in the same area. However, this rule has not prevented the ownership of stations of a *different* service in the same area; hence, many communities have an AM, FM, and TV facility owned by the same licensee. It is this latter situation that the Commission's *Order* of March 1970 was designed to restrict.

The new provisions adopted by the Commission in March 1970 retained all the preceding standards, but proscribed future acquisitions of common ownership interests in different broadcast facilities in the same area or "market."

As initially set forth, the new rules would not allow an additional grant of a license to a party who already owned one or more full-time stations in the same "market" as the proposed new station. Thus, a party owning an FM station in a community, for example, would not be allowed to construct or purchase an AM and TV station in the same "market" or community.

Initially, there were exceptions to the new rule, but they were highly restrictive and affected only a minute number of licensees.

The basic exception involved Class IV AM stations (those assigned to 1230, 1240, 1340, 1400, 1450 and 1490 kHz) in communities of less than 10,000 population. The Commission in its initial *Order* said that, in these areas, AM licensees would be allowed a license for an FM station *even though the two stations would be in the same market*. However, the converse was not permitted: an FM licensee in a community of less than 10,000 population could *not* obtain an AM station or con-

struction permit for a new AM station in the same "market."

Certain other Commission "exceptions" were directed to the many AM-FM combinations that now operate throughout the country. One exception covered facilities in which an FM station has been constructed as an integral part of the AM station: the same tower has been utilized, the same studios are used for production, and the like. This exception allowed a broadcaster to receive a license for an existing AM-FM combination in the same market or a "proper showing;" that is, a demonstration that economic or technical considerations preclude separate sale and operation of the AM-FM combination.

### **March 1971 Rules**

The Commission's rule to prohibit common ownership of AM-FM combinations in the same community received the greatest comment from broadcasters. Strong opposition was received. The opponents strenuously argued that the restrictive new rules 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 argued that the AM-FM non-duplication rule recognized that AM-FM combinations in small markets are not in a position to program even 50 percent separately, yet the rules would not only require 100 percent separate programming, but separate ownership as well.

In response to the deluge of broadcaster petitions, the Commission reconsidered its rules with respect to common ownership of AM-FM combinations in the same community. By *Memorandum Opinion and Order* (FCC 71-211) released in March 1971, the Commission declared:

. . . [T]here will be no rule barring the formation of new AM-FM combinations.

In arriving at its 1970 decision to preclude future common ownership of such AM-FM combinations, the Commission 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 FCC by independent FM stations indicated that they are generally losing money. Therefore, the Commission initially 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 them and operating them as separate stations. In so doing, the Commission 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." However, in reconsidering its initial *Order*, the Commission declared:

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. (As indicated hereafter, combinations of UHF stations with aural stations will be handled on a case-by-case basis.) As a consequence, all conditional grants of applications for assignment of licenses, or transfer of control of licensees, of AM-FM combinations in the same market made since this proceeding began will have the condition deleted.

Obviously, the new rule is a boon to all licensees who are contemplating the sale of their

commonly-owned AM-FM facilities. So too, the prospective purchaser may realize he is receiving a more economically-sound package. However, there may be an ominous cloud on the horizon. As the Commission further declared in its new rule:

We are deleting the rules concerning common ownership of AM and FM stations, partly because we intend to examine the matter further. Thus, attention is called to the fact that in the *Further Notice of Proposed Rulemaking* issued in this proceeding, we stated, as we have on other occasions in recent years, that FM should not be an adjunct or supplement of AM, but that both AM and FM should be integral parts of a total aural service.

Noting that its initial *Order* invited comments on possible forced divestiture of commonly-owned stations, the Commission said that the record compiled as a result "may prove helpful in dealing with the AM-FM problem." Additionally, the Commission declared that it will soon institute a rule-making proceeding to explore the question of whether broadcasters should provide *additional* hours of non-duplicated programming on the FM facility of commonly-owned AM-FM stations.

What will the future bring? It is difficult to forecast in light of the Commission's sudden reversal of its policy; however, it is safe to assume there has been a substantial relaxation of the previously restrictive rules governing common ownership, and there will be lengthy future studies before new rules are again adopted.

## Conclusion

In sum, there is currently no rule barring the existence of present, or formation of new, AM-FM combinations.

Additionally, the multiple ownership rules have been somewhat relaxed concerning common ownership of UHF and radio stations. Under the March 1971 *Order*, UHF licensees (or transferees

or assignees) may file applications to build or acquire radio stations (AM, FM, or AM-FM combinations) in the same market; however, such applications will be handled on a case-by-case basis by the Commission.

It should be noted that the rules prohibiting VHF television licensees from acquiring AM and/or FM facilities in the community still apply. Conversely, AM and/or FM licensees may not acquire a VHF television facility in the same market.

Existing licensees, and those who desire to acquire broadcast facilities, should be intimately aware of the Commission's rule governing common ownership of broadcast facilities; in case of doubt, your counsel should be contacted.

# Amended Multiple Ownership Rules : Part I

By its Report and Order, released June 17, 1968, in Docket No. 15627 (FCC 68-627), the Commission revised Sections 73.35 (a-m), 73.240 (fm) and 73.636 (TV) of the Commission's Rules relating to multiple ownership of a-m, fm and TV broadcast stations.

As has been stated on numerous occasions, the multiple ownership rules of the Commission have the twofold purpose of promoting (1) maximum competition and (2) diversity of programming sources and viewpoints. Sections 73.35, 73.240 and 73.636 of the Rules govern multiple ownership of standard, fm, and television broadcast stations respectively. In these three sections, the language of the provisions is identical except for variations appropriate to each service. The pertinent provisions, with underscoring added, read as follows:

§73.34 )

§73.240) Multiple Ownership

§73.636)

No license for a standard [fm or television] broadcast station shall be granted to any party (including all parties under common control) if:  
[Duopoly Rule]

(a) Such party directly or indirectly owns, operates or controls one or more standard [fm or television] broadcast stations and the grant of such license will result in any *overlap* of (specified service contours) of the existing and proposed stations; or  
[Concentration of Control Rule]

(b) Such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls or has any interests in, or is an officer or director of any other standard [fm or television] broadcast station if the grant of such license would result in broadcasting in a manner inconsistent with the 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, classes of stations involved 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 seven standard [fm or television] broadcast stations.*" [No more than seven a-m's, seven fm's, five vhf and two uhf television stations.] [One-Percent Rule]

The word control as used above is not limited to majority stock ownership, but includes actual working control in whatever manner exercised. Additionally, in applying the foregoing provisions 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 percent or more of the outstanding voting stock. [Headings and emphasis supplied.]

Parts of the multiple ownership rule have come to have their own designations. Thus, paragraph (a), which prescribes cross-interests in stations in the same broadcast service serving substantially the same area, is the so-called "duopoly rule." Paragraph (b) is often referred to as the "concentration of control" rule. The seven-station aspect of that rule is sometimes known as the "seven station" rule. Note 2 is generally called the "one-percent" rule. In connection with the subsequent discussion, it may be noted that under the one-percent and seven-station rules, *stock holdings of less than 1 percent in each of more than seven broadcast stations in the same broadcast service are not considered excessive.*

## **I. The Problem of Investment Entities**

Section 1.613 and 1.615 of the rules require that specified information concerning ownership

or control of broadcast stations be filed with the Commission. The information required by Section 1.615 must be filed on FCC Form 323—the Ownership Report. One of the purposes of these sections is to supply the Commission with information concerning multiple ownership.

In recent years, the possibility that full achievement of the objectives of the multiple ownership rules was being thwarted was brought home to the Commission by information at hand which suggested the following:

(a) Some investment entities, such as mutual funds, brokerage houses, and trusts had acquired stock in each of two or more large, publicly held, corporate broadcast licensees with the result that they had interest in stations in the same broadcast service serving substantially the same area—*acquisitions apparently inconsistent with the duopoly rule*;

(b) Such entities had acquired one percent or more of the stock of each of two or more large, publicly held corporate broadcast licensees with resulting interests in more than seven stations in the same broadcast service—*acquisitions apparently inconsistent with the seven-station rule*;

(c) Apparently, because the Commission has not provided machinery necessary for obtaining it, large, publicly traded, corporate broadcast licensees were not submitting full and complete information about *beneficial and record ownership of their stock by investment entities* (and were thus not complying with Sections 1.613 and 1.615 of the rules and the instructions accompanying FCC Form 323). Consequently, the Commission has insufficient ownership information about stock acquisitions that might be inconsistent with the multiple ownership rules.

Before discussing the modifications of the rules as adopted, it is necessary to examine the way in which the various investment entities function so that licensees will understand the basis for establishment of the revised rules. Additionally, comprehension of the entities' functioning methods will also have a bearing on other questions such as ownership reporting requirements and enforcement of the rules.

Since the mutual funds may vote stock as beneficial owners, they may be presumed to be

in a position to influence or control management of the corporations in which they are shareholders; and, under the provisions of the Investment Company Act of 1940, they could exercise control—if they so desired. However, the record indicates that, as a matter of general policy, they do not hold stock for the purpose of exercising or influencing such control. *More than 90 percent of the prospectuses of mutual funds state that the fund may not under any circumstances invest in securities for the purposes of management or exercise of control.*

Virtually all mutual funds vote at annual elections of portfolio companies by proxies given to the proxy committee of the portfolio company management committee. Generally, mutual funds are supporters of the management of portfolio companies. Their investments in such companies presuppose confidence in them, and any disaffection with management of such companies is usually indicated by selling some or all of the company's stock rather than by intervening in the company's affairs.

Finally, it is noted that the characterization of mutual funds as the beneficial owners of portfolio company stocks with the power to direct how the stocks should be voted, while correct, needs amplification. Under the provisions of the Investment Company Act of 1940, as many as 60 percent of the board of directors of a mutual fund may be managers of the fund or persons affiliated with managers. It is the practice of managers to have the full 60-percent representation on the fund board. Thus, although technically it is the mutual funds that are the beneficial owners of the portfolio stock held by bank nominees, *it is the managers who control how it should be voted.*

#### **A. Stockbrokers**

In accordance with rules and policies of the SEC, the recognized stock exchanges require that

when brokers receive proxy material for stocks held in the "street name" for benefit of their customers, it must be forwarded to the customer without comment. The broker then votes the stock as instructed by the beneficial owner. If the customer does not respond, the broker may vote the stock if the question is routine, but not otherwise. These practices apply whether or not the stock involved is listed on the exchange of which the broker is a member.

## **B. Trusts**

Unlike mutual funds and brokerage houses, trusts are of so many kinds and the duties and the voting powers conferred on trustees by trust investments are so varied that it is difficult to make generalizations in this area.

## **II. Conclusion as to Investment Entities Problem**

It is important to note that in describing the functioning of investment entities, the Commission used the terms "record owner" and "beneficial owner" to describe certain aspects of stock ownership with regard to the investment entities. Consequently, for purpose of administering the multiple ownership rules, the Commission decided that *ownership of stock in a corporate broadcast licensee should be attributed to the party or person who possesses the right to determine how the stock will be voted.*

Accordingly, the multiple ownership rules were amended to attribute ownership of corporate broadcast stock as follows:

(a) *Mutual funds: Ownership of stock held by a bank nominee for the benefit of a mutual fund will be attributed to the manager of the fund.* Since the fund manager generally holds 60-percent control of the board of directors of the fund and thus can control the voting of broadcast stock in the fund portfolio, when more than one fund

is managed by a single manager, the Commission shall, because the funds are under common control, *aggregate the holdings of the group of funds for purposes of the multiple ownership rules.* Since bank nominees, which hold record title to the stock for the funds cannot vote the stock, ownership will not be attributed to them.

(b) *Brokerage Houses: Ownership of voting stock held in street name for the benefit of the customers will be attributed to the customer.* It is true that the case of the stockbroker is unique because, as previously described, in some cases he may vote the stock held for a customer without instructions from the customer. However, this may only be done in routine matters. With publicly traded corporate broadcast licensee, the stock may only be voted under the direction of the customer. *Ownership of stock held by brokers for their own accounts will be attributed to the broker.*

(c) *Trusts: Ownership will be attributed to those having the power to vote the broadcast stock.* Naturally, this will vary from trust to trust.

(d) *Other cases: In other cases where record owners hold stock for beneficial owners (e.g. the executor of an estate holding for legatees), ownership will be attributed to those having the power to vote the stock.*

# Amended Multiple Ownership Rules: Part II

**The one-percent rule.** ("Note 2" of the multiple ownership rules) constitutes an exception to the multiple ownership rules. That is, as to corporate licensees with more than 50 shareholders, the multiple ownership rules are not applied to stockholders with less than one percent. That exception, under the new rules, has been expanded.

As to the 1-percent rule and its application to mutual funds, the Commission faced a difficult decision, because some mutual funds (unlike brokerage houses) are permitted to vote stock concerning matters of importance. The Commission realized that the practical facts of life must be faced. Generally, funds are passive investors, and they are not interested in controlling licensees. Furthermore, the Commission relied heavily on a study which disclosed that adherence to the 1-percent standard for mutual funds would require divestiture of holdings by numerous funds—thereby depressing the market for broadcast stocks. Consequently, as to mutual funds, the Commission raised the standard from 1 to 3 percent. By doing so, only three funds would be required to divest some of their broadcast holdings, and this would not appreciably affect broadcast stock prices. Therefore, broadcast licensees (with 50 or more shareholders) need not report stockholdings of mutual funds in the Ownership Report, unless the fund holds 3 percent or more.

## The Duopoly and Concentration of Control Rules Interpreted

As adopted initially in the 1940's, Sections 73.35(a), 73.240(a), and 73.636(a) of the Commission's Rules provided limitations on the common ownership or control of stations in the same service and/or serving substantially the same area. These duopoly (overlap) and concentration of control provisions of the Rules were intended to promote competition and maximize diversification of program viewpoints. The duopoly rule restricts common ownership of broadcast stations, in the same service, based upon the degree of overlap of the signal contour ( $1 \mu\text{V}/\text{m}$  for a-m or fm and Grade B for TV). The concentration of control rule prohibits common ownership in more abstract terms—i.e., the size, extent, and location of areas served, the number of people served, the classes of stations involved, etc. Significantly, "Note 2" of these rules provides that the duopoly and concentration of control rules will not be applied in cases where the licensee involved has 50 or more stockholders and the stockholder(s) violating the duopoly or concentration of control rules own less than one percent of the stock. In sum, the new rules have not changed the duopoly and concentration of control rules.

The one-percent rule—which is "Note 2" of the duopoly and concentration of control rules—is generally discussed in connection with Ownership Reports and the requirements thereon to detail stock holdings. However, it also has great bearing upon the multiple ownership rules—duopoly and concentration of control in particular. Prior to the advent of the new rules discussed herein, the multiple ownership rules were not applied to a stockholder with less than one percent in licensee-corporations with 50 or more stockholders. That is still the case today, and the new rules ease these requirements somewhat—particularly as to mutual-fund stockholders, stockholders, stockbrokers, and trusts, etc., where such legal

entities do not have the power to vote their stock holdings.

When the Commission adopted its June 1968 Report and Order in Docket 15627 it reaffirmed the rules described above. While the new rules do not really alter the old duopoly and concentration of control rules, they serve to explain and interpret them. The exception relates to mutual funds. In summary, the interpretation of greatest significance may be recapped as follows:

(1) a mutual fund may hold up to 3 percent of the voting stock of each two television stations (with more than 50 voting stockholders) in the same city;

(2) a stockbroker may hold unlimited quantities of stock in those stations for the benefit of its customers; and,

(3) a trust may only hold up to 1 percent.

If any of the foregoing be violated, the duopoly and concentration of control rules will be applied.

### **Ownership Reporting**

Section 1.613 and 1.615 of the Rules, and the Ownership Report (FCC Form 323) together with its instructions, require broadcast permittees, and broadcast licensee's to file with the Commission complete ownership information. As mentioned earlier, in the case of corporations with more than 50 stockholders, this information must be submitted with regard to all stockholders holding 1 percent or more of the voting or non-voting stock of the corporation.\* Among other things, the information required of corporate permittees or licensees includes identities of record owners, beneficial owners, and those having the

\*Do not confuse the reporting requirements discussed herein with the modification of the duopoly and concentration of control percentages discussed above. Even though a nonvoting shareholder (such as a mutual fund or a brokerage house) may hold more than 1 percent of the stock and not contravene the duopoly and/or concentration of control rules, the licensee's responsibilities under the reporting rules have not changed.

power to vote the stock. Section 1.613 requires filing with the Commission any agreement, document, or instrument affecting directly or indirectly, the ownership or voting rights of the licensee's or permittee's stock. This includes trust agreements and proxies. Supplemental ownership reports must be filed within 30 days after any change occurs in the ownership information previously reported.

Publicly traded corporate permittees and licensees with more than 50 voting stockholders do not generally submit the required information about beneficial ownership or, insofar as investment entities are concerned, the holders of one percent or more of the voting stock. In addition, proxies have often not been filed. Lack of information about these matters has weakened the Commission's administration of the multiple ownership rules. The U.S. Congress has publicly criticized the FCC for its laxity in these areas.

The Commission decided that permittees and licensees shall promptly submit to the Commission full and complete information in accordance with the provisions of Sections 1.613 and 1.615 of the Rules and the instructions on FCC Form 323 "Ownership Report." However, if a permittee or licensee is unable to obtain complete ownership information for reporting to the Commission, it shall file on the FCC Form 323 whatever information is available to it together with a detailed explanation of why the omitted material is not available.

Since information concerning trust instruments has often been lacking in the Commission's files, it amended Section 1.613 (b) (3) of the Rules to make compliance therewith easier. As opposed to the present requirements that trust instruments be filed, the Commission requires only the filing of an abstract of the instrument setting forth the following information: (1) the name of the trust; (2) the duration of the trust; (3) the name and number of shares of stock held by the trust.

The amendments adopted to Sections 1.613 (Filing of Contracts), 1.615 (Ownership Re-

ports), and 73.35, 73.240, 73.636 (Multiple Ownership Rules) codify what the Commission's staff has followed as policy during the past few years.

### Summary

In summary, the Commission has amended the rules as follows:

**Duopoly, Concentration of Control and one-percent Rule.** (1) Any amount of ownership will be interpreted as a violation of the duopoly (overlap) rules [73.35(a), 73.240(a), and 73.636(a)]. Thus, even where a stockholder would hold less than one percent, of two broadcast facilities with prohibited signal overlap, such could not be accomplished without filing and receiving a grant of a petition of waiver of the duopoly rule.

(2) For corporations with more than 50 voting stockholders, both the duopoly and concentration of control rules will be applied to (a) officers, (b) directors, and (c) stockholders owning 1 percent or more of the voting stock; however as to investment companies (e.g., mutual funds), the said rules will not be applied unless the funds own (directly or indirectly) 3 percent or more of the voting stock. Stock holdings by investment companies under common management shall be aggregated. Furthermore, if an investment company directly or indirectly owns 50 percent or more of the voting stock of a company which in turn owns directly or indirectly 50 percent of a corporate broadcast licensee, the investment company shall be considered to own the same percentage of outstanding shares of the broadcast corporation as it owns of the outstanding share of the corporation between it and the licensee corporation. If the intermediate company owns less than 50 percent of the licensee corporation's outstanding stock, the investment company's holdings need not be considered under the 3-percent rule; however, officers and/or directors of the licensee-corporation (who are representatives of

the intermediate company) shall be considered to be representatives of the investment company.

(3) Further, in determining whether the duopoly and concentration of control rules have been contravened, where there are more than 50 voting stockholders and the record and beneficial ownership of voting stock are not identical, the party having the right to determine how the stock will be voted will be considered as the owner. Examples of the foregoing include bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street name for the benefit of customers, trusts holding stock as record owners for the benefit of designated parties, and so forth.

### **Ownership Reporting**

(4) Corporations with 50 or more stockholders still are required to submit ownership information as to all stockholders holding 1 percent or more of the voting or nonvoting stock.

(5) If all the information required by Sections 1.613 (contracts) and 1.615 (ownership) cannot be ascertained, whatever information is available must be submitted with an explanation disclosing why omitted material is unavailable.

(6) Trust instruments need not be submitted; however, abstracts of same disclosing the trusts' name, duration, number and names of stock, name(s) of beneficiary, name(s) of record owner, name(s) of party exercising vote or control of stock, and, any conditions on power of voting stock as well as other unusual characteristics of the trust must be filed. (If the Commission deems it necessary, it can require the filing of the trust instrument.)

(7) Information as to brokerage houses need not be reported until their ownership of stock is at least 30 days old.

Thus, the June 1968 amendments to the multiple ownership rules have made no major changes but, rather, have relaxed the rules as to

investment entities and have served to explain and interpret the application of those rules to investment entities. In so doing, minor changes have been made in the ownership reporting requirements of 1.613 (contracts) and 1.615 (ownership).

# Main Studio Moves

IT IS ALWAYS SURPRISING to find that many broadcasters are not familiar with Federal Communications Commission requirements governing the relocation of main broadcast studios.

The Commission has recently adopted new rules concerning the relocation of main FM studios. It is therefore appropriate to discuss and review the rules pertaining to main studios for all services—FM, AM and TV.

## New FM Rules

In September 1970, the Commission initiated rule-making proceedings designed to clarify licensee questions as to when Commission authorization is required for FM main studio moves to points outside the community of license. Section 73.210 of the Commission's rules formerly indicated that FM licensees could relocate their main studios at the authorized transmitter site, wherever it may be, without prior Commission approval. A simple reading of this former rule would seem to indicate that if an FM station had its main studio in its community of license, City A, and its transmitter in adjacent City B, the main studio could be moved from City A to City B without Commission approval. Not so. The Commission has admitted that the old rule was "misleading." Actually, Section 73.257 of the Rules would govern such a situation. Section 73.257 provided that FM licensees "must obtain specific authority for a main studio move to a different city from that specified in the license." Thus, in

spite of the supposedly "clear" language of Section 73.210 noted above, licensees who moved their main studios from the city of license to the transmitter site (located in another city) incurred the wrath of the Commission for violating another section of the Rules.

In its February 1971 *Report and Order*,<sup>1</sup> the Commission, with obvious understatement, declared that the rules mentioned above "have . . . been a basis for uncertainty by some FM licensees. . . ."

In its *Order* designed to remove this confusion, the Commission reiterated the policy underlying the main studio rules:

The main studio rules . . . are intended to make broadcast stations readily accessible to the people in the communities which they are primarily licensed to serve, and they constitute one of the essential ways we have for insuring that stations realistically meet their obligation to serve their communities of license as outlets for local self-expression. Since location of a station's main studio within the corporate limits of the principal community it is licensed to serve can reasonably be expected to be consistent with those goals and the public interest, we consider it unnecessary in the public interest to require prior Commission approval for main studio relocation within the community, whether this involves a move from one location to another within the community or from a location outside the community to one within it. For such main studio relocation within the community of license, it is sufficient, we believe, that the Commission be notified when the move is made. We are, however, of the view that the location of a station's main studio outside the community of license does raise a question as to whether it can, in fact, meet its primary obligation to the city of license. We therefore consider it important to require prior Commission approval of main studio moves to points outside the principal community before they are made.

It is therefore clear that prior Commission approval is not necessary for the relocation of the main FM studio within the corporate limits of the city of license. However, if an FM licensee desires to relocate his main studio outside the corporate limits of the city of license, prior Com-

mission approval must be obtained. This rule applies even if the proposed relocation is to the transmitter site, if the transmitter site is situated outside the community of license. Similarly, Commission approval must be obtained if the proposed move is from an existing main studio location outside the city of license to another site outside the corporate limits of the city of license.

These new rules will also eliminate a rather circuitous route used by some licensees to move their suburban FM station to an adjacent large city. Much like the proverbial "camel with his nose in the tent," some FM broadcasters had sought permission from the Commission to relocate their transmitting antenna on top of a tall building in a large city adjacent to their suburban community of license. As soon as this construction had been completed, the FM licensee would, without seeking approval, move his main studio to the transmitter site—the tall building in the large city! Clearly, such practices have been eliminated by the adoption of the new FM main studio rules.

There is one exception in the new rules. The exception is for commonly-owned AM and FM stations licensed to serve the same community. If an AM station is licensed to serve City A, and has its studios located outside the corporate limits of the city of license, then the commonly-owned FM facility may move its main studios from inside the city of license to the AM studio site without prior Commission approval. However, where commonly-owned AM and FM stations in the same area have different communities of license, prior Commission approval must be obtained to relocate the main FM studios at the AM studio site.

*In sum, under the new rules, prior Commission approval of all proposed FM main studio relocations must be sought, except for relocation within the city of license, or relocation to the main studio site of a commonly-owned AM facility licensed to serve the same area. It should*

be noted that if prior approval is not necessary, licensees must promptly notify the Commission of the relocation. More specifically, the pertinent provisions of revised Section 73.210 of the Commission's Rules now read as follows:

(2) The main studio of an FM broadcast station shall be located in the principal city to be served. Where the principal community to be served is a city, town, village or other political subdivision, the main studio shall be located within the corporate boundaries of such city, town, village or other political subdivision. Where the principal community to be served does not have specifically defined political boundaries, applications will be considered on a case-to-case basis in the light of the particular facts involved to determine whether the main studio is located within the principal community to be served.

(3) Where an adequate showing is made that good cause exists for locating a main studio outside the principal community to be served and that to do so would be consistent with the operation of the station in the public interest, the Commission will permit the use of a main studio location other than that specified in subparagraph (2) of this paragraph. No relocation of a main studio to a point outside the principal community to be served, or from one such point outside the community to another, may be made without first securing a modification of construction permit or license, except for relocation at the AM main studio location of a commonly-owned AM station licensed to the same community. FCC Form 301 shall be used to apply therefor. The main studio may, however, be relocated within the principal community to be served, or be moved from a location outside the community to one within it, without specific authority, but the Commission shall be notified promptly of any such relocation.

### **AM Studio Relocation**

The long-standing rules governing the relocation of AM main studios have not been affected by the February 1971 *Order*. Declared the Commission:

We are not, however, similarly amending the AM main studio rules to require prior Commission approval for main studio relocation at a transmitter site outside the community of license, since technical considerations governing AM transmitter site selection usually place such sites in close proximity

to the community of license and not in another larger city. For this reason, AM's studio relocations at the authorized transmitter site have seldom raised questions of studio accessibility or de facto station relocation.

Therefore, AM licensees may relocate their main studios at the transmitter site, regardless of location, without prior Commission approval. However, as in the FM and TV rules, an AM licensee may not move its main studio location outside the limits of its community of license without first securing Commission approval. Section 73.31 of the Rules provides that . . .

The licensee of a station shall not move its main studio outside the borders of the borough or city, state, district, territory, or possession in which it is located, unless such move is to the location of the station's transmitter, without first securing a modification of construction permit or license. The licensee shall promptly notify the Commission of any other change in location of the main studio.

The rules governing television main studio moves have remained essentially the same; however, certain changes have been made in the February 1971 *Order*. Specifically, the major change involves the removal of language which could be construed as requiring prior Commission approval for a main studio move from a location outside the principal community to one within the community. No such prior approval is necessary. However, as with FM facilities, no relocation of a television main studio to a point outside the community of license, or from one such point outside the community to another, may be made without prior Commission approval. More specifically, the newly-amended Section 73.613 of the *Rules* provides as follows:

The main studio of a television broadcast station shall be located in the principal community to be served. Where the principal community to be served is a city, town, village, or other political subdivision, the main studio shall be located within the corporate boundaries of such city, town, village, or other political subdivision. Where the principal community to be served does not have specifically

defined political boundaries, applications will be considered on a case-to-case basis in the light of the particular facts involved to determine whether the main studio is located within the principal community to be served.

Where an adequate showing is made that good cause exists for locating a main studio outside the principal community to be served and that to do so would be consistent with the operation of the station in the public interest, the Commission will permit the use of a main studio location other than that specified in paragraph (a) of this section. No relocation of a main studio to a point outside the principal community to be served, or from one such point outside the community to another, may be made without first securing a modification of construction permit or license. FCC Form 301 shall be used to apply therefor. The main studio may, however, be relocated within the principal community to be served or be moved from a location outside the community to one within it without specific authority, but the Commission shall be notified promptly of any such relocation.

### **Conclusion**

As the Commission has repeatedly declared, the main studio rules are intended to make broadcast facilities readily available and accessible to the people in the communities which they are primarily licensed to serve.

Failure of a licensee to seek prior Commission approval of proposed main moves can result in serious sanctions being imposed. Similarly, even if a minor move (one not requiring prior approval) is contemplated, it should be remembered that the Commission must be notified promptly following the actual move.

If you have any questions concerning this important area of station operation, your counsel should be consulted.

1. FCC 71-150; 21 RR 2d 1501.

# Pay TV Rules

IN DECEMBER, 1968, the FCC issued its *Fourth Report & Order*, 15 F.C.C. 2nd 466 (1968), authorizing virtual nationwide subscription (pay) television.

Soon afterwards, the National Association of Theater Owners petitioned the FCC for a stay in the effective date (June 12, 1969) of the non-technical rules. When this was denied, the petitioners went to the U.S. Court of Appeals for the District of Columbia<sup>1</sup> where the Commission's *Fourth Report* was upheld without reservation.

To petitioner's allegations that the Communications Act precluded the FCC from approving STV, the Court answered: "The Act seems designed to foster diversity in the financial organization and *modus operandi* of broadcasting stations as well as in the content of programs."

The Court also dealt swiftly and succinctly with the petitioners' other allegations: that the FCC lacked authority to regulate STV rates, that its failure to give adequate reasons for the decisions in the *Fourth Report* was arbitrary and capricious, and that it acted in restraint of free speech. The Court then cautioned the Commission that "regulations which are vague and overbroad, create a risk of chilling free speech, while rules which are too finely drawn will arouse judicial suspicion that they are designed to suppress uncongenial ideas."

The Court felt convinced, however, that the FCC had acted within proper limits in promulgating rules for STV and, without dissent, affirmed the *Fourth Report* in its entirety on September 30, 1969.

## Fifth Report and Order

Pending the Court of Appeals decision, the Commission adopted the first technical standards for STV and also specified procedural requirements for STV applicants (*Fifth Report and Order*, FCC 69-950, Docket No. 11279; released September 11, 1969). In this *Report* the Commission declared that no applications for STV authorizations would be granted until 60 days after the Court's decision, although they would be accepted for filing immediately.

## Technical Considerations

As noted in its *Fourth Report*, the Commission had originally intended to issue technical rules before the effective date of June 12, 1969.

But in denying the petition to stay the effective date of the non-technical rules and to withhold grants of new authorizations until the Court rendered its opinion, the Commission decided to issue technical standards "as soon as possible but not necessarily before June 12, 1969." Thus, the initial standards discussed below were adopted September 4, 1969.

Voluminous comments had been filed with the Commission by various manufacturers (e.g. Zenith, Teco, Inc.). At least one manufacturer (Motorola, Inc.) was concerned over the additional power STV transmission would need so that the STV signal would be identical to conventional TV signals reaching the television receiver.<sup>2</sup> To this, the Commission declared:

"We expect to ascertain the relative amount of extra power, if any, to be transmitted in the STV systems for the encoding information. We anticipate that, in STV stations, the authorized values of peak power for the visual signal, average power for the aural signal, and the effective radiated powers of each, as based on these values, will not be increased above values which would be authorized for the conventional transmission."

If higher average power is actually transmitted by the applicant, the Commission will consider that fact in evaluating the system for approval. Because exact judgments concerning relative interference-causing capability and interference susceptibility of STV systems may not be practicable in type-acceptance applications, the Commission modified the proposed rule on type-acceptance (§73.644) to permit FCC evaluation of actual STV-system performance.

The Commission held that the type-acceptance rules provide authority to request field test information, if necessary, as a prerequisite to approval.

Interim procedures were also adopted for advance approval for STV *systems*—the schemes for generating and decoding STV signals. *But such approvals will not apply to specific items of encoding or decoding equipment.* The Commission will require use of type-accepted TV broadcast transmitters. However, just as type acceptance of conventional synchronizing signal generators or color input signal generating equipment need not now be obtained, no type acceptance will be required for encoding or decoding STV equipment.

Thus, engineering showings in STV authorization applications must identify the STV system to be used, which must have been approved pursuant to §73.644. For STV systems not already approved, the applicant must submit information necessary for approval under the pertinent provisions of §73.644. Applications must also specify, by manufacturer and type number, the proposed STV equipment (encoders and decoders).

### **General Application Information**

*STV authorizations will be granted only to licensees or permittees of television broadcast stations.* If the licensee grants a franchise (for example, to install and maintain the decoding equipment in the STV subscribers' homes) to a

business entity which is connected with the operation but is nonetheless a separate and distinct entity from the licensee or permittee, authorization goes to the licensee or permittee, and not to the franchise holder—even if the entities are commonly owned.

The Commission does not plan to adopt a specific FCC Form for STV applications. Qualified broadcast licensees or permittees must therefore file a separate STV application, in letter form, in triplicate, with a \$150 filing fee. STV applicants without appropriate broadcast authorizations must file an FCC Form 301 for construction permit, also, in triplicate with a filing fee of \$150.

The Commission will give public notice of acceptance for filing and will make no grants earlier than thirty days after the issuance of this public notice.

STV applicants must follow rules applicable to local notice of filing set forth in §1.580.

The application must describe definitively the STV's proposed operations, including:

- (1) the methods for disseminating and decoding information needed by subscribers, and for billing and collecting charges, including installation charges, monthly charges, per-program charges, or any other charges payable by subscribers;

- (2) the terms and conditions under which contracts will be entered into with subscribers; and

- (3) the approximate number of subscribers it is estimated will be served during the period of authorization. It shall also state whether a franchise holder, which is a separate business entity from the applicant, is to be involved in the proposed operation, and, if so, whether and to what extent the franchise holder and applicant are commonly owned. If a separate entity is a franchise holder, the application shall show exactly what the responsibilities and functions of the applicant and the franchise holder will be: e.g., who will install the scrambling equipment; who will install the unscrambling equipment attached to sets of subscribers; who will service and maintain that

equipment; who will provide information to subscribers so that they will know how to adjust the unscrambling equipment to obtain desired programs; who will collect and disburse revenues obtained from subscribers; who will be charged with the responsibility of obtaining programming; and who will be responsible for promotion and soliciting subscribers. An executed copy of any agreement, arrangement, or understanding between the applicant and the franchise holder concerning their respective functions shall be submitted with the application.

## Programming

The *Fourth Report* contains an exhaustive study of programming requirements, one of which is that stations engaged in STV operations must broadcast a minimum schedule of non-STV programs in addition to the STV programs.

An applicant simultaneously filing FCC form 301 (construction permit), 303 (renewal), 314 (assignment), or 315 (transfer), must complete Section IV-B of the required Form as to non-STV programming. *Proposed* STV programming must be included (and segregated from non-STV programming) in Part III, *Proposed Programming, Section IV-B*.

Applicants seeking STV authorization for an existing station, but not in conjunction with FCC Form 301, 303, 314 or 315, must similarly respond, but need not complete that portion of IV-B relating to Ascertainment of Community Needs *unless* the *non-STV* programming (i.e., news, public affairs and other fare) will be reduced to a substantial degree.

The new or existing station applicant "shall state the methods used to ascertain the [STV programming] needs and interests of the community . . . [and it] shall also show how the proposed STV programming will fulfill these needs and interests."

The applicant must also show what percentage of STV time per year will be devoted to each type

of STV programming (e.g., ballet, sports, opera, feature films) including a breakdown, by type, of programming shown from the hours of 8:00 a.m. to 6:00 p.m., from 6:00 p.m. to 11:00 p.m., and of programs shown during all other hours devoted to STV programming in a typical week.

Records supporting the representations of proposed STV programming must be kept on file at the station and be open for inspection by the Commission for at least 3 years from the date of filing.

### **Financial Showing**

The Commission has ordered the Ultravision standards applicable to STV applicants.<sup>3</sup> Thus, an STV application must show information sufficient for the Commission to decide that the applicant and franchise holder, whether or not commonly owned, have the financial capacity to operate for one year following construction.

The application must also contain:

- (1) An estimate of costs for installation of STV transmitting facilities, in place and ready for service. This estimate should include labor, supplies, etc.
- (2) A separate notation of installation costs for decoding equipment in the subscriber's home, as well as advertising and promotion costs.
- (3) Estimated costs of operation, on a month-by-month basis during the first year.
- (4) A showing of enough cash and/or liquid assets in excess of current liabilities for any construction of STV transmitting equipment for which it may be responsible (as well as additional expenses). The funds must be sufficient for operation for one year.

Furthermore:

"If the proposed STV operation involves a franchise holder (whether under common ownership with the applicant or not), the franchise holder must also make a showing like that mentioned in the preceding paragraph. If the franchise holder and the applicant are under common ownership, the showing may be either separate for each or

joint. If the applicant and franchise holder are one and the same entity, or if the applicant intends to carry on all functions of the operation without franchise, the showing will, of course, be a single one.

It will be interesting to watch the growth of subscription television over the next several years. Having received the blessings of the Commission and the U.S. Court of Appeals, a burgeoning new source of television entertainment is likely to become available to the majority of American TV households.

The opponents of STV will probably not let the matter rest at the intermediate Court level. For the moment, however, the road appears clear for a new breed of television broadcaster.

1. **National Association of Theatre Owners v. F.C.C.**, F. 2d (Case No. 22,623 [1969]).

2. The STV encoding information (which "scrambles" the video and aural signals so ordinary TV sets cannot receive them) requires additional power which might increase signal-to-interference ratios with possible co-channel or adjacent channel interference.

3. **Ultravision Broadcasting Co.**, 1 FCC 2d 544, 5 RR 2d 343 [1965].

# New Cable Rules: Part I

## Signal Carriage

In February 1972, the Commission adopted its most extensive CATV rules since February 1966, thus lifting its protracted "freeze" of some six years on cable's growth in the major markets. Numbering over 400 pages of regulations, explanatory material, and appendices, the *Cable Television Report and Order* (FCC 72-108, in Dockets 18397, et al) is necessarily detailed and comprehensive and does not lend itself to quick and easy interpretation. Accordingly, the following treatment of rules pertaining to signal carriage attempts to reduce same to portions for ready application by both cablecasters and broadcasters.

For purposes of determining the parameters of signal carriage, the Commission has divided television markets into the following categories: 1) the top-50 markets, 2) the top 51-100 markets or the second-50, 3) the markets below 100, and 4) those markets not within 35 miles of any television station. The top-100 markets are referred to as "major" markets and those below 100, yet still within 35 miles of a television station, are termed "minor" markets.

Cable systems in communities *partially* within a 35-mile zone are treated as if they are *entirely* within the zone. *Exception:* A system in a top-100 market 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.

"Significantly viewed" stations are the subject of considerable discussion in the ensuing treatment. For clarification, a "significantly viewed" full or partial network affiliate is one which has at least a three percent share of viewing hours and at least a 25 percent net weekly circulation. An independent station is "significantly viewed" if it has at least a two percent share of viewing hours and at least a five percent net weekly circulation.

In rare cases where the cable system is identified primarily with one major market and some of the local signals come from an overlapping major market (e.g., Washington and Baltimore), the cable operator is permitted and, upon appropriate request, required to carry a signal from one major market to another if he can demonstrate that such signal, regardless of distance or contour, is "significantly viewed" over-the-air in his cable community. Likewise, the rule is applicable to overlap between smaller and major markets. Yet a cable system located in a designated community of a major television market may carry the signal of a television station licensed to a designated community in another major market only if the *designated community* in which the cable system is located is *wholly* within the specified 35-mile zone of the latter, major market station.

Derived from the American Research Bureau's 1970 prime-time households ranking, the list of top-100 markets is a constant and, therefore, is not subject to revision. The Commission further classifies signals according to those *required* to be carried and those *permitted* to be carried, as follows: 1) signals that a cable system, upon request of the appropriate station, *must* carry, and 2) signals that, considering market size, a cable system *may* carry.

### **Top-50 Market CATVs**

Cable systems in the top-50 markets are *required* to carry the following signals: 1) signals of all sta-

tions licensed to communities within 35 miles of the cable system's community, 2) all "significantly viewed" signals, 3) all Grade B ETV's, and 4) all translators of 100 watts or higher power within the cable community.

In addition, systems in the top-50 markets are required to provide a minimum service of three networks plus three independents.

In addition to the authorized complement of signals, operators in the top-50 markets will be permitted to carry two *additional, independent* "bonus" signals. Yet any distant signals that have been imported to meet the authorized complement (a 3-3 service level) will be deducted from the additional signals permitted. For example, market X (a top-50 market) must meet a service requirement of three networks and three independents. If stations are carried, via 1) signals from the same market, 2) signals within 35 miles of the cable system, and 3) those "significantly viewed," and the cable operator reaches a service level of three networks and two independents, he would be permitted to import 1) one distant independent to reach the required 3-3 service level, and 2) one distant independent as a "bonus." *Note:* The one "bonus" independent is determined by subtracting the number of signals imported, i.e. *one*, to meet the mandatory service level from the number of "bonus" signals permitted, i.e., *two*.

## **Second-50 Market CATVs**

Systems in the second-50 markets are required to carry the same basic signals as those in the top-50 (see first paragraph under "Top-50 Markets," above). In addition, they must carry a minimum of three networks plus two independents.

If the above complement of signals is not available via 1) stations within 35 miles, 2) stations from the same market, and 3) stations meeting the viewing test, the cable operator is permitted to carry distant signals to reach the required level of service.

As in the top-50 markets, systems in the second-50 may bring in two additional independent signals, but these are subject to a deduction of signals imported to meet the required 3-2 service level.

### **Minor Market CATVs**

As in the major markets, minor market systems are required to carry the following signals: 1) signals of all stations licensed to communities within 35 miles of the cable system's community, 2) all "significantly viewed" signals, 3) all Grade B ETVs, and 4) all translators of 100 watts or higher power within the cable community.

Minor market systems must meet a minimum service level of three networks plus one independent and are *not* permitted to import distant signals beyond this 3-1 level.

### **CATVs Outside All Television Markets**

Cable systems outside the zones of any TV stations are required to carry 1) all Grade B signals, 2) all translator stations of 100 watts power or greater licensed to the cable community, 3) all ETVs within 35 miles, and 4) all "significantly viewed" signals, even when the station does not provide a Grade B contour signal to the cable community.

There is no minimum service standard, as required for major and minor market systems, for systems outside all TV markets. Such systems are permitted to carry any number of distant network affiliates and independents.

### **Leapfrogging**

In selecting signals, major and minor market cable systems will be required to carry the closest *network* affiliates or the closest such in-state station. *Independent* signals, if they come from the top-25 markets, must come from one or both of the two closest markets. If independents are chosen from

stations beyond the top-25, operators may exercise freedom of choice in their selection. Systems carrying a third independent signal will be required to choose a UHF station within 200 miles or, if such a station is not available, a VHF signal from the same area or any independent UHF signal.

Basic leapfrogging restrictions are suspended when 1) because of program exclusivity rules, a program is not available on a regularly carried independent station, or 2) the programming carried on the regularly carried independent is directed primarily to the local interest of viewers in the distant community (e.g., local news or public affairs.) In such cases, the cable operator is permitted to import from *any* other station (including network affiliates) *any* non-protected program and may carry the program to its conclusion.

### **Educational and Foreign Language Stations**

For purposes of fulfilling the needs of what is generally considered a "select audience," the Commission both *requires* and *permits* additional carriage of ETVs and foreign language stations. Specifically, a cable operator *must* carry all ETVs which 1) are located within 35 miles of the cable system, or 2) place a Grade B contour over the cable community. Furthermore, foreign language stations, not counted as part of the distant signal quota, *may* be imported in *unlimited* numbers. If a station broadcasts predominantly in one language, such station may keep out a distant signal broadcasting *in the same language* so long as the former can sustain its burden of proving that it will be affected adversely.

### **Program Exclusivity**

The Commission provided for exclusivity for both 1) network programs, and 2) syndicated programs. Stations with priority (i.e., a stronger grade of off-air signal) would thus be assured of exclusive presentation rights to both network and syndicated programs.

With respect to *network* television programming, a broadcaster of a higher priority station may request a cablecaster to refrain from *simultaneous* duplication of its network programming. Most saliently, the Commission has limited its rule to cover "simultaneous," rather than "same-day," protection. *Note:* Exclusivity does not apply to foreign language stations.

With respect to *syndicated* programming in the top-50 markets, the rules prohibit cable systems from carrying syndicated programs (defined, essentially, as "non-network programming sold in more than one market") on imported stations, if they have been notified by a local station that it is carrying the program. The restriction applies for one year in cases of first-run syndicated programs and for the run-of-the-contract in exclusive contract arrangements for showing by a station licensed to a designated community in the market.

Exclusivity rules pertaining to the second-50 markets are more complicated. Basically permitting greater accessibility of programs and shorter terms of exclusivity, the rules echo those in the top-50 markets which require notification by the broadcaster and restraint by the cablecaster when a station licensed to a designated community in the market runs a syndicated program under an exclusive contract. However, the Commission lists the following exceptions:

(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 one 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 two 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 two years from the date of such first availability.

(4) For feature films:

(a) Prior to the date such film is available for nonnetwork broadcast in the market under the provisions of any contract or license of a television broadcast station in the market;

(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 one year from the date of purchase of the program for non-network broadcast in the market, whichever occurs first.

Furthermore, a cable system in the second-50 markets may carry any *distant* signal syndicated program unless 1) the operator claiming exclusivity protection has an exclusive contract, and 2) the "syndicated" program is to be broadcast during prime time.

In all cases, the burden of notification is on the broadcaster to assert exclusivity by identifying to the cablecaster, at least 48 hours in advance, 1) the name and address of his TV station, 2) the title of the program or series to be protected, and 3) the dates of the run of exclusivity. The cable operator has the right to request that such information be supplied no later than the Monday prior to the calendar week in which the program is to appear. In addition, the broadcaster is required to contract for *thorough* exclusivity of the syndicated program within his market. He must contract for exclusivity of same against 1) other TV stations within the market, 2) cable carriage of the program via a distant signal, and 3) cable origination of the program via, for example, a leased channel presentation.

Exclusivity requirements in overlapping markets are shrouded in detail. The broadcaster is permitted syndicated program protection of his major market station from another major market only if the latter designated community lies *wholly*, not partially, within 35 miles of the former's designated community. Signals on a "significantly viewed" station are not entitled exclusivity, nor need any of its programming be "blacked out" to protect stations in the designated communities in the market.

Recognizing that exclusivity and market overlap is a most complicated area of the rules, the Commission decided to teach-by-example by presenting the Washington-Baltimore illustration:

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 Washington and Baltimore signals, would protect the programming of neither against distant signals. Assuming that a smaller television market community were located wholly or partially within the 35-mile zone of Washington, a Washington station would be entitled to top-50 market exclusivity protection in that community. If a community fell wholly or partially within 35 miles of both a top-50 station and a second-50 station, the one year preclearance period would be applicable, and the cable system could be called on to protect the programming of stations from both markets in accordance with the requirements respectively applicable to those markets."

Where both a top-50 and second-50 market overlap a community, stations from the former would receive top-50 protection (preclearance and run-of-the-contract) while stations from the latter would receive less binding second-50 protection.

## **Grandfathering**

The new rules are not binding to signals carried or authorized to be carried prior to March 31, 1972. Any signals authorized or grandfathered to one system in a community may also be carried by any other system in that community.

The foregoing attempts to bring into clearer focus the salient points of the Commission's recently adopted cable rules. As this treatment serves merely to analyze and interpret the 400-plus pages of prose proffered by the Commission, it, of course, is no substitute for legal counsel.

# New Cable Rules: Part II Non-Broadcast Channels, Operating Requirements, and Technical Standards

## Operating Requirements

Operating requirements are spelled out for both existing and new cable licensees. *New* cable systems must, before commencing operations, file with the Commission an application for a certificate of compliance. Information contained therein must include:

- 1) The applicants name and address;
- 2) The name of the community it plans to serve and starting date of proposed service;
- 3) A list of broadcast stations expected to be carried. **Note:** Stations to be carried as "substituted" programming (i.e., those stations carried in lieu of regularly carried independents during times when the programming of same is protected by program exclusivity rules) need not be listed;
- 4) A statement of proposed use of microwave to import any signals;

5) A copy of revised FCC Form 325 "Annual Report Of Cable Television Systems" which requires (a) ownership data, including all holdings in other CATV systems, and/or other communications media and/or businesses in which the cable owner has a "substantial interest," (b) statistical data concerning all CATV originations and (c) statistical data re all channel services and advertising;

6) A copy of the franchise, license, permit or certificate granted by the local authority. **Note:** Once a system is certified by the Commission, it need not file numbers 5, above, and 6 (FCC Form 325 and franchise copy) pursuant to an application for a "new" certificate to add local or distant signals;

7) A statement demonstrating that the system's proposal complies with the cable television rules, including, in particular, compliance with (a) signal carriage and exclusivity regulations, (b) rules relating to access to and use of non-broadcast channels and (c) technical standards.

Separate applications for certificates of compliance must be filed for *each* community served by the cable system. However, information pertaining to a number of communities need not be refiled separately for each community, but may be incorporated by reference. Attendant to its filing, the system operator must notify (a) the local franchising authority, (b) all local TVs, (c) the superintendent of schools, and (d) all local educational authorities of such application to the Commission. The Commission will issue a public notice on all applications and interested parties will be permitted 30 days to submit objections. If objections are raised, restrictions on *otherwise permitted* signals will be imposed on the cable operator if the challenger (e.g., the station operator) can sustain his very considerable burden of showing clearly (a) that "the proposed service is not consistent with the orderly integration of cable television service into the national communications structure," *and* (b) that "the results would be inimical to the public interest." On the other hand, the cable system may secure special relief and bring in signals *otherwise not permitted* by the rules only upon a "substantial showing," itself.

*Existing* systems (those operating as of March 31, 1972) need file an application for certification only if the addition of new signals is proposed. Otherwise, applications need not be filed until either (a) the system's current franchise expires, or (b) March 31, 1977, whichever comes first.

## Non-Broadcast Channels

### A) Franchises

Operating under a "deliberately structured dualism," the Commission indicated that it would set *minimum* standards for franchises from local authorities (e.g., construction deadlines, franchise duration, handling of service complaints and franchise fees), but that matters peculiarly *local* in nature (e.g., character qualifications for franchise applicants, determination of franchise area and subscriber rates) would continue to be in the hands of the local regulating authority. Included in the Commission's "minimum standards" for franchises are the following.

**1) Construction deadlines:** The Commission requires that construction "commence" within a year "after a certificate of compliance is issued" by the FCC and that the cable facilities should be completed at a rate of 20 percent per annum with some variance permitted because of local conditions.

**2) Franchise duration:** The Commission admonished that cable franchises generally should *not exceed* 15 years. Whatever the franchise period, the local franchising authority should provide for a renewal period of reasonable duration.

**3) Service complaints:** Regulations are set forth by the Commission that require a local business office or agent to handle the investigation and resolution of subscriber complaints.

**4) Franchise fees:** The Commission imposes a three percent ceiling on franchise fees. Any local government which desires to assess a greater fee must meet a difficult, two-pronged test that (a) requires the *government* to show that its fee is "appropriate in light of the local regulatory program," and (b) requires the

*franchisee* to "demonstrate that the fee will not interfere with its ability to meet the obligations imposed by the rules."

The three key areas of local jurisdiction (i.e., (a) applicant qualifications, (b) determination of franchise area, and (c) subscriber rates) are subject to Commission standards of "fairness" and "reasonability" only and are, therefore, essentially controlled by the local franchising authority.

## **B) Use of and Access to Non-Broadcast Channels**

The Commission concluded that, despite its intense interest in local programming by CATV systems and despite the present availability of greater channel capacities, it would require a minimum channel-capacity of only 20 channels, and this requirement would pertain solely to systems in the top-100 markets. The Commission also specified that top-100 market systems must make available, *for non-broadcast use*, one signal for each signal carrying an off-air television station.

As to the *public service* use of non-broadcast channels, the Commission promulgated the following rules. *They are applicable to all top-100 market systems*. Existing CATVs will have five years from the effective date to comply and waiver requests will be considered.

**1) Public access:** CATV systems will be required to make one public access channel available on a "free," "non-discriminatory," "first come, first served" basis and maintain production facilities for those using same. "Free" means no charge for use of facilities and no charge for production costs unless the program exceeds five minutes in duration. Cable operators will not be permitted any form of censorship, program content control or discrimination on public access channels. Only lotteries, obscene or indecent matter, political spot announcements, and other forms of advertising would be prohibited. (Advertising *would* be permitted on CATV-controlled local channels at "natural breaks." **Note:** If the public user libels someone, the Commission does not believe that the courts will hold the CATV liable because, "it is doubtful that (actual) malice could be

imputed to a cable operator who has no control over the given program's content." However, prudence would dictate that CATVs carry insurance for same.

**2) Educational access:** Cable systems will be required to make available to local educational authorities one designated channel "for instructional programming and other educational purposes."

**3) Government access:** Cable systems will be further required to dedicate one channel for use by the local government.

**4) Leased access:** Any "unused channels" on the system shall be made available for lease use. "Unused channels" include, besides the remaining bandwidth, all broadcast channels when "blacked out" by the program exclusivity rules and all education and government access channels not in use. Operators must also adopt rules proscribing the presentation of lotteries, obscene or indecent matter and advertising material not containing sponsorship identification on leased channels, as well as others. Unlike other "access" channels, commercials are permitted on *leased* access channels and may be presented at times other than "natural breaks."

We re-emphasize that only systems in the top-100 markets are required to comply with the rules on non-broadcast services. New systems must comply immediately; existing systems have a five-year grace period. In communities outside the top-100, where access channels are *not* required, the Commission permits *local* authorities to require access services so long as such services (a) are based on the above major market standards, and (b) do not exceed said standards.

Cable systems will further be required to make additional channels available as public demand increases. The Commission's test for defining the point in time when additional channels are necessary is somewhat obscure; i.e., whenever the system lacks sufficient unused channel space "to encourage public participation." This standard will likely be more clearly defined in a later rule-making proceeding.

### C) Two-Way Capacity

Cable systems will be required to have a capacity "for return communications on at least a non-voice basis." The Commission indicated that this requirement did not extend to "two-way capacity for each subscriber," but, rather, its "return communications" standard was designed to meet the existing state-of-the-art and to provide for future two-way communications without time-consuming and costly system rebuilding.

### Technical Standards

The Commission adopted a series of minimal technical standards based on its rules proposed June 24, 1970 (Docket 18894). Most contemporary CATVs already more than meet these technical requirements.

The Commission divided all CATV channels into four classes according to use:

- 1) Class I: Channels carrying standard TV signals;
- 2) Class II: Channels carrying CATV-originated programs;
- 3) Class III: Channels carrying non-TV, miscellaneous services, printed messages, etc.;
- 4) Class IV: Channels used for return (two-way communications).

Presently, *the precise technical standards apply to Class I (broadcast carriage) signals only.*

Requirements for (a) performance testing, (b) station lists and (c) measurement data apply to all systems and are effective March 31, 1972.

A system operator must check *performance* on his system annually by testing each broadcast signal at three widely separated points, including one point at the extremes of the system input. These tests must be kept in a public file for five years. In addition, each system must keep a current *list* of (a) the

cable channels it delivers and (b) the stations whose signals are delivered. Finally, *measurement* procedures are recommended to be made under "normal operating conditions." Though not mandatory, these measurements must, nevertheless, be authoritative in nature.

The system operator is held responsible for his system's interference with (a) reception of authorized radio signals, and (b) interference generated by a radio or TV receiver. He is not responsible for "receiver-generated interference;" rather, the operator may suspend service to the subscriber to remedy same.

New technical standards, particularly for Classes II, III and IV, will be the subject of future Commission rule-making.

In addition, the Commission will likely promulgate, in separate proceedings, definitive rules to prohibit 1) undue concentration of control and ownership of CATV, and 2) undesirable cross ownership between CATV and other media and businesses (such as newspapers). Furthermore, new rulemaking proceedings relating to local governments, manufacture of special TV sets for CATV, standardized accounting for CATVs and common carrier rules will likely be forthcoming. *Interpreting the FCC Rules* will analyze these myriad, yet related, subjects in future articles.

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