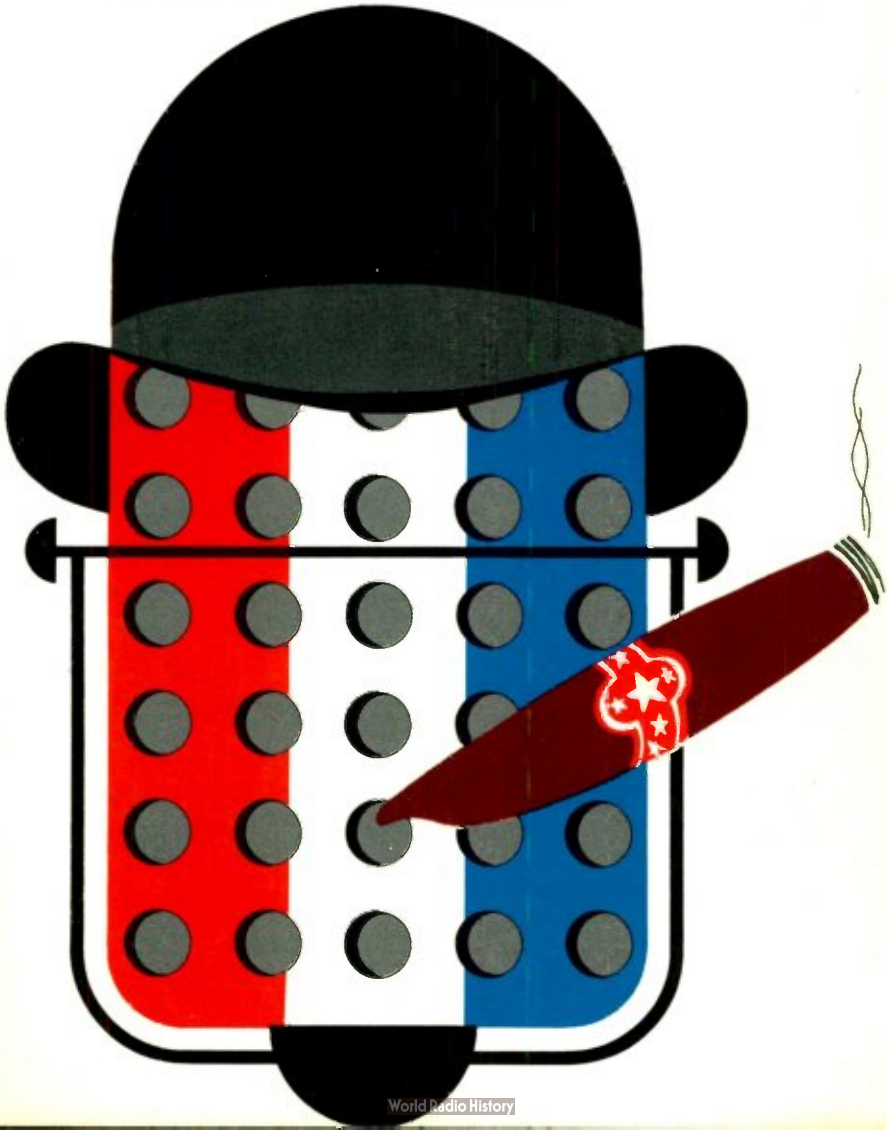
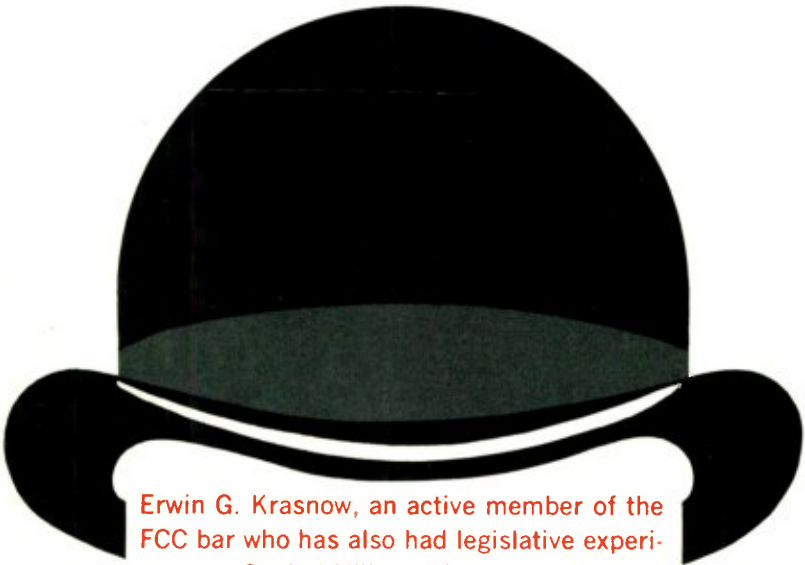
The Politics of Broadcast Regulation

ERWIN G. KRASNOW/LAWRENCE D. LONGLEY
PREFACE BY NEWTON MINOW





Erwin G. Krasnow, an active member of the FCC bar who has also had legislative experience on Capitol Hill, and Lawrence D. Longley, a political scientist with expertise in interest-group politics, have produced a useful book which gets down to hard cases. By focusing on the real case histories of regulation — of FM broadcasting, of UHF television, of proposed limits on broadcast commercial time, and of license renewal policies — the authors have shown us how the regulatory process actually works, how it is influenced by political realities, and how decisions are really made.

from the Preface by Newton Minow

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Preface

The Federal Communications Commission is one of the most important and least understood government agencies. Issues of momentous concern to every citizen come to the FCC, but its responsibilities, limitations, and processes are followed closely only by a small segment of the press, the bar, and the engineering fraternities. True, it is accountable directly to the Congress and there are frequent Congressional reviews of its decisions and deliberations. True, the courts are constantly reviewing—and reversing—its decided cases and regulations. True, the President appoints the Commissioners, thereby having some supervisory control. But, despite these continuing links with all three branches of the federal government, citizen familiarity with the FCC remains dim and distant.

I teach a seminar each year at the Northwestern University Medill School of Journalism. Our seminar includes graduate students of journalism and law students, and we probe the issues which are presented to the FCC from the perspectives of both law and journalism. Broadcasting is the only medium of expression under direct governmental regulation. Hard, sensitive, baffling problems arise in interpreting the First Amendment in a world of new technological advances. I often end class sessions by asking the students to pretend they have just been appointed to the FCC by the President and must vote on a precise case or issue.

It does not surprise me that the vote often comes out something like 9 to 8.

That is one reason why I welcome this book and intend to use it in my class. For very few scholars have paid enough attention to the *politics* of the federal regulatory agencies. Professor William L. Cary of Columbia University Law School, formerly SEC Chairman, led the way in 1967 in his classic book, *Politics and the Regulatory Agencies*. Bill Cary (who, fortunately for me, was my law professor

when I was a student), perceptively analyzed the relationship between regulation and the political process from the perspective of the thoughtful scholar as well as an agency chairman. Now, Erwin G. Krasnow, an active member of the FCC bar who has also had legislative experience on Capitol Hill, and Lawrence D. Longley, a political scientist with expertise in interest-group politics, have pooled their talents to carry the analysis more specifically into the record of one agency—the FCC.

Their efforts have produced a useful book which gets down to hard cases. By focusing on the very real case histories of regulation—of FM broadcasting, of UHF television, of proposed limits on broadcast commercial time, and of license renewal policies—the authors have shown us how the regulatory process actually works, how it is influenced by political realities, and how decisions are really made.

Pressures are intense in the regulation of broadcasting. The industry is strong, vocal, and has many powerful friends. Citizens' groups, a latecomer to the scene, are beginning to acquire some muscle and sophistication in the ways of the regulatory world. The White House is becoming more concerned about regulatory decisions because it is now aware that FCC decisions have not only national but also international implications. And the Congress and courts have the last word.

Let me give but one example from personal experience. When I was at the FCC, I was one of a few Commissioners who wanted to place some limits on the amount of commercial time on radio and television. We strongly believed that some rules were long overdue. We proposed that the commercial time rules established by the broadcasters themselves in the National Association of Broadcasters be enforced. I finally mustered a majority of the Commission to support this proposal. After I left, my successor, Bill Henry, was besieged by the industry. The Congress reacted almost immediately, and, as described in detail in Chapter 7, the House of Representatives made it clear to the FCC that it should stay out of the area. Thus, we remain the only nation in the world which has no limits on how many commercials a broadcaster may run, and our best broadcasters are reduced to the law of the jungle in this area. Yet, the FCC is blamed as a spineless tool of the broadcasting lobby, when in fact, its efforts to regulate were frustrated by the Congress.

Authors Krasnow and Longley document similar examples in their work. They conclude, quite properly, that while the FCC may

initiate policy, the fate of such policy is often determined by others. A good example which I know something about is the creation of policy in the early 1960's concerning international communication satellites. Here, we succeeded in getting Comsat launched and thus preserved American leadership in the world. But we succeeded only because the FCC was willing to compromise with various competing economic interests and theories, governmental and private agencies, and because we turned to the President and the Congress for the final word. This required an understanding of the political process; the essence of that process will almost always require compromise. Sometimes, compromise will not necessarily be the best service to the public interest—but under our system of government, I do not know a better alternative.

I commend the authors for digging beneath the surface to give their readers an accurate understanding of how the regulation of broadcasting really works. The idea of active practitioners like Erwin Krasnow working in harness with academic authorities like Lawrence Longley is a good one. The union of their efforts is in the best interests of their readers.

How do I know? I can best answer by quoting a favorite poem of President Kennedy's. It is a poem written by a bullfighter, Domingo Ortega, as translated by Robert Graves:

Bullfight critics ranked in rows
Crowd the enormous Plaza full;
But he's the only one who knows—
And he's the one who fights the bull.

Newton Minow

Acknowledgments

Countless people have influenced this work, including virtually everyone that we have dealt with in the course of a Washington, D.C., communications law practice or political science research. However, we wish to single out certain individuals for their special willingness to provide their insights and perceptions on various aspects of the politics of broadcast regulation.

Among those deserving credit are the following FCC Commissioners and personnel who made themselves available for interviews or in other ways provided considerable assistance: E. W. Allen, Gerald Cahill, Barry Cole, Commissioner Kenneth A. Cox, Phil Cross, Chairman E. William Henry, Chairman Rosel H. Hyde, Howard Kitzmiller, Commissioner Robert E. Lee, Commissioner Lee Loevinger, Chairman Newton Minow, Max Paglin, Alan Pearce, and Arthur Stambler.

Others persons familiar with broadcast regulatory policy who were of value to our understanding of the inner workings of the FCC include: Richard Ahles, Fred W. Albertson, Dan Callibraro, LeRoy Collins, Everett Dillard, Representative Oren Harris, C. M. Jansky, Jr., Professor John M. Kittross, Professor Lawrence W. Lichty, Professor Don R. LeDuc, Steve Millard, Harold Niven, Professor Christopher Sterling, Sol Taishoff, Jack Wayman, Nicholas Zapple, and various members of the law firm of Kirkland, Ellis and Rowe.

Special appreciation is due to three political scientists at Vanderbilt University—Professors J. Leiper Freeman, Avery Leiserson, and George J. Graham, Jr.—who constituted Lawrence D. Longley's dissertation committee and advised him throughout the research which led—following his collaboration with Erwin G. Krasnow—to this book.

Portions of this work have previously appeared in substantially different form as articles. By Erwin G. Krasnow: "The Ninety-First Congress and the Federal Communications Commission," *Federal Communications Bar Journal*, XXIV (No. 2, 1970–1971), 97–176. "The 91st Congress and the FCC," *Variety*, Jan. 6, 1971. By Lawrence D. Longley: "The FCC's Attempt to Regulate Commercial Time," *Journal of Broadcasting*, XI (Winter, 1966–1967), 83–89; "The FM Shift in 1945," *Journal of Broadcasting*, XII (Fall, 1968), 353–365; and "The FCC and the All-Channel Receiver Bill of 1962," *Journal of Broadcasting*, XIII (Summer, 1969), 293–303. We are grateful to the editors of these journals for permission to utilize this material in the revised form in which it appears here.

We would be remiss if we did not acknowledge our debt to Mary Townsager for her intelligent editorial skill. Finally, we would like to express both appreciation and indebtedness to our wives, Judy Krasnow and Jane Longley, who provided the encouragement, sympathy, and patience necessary for this book's completion.

Erwin G. Krasnow, Washington, D.C.
Lawrence D. Longley, Appleton, Wis.

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PART TWO
FOUR CASE STUDIES

INTRODUCTION

An Overview of the Terrain

The manner in which the Federal Communications Commission regulates the communications media lies at the heart of our democratic system of government. Broadcasting in America has emerged over the 50-odd years of its existence as a critical and central element of society, shaping values and opinions to an extent unrivaled by all other forms of media. Yet, unlike newspapers, magazines, or films, communication by this medium is not open to all, but rather is strictly regulated by a government agency. Only a few groups may obtain broadcasting licenses, and only a limited number of programs can be broadcast by these licensed stations. Crucial decisions as to who may broadcast what programs are made by an "independent regulatory commission" which operates in a supercharged political atmosphere.

While there have been numerous studies on the FCC and the other independent regulatory agencies, the number of works dealing with the political aspects of regulation is very limited. Over a decade ago, Marver Bernstein observed that "remarkably little empirical work has been done to describe and analyze the *political* context of particular regulatory programs." [1] Bernstein's statement still holds true today. As late as 1972, according to Bernstein, "our thinking about the regulatory process and the independent commissions remains impressionistic, and the need for empirical research is largely unfulfilled. As a consequence, we fall back on our value preferences concerning the role of government in economic life, on the biases of our professional affiliations, and on assertions by others that support our personal conceptions and conclusions." [2]

The lack of such empirical research may be due in part to the considerable confusion surrounding the concept of politics. Definitions of this term are so plentiful and varied that its application to broadcast regulation may lack precise focus. Harold Lasswell once

commented that political science "is the study of influence and the influential" and "the influential are those who get the most of what there is to get." He encouraged analysis of political activities centering on "who gets what, when and how." [3] This focus provides a useful operational definition of politics: *politics are those activities leading to decisions about the allocations of desired goods.* In the context of broadcast regulation, such activities can range from legal briefs prepared by citizens groups to the appointment of a special task force by the White House on a key communications problem. They may also refer to such actions as the FCC's proposal to regulate advertising time, or the Court of Appeals' decision to strike down Commission standards for the renewal of broadcast licenses.[4] Such decisions usually result in allocations of desired goods—only some of the participants get what they want.

Despite persistent calls for an emphasis on the political aspects of policy-making by agencies such as the FCC, most of the existing literature on broadcast regulation has instead emphasized such topics as the history and development of the FCC and the broadcasting industry, the agency's legal and administrative status, and the legal problems resulting from the combination of rulemaking and adjudicative functions in the same body. The political context of particular regulatory programs is generally omitted or mentioned only perfunctorily. Questions such as "who gets what, when and how out of the process" are rarely considered—never in a systematic manner. We propose to deal specifically with these questions. Their answers are central to the politics of broadcast regulation.

The first chapter of the book will examine the basic characteristics and the ecological context of the regulatory process and will trace the historical development of broadcast regulation. Chapters 2 and 3 will examine the role of the various participants in the making of regulatory policy and will be followed, in Chapter 4, by an analytical consideration of the structure and characteristics of the process.

Chapters 5 through 8 consist of four case studies of broadcast regulatory policies:

1. the questionable decision of the FCC, in 1945, to shift the frequency allocation for FM broadcasting from the 44 mc. range to the 98 mc. band;
2. the development of the All-Channel Receiver Bill of 1962 as a desper-

ate attempt to resolve the decade-old problems of a crippled Ultra-High Frequency (UHF) television service;
3. the abortive effort of the FCC in 1963 to set commercial time limits for broadcast licensees; and
4. the Commission's attempt in 1970 to establish policy on license renewal challenges.

We chose these four case studies largely because they are clear instances of controversy over specific policy proposals. They also provide diverse examples of the politics of broadcast regulation—examples which, taken together, support the formulation of generalizations and hypotheses about the broadcast regulatory process. Various time periods (from the mid-1940's to the early 1970's) and different broadcasting interests (FM, TV, manufacturers, citizens groups, and license renewal applicants) are represented. The issues range over a broad spectrum—frequency allocations, equipment requirements, broadcasters' responsibilities, and the role of public participation. Most important, we feel that the politics of broadcast regulation is best seen in actual instances of political conflict. In these four cases political conflict is evident, and political gains and losses resulting from policy decisions are quite marked. In the final chapter, we take a closing look at the politics of broadcast regulation by analyzing the four case studies as a group, and reaching some conclusions about the regulatory process in broadcasting.

NOTES

[1] Marver H. Bernstein, "The Regulatory Process: A Framework for Analysis," *Law and Contemporary Problems,* XXVI (Spring 1961), 341 (emphasis added).

[2] Marver H. Bernstein, "Independent Regulatory Agencies: A Perspective on Their Reform," *The Annuals,* CCCC (March 1972), 21.

[3] Harold D. Lasswell, "Politics: Who Gets What, When, How," from *The Political Writings of Harold D. Lasswell* (Glencoe, Ill.: The Free Press, 1951), pp. 295, 309.

[4] These examples are discussed in detail in Chapters 7 and 8.

PART ONE

THE REGULATORY PROCESS

1

Broadcasting and the Regulatory Process

The Federal Communications Commission is a creature of Congress, staffed at its highest levels by White House appointees, subject at every moment to judicial review, and faced with daily pressures from the industries it regulates, other branches of government, and the public whose interest it is supposed to protect. Yet, the regulation of American broadcasting is often portrayed as if it takes place within a cozy vacuum of administrative "independence." In reality, the making of broadcast policy by the FCC, an ostensibly independent agency, is an intensely *political* process—not, incidentally, as an aberration, but by its very nature.

GROUND RULES FOR CATV

The case of community antenna television (CATV) is a classic illustration of this process. In 1968, after the Supreme Court affirmed the FCC's authority to regulate CATV systems, the Commission took the textbook action; it issued a voluminous set of its own CATV policy proposals and invited comments from broadcasters, cable operators, citizens groups, members of the general public, and other interested parties. Three years and several thousand pages of dialogue later, FCC Chairman Dean Burch sent the House and Senate Communications Subcommittees a 55-page summary of the kinds of rules the Commission had tentatively concluded were necessary for the healthy development of the cable industry. Burch assured Congress that the new rules would not be made effective until several months later—March 1, 1972—in order to allow time for Congressional review.

The consideration of CATV rules, however, was not to be left

to the discretion of the FCC and the Congress alone. President Nixon became involved in July 1971 by appointing a cabinet-level advisory commission on CATV headed by Dr. Clay T. Whitehead, Director of the White House Office of Telecommunications Policy. During the Fall of 1971, Chairman Burch and Dr. Whitehead went their separate ways, meeting privately with representatives of CATV, broadcast, and copyright interests in an effort to effect a compromise agreement. Meanwhile, the Supreme Court was considering an appeal of a lower court ruling that the FCC had no authority to require cable systems to originate programs—a central element in the Commission's regulatory strategy.

All branches of government—legislative, executive, and judicial—were independently considering the future of CATV when the FCC, in a 136-page decision in February 1972, adopted new CATV rules which were based on a private agreement entered into by cable operators, broadcasters, and a group of copyright owners under the prodding of the White House. In a biting dissenting opinion, Commissioner Nicholas Johnson, a liberal Democrat, said that "in future years, when students of law or government wish to study the decision making process at its worst, when they look for examples of industry domination of government, when they look for Presidential interference in the operation of an agency responsible to Congress, they will look to the FCC handling of the never-ending saga of cable television as a classic case study." Chairman Burch, a former head of the Republican National Committee, accused Johnson in a special concurring opinion of using a "scorched earth" technique to distort an act of creation into a public obscenity. Burch said that there was no conspiracy, no arm-twisting, no secret deals. The cable decision, he said, was the result of months of painstaking study and measured deliberation, culminating in regulatory craftsmanship of a high order.[1]

From the foregoing example, it is clear that the regulatory process as applied to broadcasting is laced with an ample dosage of political maneuverings. The FCC does not develop and administer policy in a political vacuum; rather, it operates within a system involving various participants, including the industry, the public, the White House, the courts, the Congress, and the Commission itself. It should be noted that these participants are neither monolithic nor unchanging entities, but aggregations of human beings operating in various structured roles. Too frequently, these par-

ticipants, and the description of their activities by such terms as "government regulation," are viewed in a way that suggests an impersonal mechanical operation. Realistically, there is no such thing as "government regulation"; there is only regulation by government officials.[2] The essence of the politics of broadcast regulation lies in the complex interactions between these diverse participants, not only in their day-to-day confrontations, but also in the more enduring adjustments and readjustments of their relationships.

To a great extent, these relationships are determined by law—by statutes which themselves are the formal heritage of past political disputes. Such laws, however, are seldom crystal clear: the result of earlier political conflict may have been, and often is, legislation and rules drafted with deliberate ambiguity—broad general mandates which permit the politics of today to determine the rules and standards of tomorrow.

Thus, a major task of the FCC (and other regulatory agencies) is not only to conform to the letter of the law but, beyond that, to attune its behavior to the requirements imposed by its political environment. To retain some flexibility and freedom of choice in its policy-making, the Commission must try to maintain a balance of political support over opposition. This balancing process is more subtle than normally suggested by concepts such as "legislative control of administration" or "administrative representation of interests." William W. Boyer aptly describes agency policy-making as "environmental interaction": for effective policy initiation, an administrator must attempt to perceive and anticipate the behavior of participants in the process and the environment reflected by them. Only thus can he hope accurately to assess the political ecology within which he must make his policy decisions.[3]

THE HISTORICAL CONTEXT OF BROADCAST REGULATION

The regulation of broadcasting as we know it today is to a large degree the product of its history. For example, the basic statute under which the FCC currently operates is virtually identical to the legislative charter given to the Federal Radio Commission in 1927. The very questions on the proper role of regulation posed during the 1920's and 1930's continue to be debated in the 1970's.

Secretary Hoover and the Radio Conferences. The growth of large-scale broadcasting in the early 1920's found the Congress and the Executive Branch almost totally unprepared to meet new obligations in this field. Until 1927, the only law passed by Congress dealing with radio was the Radio Act of 1912, which was designed primarily for ship-to-ship and maritime communications. In 1921, Secretary of Commerce Herbert Hoover designated 833 kc. as the frequency for broadcasting (allowing but one station in a reception area) and in the summer of 1922, added 750 kc. as a second broadcast frequency. Acting under what he believed to be Congressional authority conferred by the 1912 maritime legislation, Hoover attempted to establish rules of broadcasting frequencies, hours of broadcast, and limits of power. In 1922 he convened the first of a series of industry conferences to discuss ways of controlling the use of these frequencies. After two months of study and investigation, the First Radio Conference unanimously decided that regulation by private enterprise alone would not be effective and recommended the passage of legislation authorizing government control over the allocation, assignment, and use of broadcasting frequencies.

Representative Wallace H. White of Maine sponsored a measure designed to put the recommendations of the conference into effect by authorizing Secretary Hoover, assisted by an advisory committee, to act as a "traffic cop of the air." Congress, however, failed to enact this legislation. Hoover then called a Second Radio Conference in 1923 to work out ways of reducing the mounting interference to radio reception caused by the crowding of stations. Shortly before the conference, Hoover's attempts to regulate were seriously undermined when the United States Court of Appeals for the District of Columbia Circuit ruled that the Secretary of Commerce lacked legal authority to withhold licenses from broadcast stations.[4] The Court concluded that Congress had never intended to delegate such authority to the Secretary of Commerce.

While Congress continued to study the problem by holding periodic hearings, Hoover continued to call industry conferences. At the Third National Radio Conference in 1924, Hoover commented: "I think this is probably the only industry of the United States that is unanimously in favor of having itself regulated."[5] The industry had come to demand such controls as the increase in stations continued unchecked. By November 1925, more than 578 stations were on the air and applications had been filed for 175 more.

With every channel filled, most stations were experiencing considerable interference from other stations and had been forced to work out complex time-sharing schemes.

Despite the evident need, Secretary Hoover's regulatory initiatives were repeatedly thwarted. The final blows came in 1926 when a series of court rulings deprived him of any authority to regulate radio frequencies, power, or hours of operation. Hoover then limited the Department of Commerce to the role of a registration bureau, and urged the stations to undertake self-regulation.

The Federal Radio Commission as "Traffic Cop." The chaotic conditions resulting from reliance on voluntary measures in 1926 brought strong demands from the public and the radio industry that Congress take action. Until then, Congress had held several hearings but the House and the Senate were unable to agree on legislation. The House had wanted the Secretary of Commerce to retain the authority to issue licenses, subject to appeal to a Federal Radio Commission, while the Senate favored the establishment of a permanent radio commission.

Addressing himself to the pending Federal Radio Act in 1926, Senator Clarence C. Dill of Washington, Chairman of the Senate Interstate Commerce Committee, argued that the influence of radio on the social, political, and economic life of the American people and the complex problems of its administration:

> demand that Congress establish an entirely independent body to take charge of the regulation of radio communications in all its forms. . . . The exercise of this power is fraught with such possibilities that it should not be entrusted to any one man nor to any administrative department of the Government. This regulatory power should be as free from political interference or arbitrary control as possible.[6]

(Nearly 45 years later, the President's Advisory Council on Executive Organization—popularly referred to as the Ash Council—recommended that the bipartisan collegial form of organization be retained for the FCC for the identical reasons mentioned by Senator Dill in 1926.) [7]

Finally, in March 1926, Representative White's bill to authorize the Secretary of Commerce as "traffic cop of the air"—substantially the same bill he introduced in 1923—passed the House by a vote of

218 to 123. However, the measure soon ran into difficulties in the Senate, which continued to favor a permanent, independent radio commission. Early in 1927, a Senate-House conference committee hammered out a compromise which would establish a Federal Radio Commission on an experimental basis for one year.

This legislation was enacted, and the Radio Act of 1927 thus reflected an accommodation of interests between the House and Senate by setting up a curious division of responsibilities between the Secretary of Commerce and the new Federal Radio Commission. The Radio Act provided that applications for station licenses, renewals, and changes in facilities be referred by the Department of Commerce to the Federal Radio Commission, and it gave the FRC broad administrative and quasi-judicial powers over these applications. The Secretary of Commerce continued to have such powers as fixing the qualifications of operators, inspecting station equipment, and assigning call letters. After the expiration of one year, however, the Secretary of Commerce was to take over all powers—except the power to revoke licenses—with the FRC continuing purely as a part-time appellate body, dealing with appeals from the decisions of the Secretary of Commerce. An important feature of the Radio Act (which, however, received little attention at the time) was the requirement in Sections 9 and 11 that "the licensing authority should determine that the public interest, convenience, or necessity would be served by the granting [of a station's license]."

The Act created a Radio Commission of five members appointed by the President with the advice and consent of the Senate. The President was required to nominate one Commissioner from each of five geographical zones. One of the Commissioners was to be designated by the President as its initial Chairman, with subsequent Chairmen being elected by the Commission itself. Having structured the FRC so carefully, Congress then launched the infant Commission with a serious handicap—it failed to give it any money! The Commission was nevertheless able to function due to a clause in the Radio Act allowing it to utilize the unexpended balance in the appropriation made to the Department of Commerce under the item "wireless communications laws." The original members of the Commission were forced to do their own clerical work, and, for the first four years, engineers had to be borrowed from other agencies.

The FRC faced other virtually insuperable problems: its temporary status as an experimental body with powers expiring after

one year; the danger of internal strife because of each Commissioner's appointment from a geographical zone; the great vagueness of the Act and the lack of a specific mandate from Congress; the slowness of Senate confirmation of the Commissioners; constant court challenges to its decisions; and the "prior rights" of stations already on the air. Llewellyn White summarized these problems in vivid terms: "The F.R.C. had found the job cut out for it quite literally killing. One hearing alone required 170,000 affidavits. One out of ten decisions had to be fought through the courts. Congress had allowed the Commission a staff of twenty, including engineers and office workers. Two of the five Commissioners were not confirmed for nearly a year, one resigning in disgust after seven months' backbreaking work without pay." [8]

In addition to administrative bottlenecks, the FRC faced monumental technical problems. As of 1927, there were 732 stations blanketing all 90 radio channels. At least 129 stations were broadcasting off their assigned channels and 41 were broadcasting on channels reserved for Canadian use. In practice, there were no restrictions concerning power or hours of operation. Adding to the confusion was the presence of completely unregulated amateurs on the broadcast band. In an effort to wipe the slate clear, the FRC announced that it would adopt "a completely new allocation of frequencies, power, and hours of operation for all of the existing 732 broadcast stations." The Radio Act encouraged this attempt at a fresh start by providing that all existing licenses were to expire 60 days after its enactment. The Act further stated that "no license should be construed to create any right, beyond the terms, conditions, and periods of the license." The Commission soon found out, however, that broadcasters who had been on the air for years had a very strong interest in preserving their favored status and would fight lengthy court battles to keep their "rights." As a result, the FRC was largely unsuccessful in its attempts to solve radio's problems on an individual hearing basis.

Throughout its short history, the Radio Commmission was subjected to great Congressional pressure. Not really accepting the independent status of this "independent regulatory commission," Congress continually tinkered with the 1927 Act. Since the Radio Commission was originally established for a period of only one year, Congress had to renew the legislation annually (or let the FRC's activities be absorbed by the Department of Commerce).

This annual review gave Congress a convenient opportunity to conduct hearings and add further legislative restrictions and regulations.

One of the most limiting Congressional mandates was the so-called Davis amendment to the 1928 renewal act, requiring the FRC to allocate licenses, frequencies, times of operation, and power equally among five geographic zones, and among the states therein. This amendment had been drafted in response to Congressional concern that the Commission favored high power stations in the North and East and discriminated against stations in the South and West. The Davis amendment prevented the FRC from functioning effectively as a harmonious group and seriously impeded the development of radio policy. In his annual message to the Congress on December 2, 1929, President Hoover criticized the Davis amendment, warning that "there is a danger that the system will degenerate from a national system into five regional agencies with varying practices, varying policies, competitive tendencies, and consequent failure to attain its utmost capacity for service to the people as a whole."[9] Hoover also recommended that the Commission be reorganized on a permanent instead of a temporary basis. This recommendation, however, was ignored by Congress.

In 1933, President Roosevelt requested Secretary of Commerce Daniel C. Roper to direct a study of the organization of radio regulation. In January 1934 the Roper Committee issued a report recommending the consolidation of the communications regulatory activities of the FRC, the Interstate Commerce Commission, the Postmaster-General, and the President into "a new or single regulatory body, to which would be committed any further control of two-way communications and broadcasting."[10] Although it strongly supported the centralization of regulatory activities, the report did not take a stand on whether the organization should be of the independent commission type.

The Birth of the FCC. Spurred by the Roper Committee recommendations and by general dissatisfaction with the existing structure of governmental regulation, Congress proceeded to enact the Communications Act of 1934, which established a new Federal Communications Commission. The Communications Act made various organizational changes in the Commission (it called for seven commissioners instead of five, for example, and stipulated the appoint-

ment of all chairmen by the President) and gave the new agency a broader scope of activity over all communications, including telephone and telegraph. Title III of the 1934 Act, which dealt with radio, was almost identical with the Radio Act of 1927. Most importantly, the "public interest" criterion in the 1927 legislation was also retained.

An innovation in the 1934 law was Congressional emphasis on the long-range planning of broad social goals. Section 303(g) specifically called upon the FCC to "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." (This provision later led the Commission to study such unearthly subjects as communications satellites for broadcasting to local receivers and the use of laser beams as relay mechanisms.) Congress also required the FCC to make studies of, and to report on, possible new legislation necessary for effective long-range goals. Throughout the Commission's history, however, the Congress has never provided the agency with sufficient funds to make long-range studies. Commissioner Nicholas Johnson graphically put the FCC budget in perspective by pointing out that "the Federal Aviation Administration spends as much on *communications research* as the FCC's total annual budget; the Navy spends five times the FCC's annual budget doing cost-effectiveness studies of the communications system on one ship type; [and] Bell Labs has a budget over 15 times that of the FCC." [11]

Several factors in the Commission's early history deserve emphasis because of their relevance to the regulatory process today. The first is the failure of early attempts at industry self-regulation. In an unprecedented and never-repeated phenomenon the broadcasting industry itself requested governmental controls to eliminate the audio chaos caused by unregulated radio operations. This factor partly explains why the radio industry gained its powerful influential position with respect to the FCC. Another historical factor which should be noted is the deep and early involvement of Congress. With Secretary of Commerce Hoover's regulatory activities blocked by the courts, the salvation of American broadcasting lay with Congress. When Congress *did* act to establish a regulatory agency, its existence and financing were subjected to yearly Congressional consideration.[12] By giving the FRC limited financial and technical resources, Congress effectively ensured the Commission's dependence

upon Congressional good will and kept a firm grip on the control of this "independent" regulatory agency.

THE "PUBLIC INTEREST"—BROADCASTING BATTLEGROUND

A key factor relevant to today's regulation of broadcasting is the vagueness of the Congressional mandate given both to the FRC and the FCC to regulate broadcasting in "the public interest, convenience and necessity." The concept of a public interest in radio communications was first officially expressed by Secretary Hoover in a speech before the Third Annual Radio Conference in 1924. One commentator wrote shortly after the passage of the Radio Act of 1927 that the inclusion of the phrase "public interest, convenience and necessity" was of enormous consequence since it meant that "licenses are no longer for the asking. The applicant must pass the test of public interest. His wish is not the deciding factor." [13]

Conflicts over the meaning of the "public interest" have been recurrent in broadcasting history. Besides lending itself to various interpretations, this vague statutory mandate has also hampered the development of coherent public policy since Congress (or influential Congressmen) can always declare, "that is not what *we* mean by the public interest." [14] Few independent regulatory commissions have had to operate under such a broad grant of power with so few substantive guidelines. Rather than encouraging greater freedom of action, vagueness in delegated power may serve to limit an agency's independence and freedom to act as it sees fit. As Pendleton Herring put it, "administrators cannot be given the responsibilities of statesmen without incurring likewise the tribulations of politicians." [15]

Newton Minow has commented that, starting with the Radio Act of 1927, the phrase "public interest, convenience and necessity" has provided "the battleground for broadcasting's regulatory debate." [16] The meaning of this term is extremely elusive. Although many scholars have attempted to define the "public interest" in normative or empirical terms, these definitions have added little to an understanding of the real relevance of this concept to the regulatory process. A pragmatic but somewhat limited view is that offered by Avery Leiserson, who suggests that "a satisfactory criterion of the public interest is the preponderant acceptance of administra-

tive action by politically influential groups." Such acceptance is expressed, in Leiserson's opinion, through groups which, when affected by administrative requirements, regulations, and decisions, comply without seeking legislative revision, amendment, or repeal.[17] Thus, in order for a policy to be accepted by politically influential groups, it must be relevant to and must not conflict unacceptably with their expectations and desires. Defining the interest of the entire general public is considerably more difficult.

The concept of the public interest is important to the regulation of broadcasting in another sense. A generalized public belief even in an undefined "public interest" increases the likelihood that policies will be accepted as authoritative even by those participants who suffer deprivations from such a policy. The acceptance of "the public interest" may thus become an important support for the regulation of broadcasting and for the making of authoritative rules and policies toward this end. For this reason, the courts have traditionally given the FCC wide latitude in determining what constitutes the "public interest." This view was expressed by Judge E. Barrett Prettyman in a decision denying the appeal by an unsuccessful applicant for a television station:

> . . . it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates change. Two diametrically opposite schools of thought in respect to the public welfare may both be rational; e.g., both free trade and protective tariff are rational positions. All such matters are for the Congress and the executive and their agencies. They are political in the high sense of that abused term. They are not for the judiciary.[18]

On the other hand, ambiguity as to the meaning and lack of consensus over the requirements of the public interest has heightened conflict among participants in the regulatory process. Since Congress has found it inadvisable to define specifically for future situations exactly what constitutes the "public interest," the political problem of achieving consent to the application of this standard has been passed on to the FCC. Thus, the objectively unverifiable and elusive concept of the public interest can be very significant to the FCC—both as an undefined general support, and, because of its unclarified nature, as a potential source of controversy.

UNRESOLVED REGULATORY PROBLEMS

The regulation of American broadcasting is no less controversial today than it was in the turbulent twenties and thirties. Many unresolved problems remain. Some of these difficulties stem from specific economic and technical characteristics of the broadcast industry. Others are the direct legacy of the historical development of regulation; certain legal prescriptions and requirements still on the books are interpreted differently by different participants in the regulatory process. Still other problems may be traced to generalized public attitudes toward governmental regulation. Seldom can the FCC attempt to frame regulations without becoming entangled in this political thicket.

Statutory Ambiguities and Recurring Controversies. Disputes concerning legal prescriptions imposed by the Communications Act have centered around certain recurring value conflicts—assumptions about what ought or ought not to be done. One such question is the extent to which broadcasting should be related to social as well as economic and technical goals. The emphasis upon the social responsibilities of licensees rests on the view that "the air belongs to the public, not to the industry" since Congress provided in Section 301 of the Communications Act that "[no] license should be construed to create any right, beyond the terms, conditions, and period of the license." During the early 1970's, for example, the FCC has urged broadcasters to meet their social responsibilities by implementing equal employment opportunity programs for women and minorities, donating free air time to political candidates, and editorializing on problems of public concern.

"Program censorship" versus "free broadcasting" is another value conflict arising from legal prescriptions and requirements. Section 326 of the Communications Act states:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

In the same Act, however, Congress also directs the Commission to regulate "in the public interest, convenience and necessity." [19]

To the extent that such regulation entails review and evaluation of program output, it can be considered a form of censorship. This ambiguity leads to divergent views of the desirable balance between the two values.

Technical Factors Influencing Regulation. Two complementary and determinative features of American broadcasting are scarcity and technological innovation. Scarcity, of course, has always been the underlying *raison d'être* for broadcast regulation. Technical factors limit the number of available broadcast frequencies. Since not everyone can transmit without interfering with others, Congress concluded that the federal government has the duty to select who may and who may not broadcast and to regulate the use of the electromagnetic spectrum so that the public interest will be served.

Scarcity has been a special problem in the case of television. While an FM broadcast needs a section of the spectrum twenty times wider than an AM broadcast, a TV signal of picture and sound requires a channel 200 times as wide as an AM station.[20] During the 1950's, when television was confined within a 12-channel Very High Frequency (VHF) system incapable of offering even 2- or 3-station service in many cities, broadcasters with the only television station (or with one of the two) in a market were in an awkward position to be complaining about governmental regulation. The All-Channel Receiver Bill of 1962 [21] aimed to make additional television service available in many areas, with the expectation that greater diversity in programming would result.

It can be argued that scarcity of service implies close governmental control approaching that of a public utility, while diversity and choice of services implies more relaxed governmental demands. Scarcity also raises the economic stakes enormously, and, by doing so, increases the likelihood of conflict over policy alternatives. The FCC's decisions on spectrum allocations have a multi-billion dollar impact on the nation's gross national product. As a result of the scarcity of broadcast facilities, the FCC serves, in effect, as a substitute for the free market allocation of resources.

Limited broadcast facilities, which led on the one hand to a cry for government regulation, have also encouraged technological innovations to expand programming possibilities. Throughout its history, the FCC has had to wrestle with new problems brought about by such technical developments as network broadcasting, the

possibility of higher transmitting power for AM stations, FM broadcasting, UHF and VHF telecasting, color television, cable television, and communications satellites. The making of public policy in each of these areas goes far beyond resolving technical issues. Frequently, technical issues disguise what are actually economic interests vying for control of some segment of the broadcasting market. The politics of broadcasting is present in technical as well as clearly social controversies.

Several technological innovations—specifically the development of FM broadcasting and the opening up of ultra-high frequencies (UHF) to television—and the FCC's policies regarding them will be examined in more detail in subsequent chapters. Here it is enough to note that the Commission has been subjected to considerable criticism concerning its ability to cope with change—the most common charge being that it is concerned mainly with preserving the status quo and with favoring the well-established broadcast services. From a technological standpoint, for example, the television stations constructed in 1952 might have been operating as early as 1937 had the Commission actively supported the development of this new medium.[22]

An agency's ability to respond to and foster technological change is largely a matter of how dependent the agency is upon dominant industry factions—the "haves" as opposed to the innovators. Throughout its history, the FCC has lacked sufficient skilled personnel and funds to weigh the merits of new technology and has been forced to rely on outside advice and technical opinion. When faced by complex technical questions, the Commission has often taken the easy road of finding in favor of the "haves" over the "have nots." The ability of a regulatory commission to protect or to promote a technical innovation that challenges the regulated (and sometimes sheltered) industry is a measure of the vitality and strength of that agency. As will be seen in Chapters 5 and 6, the FCC has failed miserably in its few attempts to help give birth to new broadcast services, and, in fact, has at times almost destroyed innovations. It must be noted that these failures resulted at least in part from the highly political environment in which the FCC must regulate. We turn now to a closer look at the people and the institutions which comprise this political environment.

NOTES

[1] *Cable Television Report and Order,* 24 Pike & Fischer Radio Regulation 2d Series 1501 (1972) at pp. 1580 and 1589.

[2] Lee Loevinger, "The Sociology of Bureaucracy," *The Business Lawyer,* XXIV (November 1968), 9.

[3] William H. Boyer, *Bureaucracy on Trial: Policy Making by Government Agencies* (Indianapolis: Bobbs-Merrill, 1964), p. 68.

[4] *Hoover* v. *Intercity Radio,* 286 Fed. 1003 (C.A.D.C. 1923).

[5] Quoted in Sydney W. Head, *Broadcasting in America: A Survey of Television and Radio* (Boston: Houghton-Mifflin, 1956), p. 125.

[6] U.S. Senate, Senate Report No. 772, 69th Congress, 1st Session, 2 (1926).

[7] *A New Regulatory Framework, Report on Selected Independent Regulatory Agencies* (Washington, D.C.: U.S. Government Printing Office, 1971), pp. 117–118.

[8] Llewellyn White, *The American Radio: A Report on the Broadcasting Industry in the United States from the Commission on Freedom of the Press* (Chicago: University of Chicago Press, 1947), p. 200.

[9] Quoted in Robert S. McMahon, *The Regulation of Broadcasting,* Study made for the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Congress, 2nd Session, 1958, p. 19.

[10] Senate Committee Print, S. Doc. 144, *Study of Communications by an Interdepartmental Committee* (73rd Congress, 2nd Session, 1934).

[11] Speech before the Federal Communications Bar Association, Washington, D.C., May 10, 1968, p. 9.

[12] Congress has followed a similar approach with the Corporation for Public Broadcasting, which initially received funding and authorization on an annual basis.

[13] Steven Davis, *The Law of Radio Communications* (New York: McGraw-Hill, 1927), p. 61.

[14] For example, see the discussion in Chapter 7 of a Commission initiative to control advertising "in the public interest," which led to a stern rebuke from the House of Representatives.

[15] Pendleton Herring, *Public Administration and the Public Interest* (New York: McGraw-Hill, 1936), p. 138. Vagueness, however, may also serve to protect the agency when its decisions are challenged in the courts, since the judiciary may be loath to overturn actions protected by a broad statutory mandate.

[16] Newton Minow, *Equal Time: The Private Broadcaster and the Public Interest* (New York: Atheneum, 1964), p. 8.

[17] Avery Leiserson, *Administrative Regulation: A Study in Representation of Interests* (Chicago: University of Chicago Press, 1942), p. 16.

[18] *Pinellas Broadcasting Co.* v. *F.C.C.,* 230 F. 2d 204, 206 (C.A.D.C., 1956), writ of certiorari denied, 76 S. Ct. 650 (1956).

[19] Congress did not uniformly use the phrase "public interest" in the Communications Act. For example, the standard of "public interest" is specified in Sections 201(b), 215(a), 221(a), 222(c) (1), 415(a) (4), 319(i), and 315; "public convenience and necessity," Section 314(f); "interest of public convenience and necessity," Section 214(a); "public interest, convenience and necessity," Sections 307(d), 309(a), 316(a), and 319(a); and "public interest, convenience or necessity," Sections 307(d), 311(b), and 311(c) (3).

[20] Richard W. Taylor, "Government and Business," in J. W. Peltason and James M. Burns (eds.), *Functions and Policies of American Government* (Englewood Cliffs, N.J.: Prentice-Hall, 1962), p. 243.

[21] See Chapter 6, "UHF Television: The Fading Signal is Revived After Only Ten Years."

[22] See Don R. Le Duc, "The *FCC* v. *CATV, et. al.*: A Theory of Regulatory Reflex Action," *Federal Communications Bar Journal*, XXIII (1969), 93, and Robert H. Stern, "Regulatory Influences Upon Television Development," *American Journal of Economics and Sociology*, XXII (1963), 347.

2

Five Determiners of Regulatory Policy

From its establishment the FCC has enjoyed a broad Congressional mandate—at least in theory—to frame responsible public policy regarding broadcasting. Certainly the FCC does play a central role in the regulation of broadcasting, but often the crucial decisions in policy-making come about through the action, interaction, or, indeed, the inaction of persons or institutions other than the FCC. This chapter examines five of the six major participants in the regulatory policy-making process: the FCC, the broadcasting industry, citizens groups, the courts, and the White House. The sixth determiner of regulatory policy—the Congress—interacts with the other five at so many levels that it will be studied separately in Chapter 3. Additional participants such as the Corporation for Public Broadcasting and the Federal Trade Commission could be added, but these six stand out because of their continued and repeated involvement.

THE FCC

Former Chairman Newton Minow has described the FCC as "a vast and sometimes dark forest, where FCC hunters are often required to spend weeks of our time shooting down mosquitoes with elephant guns." [1] Over the course of its history, the Commission has been bombarded with criticism from various quarters. A good summary of many of the sweeping charges levelled against the FCC was included in the Landis Report on Regulatory Agencies to President-elect Kennedy in December, 1960:

The Federal Communications Commission presents a somewhat extraordinary spectacle. Despite considerable technical excellence on the part

of its staff, the Commission has drifted, vacillated and stalled in almost every major area. It seems incapable of policy planning, of disposing within a reasonable period of time the business before it, of fashioning procedures that are effective to deal with its problems. The available evidence indicates that it, more than any other agency has been susceptible to ex parte presentations, and that it has been subservient, far too subservient, to the subcommittees on communications of the Congress and their members. A strong suspicion also exists that far too great an influence is exercised over the Commission by the networks.[2]

The Landis Report pinpointed one of the FCC's major problems —its lack of real independence. A regulatory agency may be established by law as independent from the Executive, but this does not by any means imply independence from Congressional or industry pressures. Nor does statutory separation from the Executive Branch assure an agency's independence from politics. Indeed, an essential characteristic of independent regulatory commissions is their need of political support and leadership for successful regulation in the public interest. Samuel P. Huntington, in his study of the Interstate Commerce Commission, explains this seeming paradox:

If an agency is to be viable, it must adapt itself to the pressures from [outside] sources so as to maintain a net preponderance of political support over political opposition. It must have sufficient support to maintain and, if necessary, expand its statutory authority, to protect it against attempts to abolish it or subordinate it to other agencies, and to secure for it necessary appropriations. Consequently, to remain viable over a period of time, an agency must adjust its sources of support so as to correspond with changes in the strength of their political pressures. If the agency fails to make this adjustment, its political support decreases relative to its political opposition and it may be said to suffer from administrative marasmus.[3]

The FCC as a Bureaucracy. The FCC is, however, more than just an independent regulatory commission wrestling with the problem of its political non-independence—it is also a bureaucracy. As such it exhibits all the classic symptoms of bureaucracies—massive hierarchy, institutional conservatism, professed rationality, and entrenched self-interest.

Lee Loevinger, a former FCC Commissioner, has likened the FCC and other administrative agencies to a pyramid. At the apex of the pyramid (the part most visible from a distance) are the Com-

missioners. The professional and middle staff members of the agency form the base of the pyramid, which supports the structure and determines whether it stands straight upright or leans in any direction.[4] Loevinger maintains that no one can understand the agencies and their operation without "some inquiry into the motivating forces that drive agency members and staff, and into the internal relationships by which work information and agency power are divided among and transmitted between persons comprising the institution." [5]

The attitudes of the FCC's middle staff are a significant factor in the development of its regulatory policy. First, unlike the Commissioners and their top staff aides who are political appointees and therefore subject to periodic change, the FCC's middle staff are government career employees, many of whom have spent their entire working lives at the Commission. Second, the Commission's middle staff exercises considerable influence through its control of the channels of communications to FCC Commissioners. In choosing among various alternative policies, FCC Commissioners usually must base their decisions on information selected by staff personnel as relevant and significant. So common is this practice that Commissioner Nicholas Johnson perceives the FCC's decision-making process as dominated by entrenched bureau chiefs and agency coordinators who are reluctant to present alternatives to the Commissioners for their consideration.[6] Third, since hundreds of decisions must be made daily by the FCC, the formulation as well as the implementation of policy is frequently delegated to the Commission's middle staff. When this happens, another bureaucratic symptom is evident—the struggle for power within the hierarchy.

Loevinger contends that the first step toward a realistic understanding of bureaucratic decision-making is a recognition that the power motive is to bureaucracy what the profit motive is to business. Government officials and staff generally try to maximize the power of their positions. No exception to this generalization, the FCC Commissioners and staff seek almost daily to perpetuate and extend their own power. Newly created bureaus and those hired to staff them attempt to justify and prolong their existence, frequently long after their usefulness has ended. Sometimes the power motive is expressed through the assertion of jurisdiction over new industries such as CATV which are not specifically mentioned in the Communications Act.

Another characteristic of bureaucracy, related to its concern

for its own institutional survival and power, is a tendency to be inflexible, static, and conservative, rather than adaptive, innovative, or creative. As a bureaucracy, the FCC is often reluctant to embrace innovative proposals, especially when such actions might mean the abandonment of familiar assumptions and standards. Incremental change—which can be bureaucratically digested in small bits—is often favored over sweeping change. Moreover, a policy that is "rational" in terms of accepted evaluative procedures is to be favored over a risky but potentially high-gain policy that demands different criteria for evaluation. Above all, it is best, when in doubt, to demand documentation rather than to make policy. As a result of such bureaucratic tendencies, the Commission spent nearly a decade searching for a means to encourage development of UHF television, has spent many more years worrying about programming evaluation standards for license renewals, and has fretted about CATV endlessly. In short, what "the FCC as a bureaucracy" means is that the Commission often substitutes the act of evaluating and studying a problem or policy for the act of actually dealing with a problem or making policy.

Background Patterns Among the Commissioners. This huge bureaucracy—the FCC—is directed at the top by seven Commissioners with varied social and political backgrounds who interact among themselves in a variety of aggregate and individual roles. The diverse roles of Commissioners as well as Commission staff are shaped to a significant extent by the formal structure of decision-making. Bradley Canon has provided an illuminating description of this process:

> Commission meetings are held weekly and last three or four hours. The agenda is usually lengthy; often 50 to 100 items of business (not all of them cases) are considered in a single meeting. Although it varies among individuals, the general level of interaction between Commissioners on policy questions seems low. Thus, only those items considered really important receive any pre-meeting discussion or in-meeting debate. In other cases, the Commissioners vote on the basis of prior judgments and attitudes or follow the recommendations of staff members in whom they have confidence. Commissioners are free to switch their vote between the meeting and the writing of the opinion disposing of the case, but this occurs only occasionally. Opinions are almost always written by staff

members and adopted by the Commission, usually with a minimum of supervision and attention. Dissenting opinions, of course, are the responsibility of the dissident, although staff help is not unknown here. About one-fifth of such votes are not accompanied by an opinion.[7]

The seven Commissioners invariably come from distinctive and sometimes divergent social and political backgrounds. The characteristics of the forty-four individuals who served as FCC or FRC Commissioners between 1927 and 1961 have been analyzed in detail by Lawrence Lichty.[8] Lichty found that individual Commissioners held office for periods varying from 6 months to 19 years, with the average length of service approximately four and one-half years. Of the 44 Commissioners, 23 had studied law, 24 had some prior experience with broadcasting, and all but four had previously held government office on either the federal or state level. In short, the typical Commissioner was trained in law, generally familiar with broadcasting, and quite likely to have had prior government administrative responsibilities.

One particularly important result of this common legal and administrative background shared by many of the Commissioners is the FCC's tendency to see regulatory activities in legal and administrative terms rather than in political or even broadly social terms. Traditionally, the FCC has preferred the administratively and legally sound policy over the controversial or more inclusive alternative.

While describing the FCC in general terms, it is important to remember that it is not a static institution, but one which changes as its personnel change. Critics frequently attack "the Commission" as if it were a single, fixed, and unalterable body. In reality, there have been a number of "Commissions" at different times with divergent opinions as to how broadcasting should be regulated. As Lichty concluded,

> Changes in the direction and emphasis of the Commission's regulation of broadcasting are a function of the members serving on the Commission at . . . specific times. Further, the personal experience, education, occupational background, and governmental philosophy of the members of the Federal Radio Commission and the Federal Communications Commission directly influence the direction and emphasis of the agency's policy.[9]

In an attempt to show variation within the Commission at different historical periods, Lichty also analyzed distinctive patterns of Commissioners' backgrounds during various periods of the FRC and the FCC. His findings, which we have summarized and updated in Table 1, show a definite correlation between Commissioner background patterns and predominant Commission activities. Lichty found that the regulation of broadcasting has been influenced to a measurable degree by the occupational backgrounds and political philosophies of these Commissioners. For example, the "technical" period was dominated by members who had engineering background and the "trustbusting" era was characterized by attorneys experienced in governmental regulation.[10]

The Influence of Individual Commissioners. Two other important points about the Commissioners should also be mentioned: (1) Commissioners may exhibit factional behavior, and (2) individual Commissioners often play pivotal roles in decision making. That groups or factions are important in a collegial voting body such as the FCC is certainly not a particularly new or striking idea; the literature on legislative committees and judicial institutions is replete with findings stressing the importance of internal groups and factions. In a recent study of the FCC as a decision-making body, political scientist Bradley Canon used techniques familiar in judicial behavioral analysis, including bloc-analysis and Gutman cumulative scaling. Canon concluded that various voting blocs *are* important in Commission decisions and are especially present in dissents. He further found that partisan affiliations of Commissioners seem to be related to voting behavior on some issues connected with broad social and economic problems, that appointees of different Presidents seem to vote somewhat differently, that the solo dissenter is not an uncommon occurrence, and that there is some consistency among Commissioners in their voting patterns.[11]

Canon's conclusion concerning the individual dissenter should be stressed, for throughout the history of the FCC, the role of the individual Commissioner has been particularly significant. Lichty observes that "the problems tackled and solutions proposed were due in part to the individual interests of Commissioners, and that many important decisions or changes were the result of a crusade by one Commissioner."[12] It cannot be denied that James Lawrence Fly, Nicholas Johnson, Dean Burch, Kenneth Cox, and Newton

TABLE 1. PATTERNS OF FRC AND FCC COMMISSIONERS' BACKGROUNDS: 1927–1972

Commission Periods	*Background Patterns of Commissioners*
1. Establishing Technical Standards, 1927–1930	Technical Experts
2. Important Legal Actions, 1930–1934	Legal Background
3. Cleaning-up and Vigorous Application of the Law, 1934–1938	Legal Background Prior Experience in Government
4. Trustbusting of Broadcast Ownership, 1939–1945	Prior Experience in Government, Especially Public Utility and New Deal Agency Background
5. Public Service, New Radio Facilities, and TV Engineering Problems, 1946–1952	FCC Staff Backgrounds as Engineers and Chief Counsels
6. Moderate Regulation, 1953–1960	Prior Experience on State Regulatory Commissions and FCC Staff Background
7. Increased Emphasis on Programming, 1960–1965	Legal Background Prior Experience in Government
8. Moderate Regulation, 1965–1969	Legal Background Prior Experience in Government
9. Cleaning-up and Adoption of a Comprehensive Cable Television Policy, 1970–1972	Prior Experience in Government and Politics

Adapted and updated from Lawrence Lichty, "The Impact of FRC and FCC Commissioners' Backgrounds on the Regulation of Broadcasting," *Journal of Broadcasting*, VI (Spring 1962), 97–110.

Minow had significant impact on the Commission beyond the power of their individual votes. Former Commissioner Kenneth Cox points out that the Chairman of the FCC can have a significant influence on the planning of the Commission's work since he is responsible for the preparation of the agenda at Commission meetings and "has a much more direct relationship with the bureau chiefs as to scheduling, the allocation of priorities and so on." Cox says a Chairman "definitely has some edge in influence" since "there is some inclination on the part of some individual commissioners, if they don't feel strongly about a matter, to go along with the Chairman if he wants to say something is a matter of importance to him." [13]

A fascinating example of the role of a single Commissioner in forging a majority in favor of a policy is provided by the events surrounding the FCC's issuance of proposed rules, early in 1966, to regulate CATV systems. The following passages from a report in *Broadcasting* magazine indicate the importance both of groups within the FCC and of individual Commissioners in the formulation of a Commission consensus:

None of the tough new proposals was adopted for rule-making by more than a bare majority of the commission. Thus, a single defection, even the wavering of a formerly committed commissioner, can kill a proposal or strip it of meaning. Representatives of groups directly affected know this, and are lobbying accordingly, on Capitol Hill as well as at the commission.

The commissioners themselves are uncertain and divided in their guesses as to what kind of rules, if any, will emerge. They talk of "shifting coalitions" among their number, of differing weights various commissioners ascribe to the arguments of different industry figures.

The commission statement on the CATV issue last week is a case in point representing as it does a number of compromises on some extremely controversial questions.

Chairman Henry is credited by his colleagues for the degree of unanimity that was achieved. "It was very close," said one commissioner in commenting on the commission's decision. "It could have failed by an eyelash." "The chairman," he said, "did a very constructive job."

The chairman moderated his own previously hard line and abandoned the even harder line advocated by the staff. This cost him the support of Commissioner Cox, who favored stricter regulation. But it won the support of Commissioner Loevinger and held the vote of the other commissioners.[14]

The potential influence of one Commissioner—particularly a Chairman—is further shown in Newton Minow's attempts to change what he perceived as a "hostile environment" partially paralyzing the Commission. He sought to overcome this handicap by appeals to public opinion.

> Very early I decided that of all the routes I might take to the best performance of my job, the most effective and the wisest road in the long run was to speak out in the hope of influencing public opinion about television . . . and so I went to the people with public speeches.[15]

By seeking to draw upon and to encourage active public involvement in American broadcasting, Minow was, in effect, attempting to strengthen his role as Chairman by creating public support for certain types of policies. His characterization of television as "a vast wasteland" was used in a speech before the National Association of Broadcasters shortly after he became Chairman and resulted in wide publicity in magazines and newspapers. Minow challenged broadcast executives to sit down in front of their television sets for a full day, assuring them that they would observe a "vast wasteland" of game shows, violence, formula comedies, sadism, commercials, and boredom.[16]

The adjustment that the FCC makes to the demands and actions of interested parties in any case is often a rough balance of the forces which affect its political environment, its internal operations, and prevailing attitudes of the American public toward regulatory issues. The problem for a regulatory commission is how to respond to these pressures while maintaining some integrity of purpose and freedom of decision. The dilemma is sharp: if a regulatory commission is content to respond to dominant interests, it may lose its meaning, while if it defies major forces in its environment, it may lose its existence.

THE INDUSTRY

Introducing the broadcasting industry as a second participant in the regulatory process raises the threshold issue of the purpose of a regulatory commission and its relationship to the regulated in-

dustry. Recognizing the tensions and pressures routinely applied by industry, Marver H. Bernstein has characterized regulation as "a two-way process in which the regulatory agency and the regulated interest attempt to control each other." [17]

Early federal regulatory legislation was designed to curb specific abuses involving concentrated economic power.[18] The Interstate Commerce Act of 1887, the Sherman Act, the Federal Trade Commission Act, and the Clayton Act all reflect this trend. With the passage of the Transportation Act of 1920 and subsequently the Radio Act of 1927 and the Communications Act of 1934, Congress shifted the mandate of regulatory commissions to the broader but less well-defined charge to regulate in the "public interest." As noted in Chapter 2, this ambiguous mandate is made even more indefinite to an administrator who must consider his responsibilities to meet ill-formed public expectations of the "public interest" as well as more often clearly-stated Congressional and industry desires. At least to some degree the administrator can see his charge as including the preservation and encouragement of the regulated industry. The crux of his problem, then, is determining to what degree this goal should be subservient to other considerations, in particular to a larger conception of the public interest.

Industry-Commission Relationships—a Complex Web. On a day-to-day basis, Commissioners are forced to immerse themselves in the field they propose to regulate; however, the line between gaining a familiarity with an industry's problems and becoming biased thereby in favor of that industry is perilously thin. It is difficult for Commissioners and their staff to operate closely with an industry without coming to see its problems in industry terms. As Professor Landis reported to President Kennedy, "it is the daily machine-gun-like impact on both agency and its staff of industry representatives that makes for industry orientation on the part of many honest and capable agency members, as well as agency staffs." Landis also observed, however, that direct contacts by industry representatives "of necessity . . . are frequently productive of intelligent ideas," whereas contacts with the general public "are rare and generally unproductive of anything except complaint." [19]

The opinions and demands of the broadcast industry are expressed through consultative groups (such as joint industry-government committees), interchange of personnel, publication of views

in the trade press, liaison committees of the Federal Communications Bar Association, social contacts and visits to offices of the Commissioners, informal discussions at state broadcaster and trade association meetings, and the formal submission of pleadings and oral argument. The Commission is largely dependent for much of its information about proposed policies on industry trade associations and broadcast licensees, especially about new technological developments.

Given such numerous opportunities to influence each other, it is hardly surprising that the pattern of industry-Commission relationships is dynamic, ever changing, with shifting degrees of industry control. Since a regulatory agency must make enough alliances with effective power centers to retain its vitality, it must necessarily "come to terms" with powerful elements in its environment by knowing which elements are powerful and which participants offer the best hope for continued vitality if an alliance is formed. FCC Chairman John Doerfer once offered what is probably an effective justification of extensive consultation with the regulated industry: "It is naive to think that it is possible to legislate without conversations and conferences, without people who know problems of the particular industry." [20]

In the intricate and dynamic relationship between the FCC and the industry, the Washington communications lawyer plays a special role—not only in interpreting FCC policies for broadcast licensees but also in shaping the policy direction of the Commission. In a recent study of Washington lawyers, Joseph Goulden has noted that, while the lawyer's historic role has been to advise clients on how to comply with the law, the Washington lawyer's present role is to advise clients on how to make laws and to make the most of them. Goulden describes how the Washington lawyer serves as the interface that holds together the economic partnership of business and government:

> Relations between some Washington lawyers and officials of the regulatory agencies can be so intimate they embarrass an onlooker. The lawyers and the regulators work together in a tight, impenetrable community where an outsider can't understand the language, much less why things are done the way they are. The lawyers and the regulators play together, at trade association meetings, over lunch, on the golf courses around Washington. They frequently swap jobs, the regulator moving to

the private bar, the Washington Lawyer moving into the Commission on a "public service" leave of absence from his firm.[21]

Commissioner Nicholas Johnson has identified as the "subgovernment phenomenon" the domination of an agency's policy-making by a coalescence of lobbyists, specialty lawyers, trade associations, trade press, Congressional subcommittee staff members, and Commission personnel who cluster around each of the regulated industries. This subgovernment, Johnson maintains, grows around any specialized private interest-government relationship that exists over a long period of time, is self-perpetuating, and endures unaffected by tides of public opinion and efforts for reform. Johnson describes the broadcasting industry subgovernment as including

> . . . the networks and multiple station owners, the Federal Communications Bar Association, *Broadcasting* magazine, the National Association of Broadcasters, the communication law firms, and the industry-hired public relations and management consultant firms. It also includes the permanent government staff—regulatory, executive and congressional—which is concerned with day-to-day activities of the broadcasting industry. People in this subgovernment typically spend their lives moving from one organization to another within it. Those who pursue the course of protecting the public interest are rarely admitted.[22]

The NAB and other Broadcasting Lobbies. The leading spokesman for the broadcasting industry is the National Association of Broadcasters, a trade organization with more than 4,000 member radio and television stations, a $3 million annual budget and a staff of about 100 based in a $2.6 million building situated only a few blocks from the FCC. Over the several decades of its existence, the NAB has been remarkably effective in thwarting any efforts to place onerous regulatory burdens on broadcasters. One conspicuous instance was the NAB's success in persuading the House of Representatives to block the FCC's proposed adoption of rules on commercial advertising. (This case study is discussed in Chapter 7.) The lobbying prowess of the broadcasting industry—especially during the years before 1947—has been described by Murray Edelman as follows:

> At a public hearing it is the "regulated" who appear and offer argument—regularly, forcefully, and with a show of massed strength. The

industrial giants in this field have, moreover, shown marked ability and determination to organize pressure on Capitol Hill, on the Commission, in the press, and over the radio whenever it has appeared to them that a proposed or promulgated Commission policy would affect their interests adversely. Groups that represent listeners are rare, and those that do arise have become impotent with impressive regularity.[23]

In recent years, however, the NAB has encountered increasing difficulty in its efforts to fend off Congressional and FCC regulation of the broadcasting industry. Commissioner Robert E. Lee believes that the NAB has been losing effectiveness and that lately it has been unable to prevail on any issues in which it has taken a major interest.[24] Whether or not Commissioner Lee is correct in his assessment of the waning strength of the NAB, it is certainly true that the climate in which broadcast regulation takes place has changed markedly in the past ten years.

Two trends have been primarily responsible for this change, and both have made the NAB's job more difficult. First, the organizations represented by the NAB have grown in number and diversity, ranging from the smallest "mom and pop" AM radio stations to the largest television networks and conglomerate owners of multiple communications media. Because the NAB's membership is so diverse, smaller, more specialized trade organizations have sprung up over the years to protect the interests of television stations (Association of Maximum Service Telecasters), television translator stations (National Translator Association), UHF television stations (All-Channel Television Society), clear channel AM radio stations (Clear Channel Broadcasting Service), daytime AM stations (Daytime Broadcasters Association), religious stations (National Religious Broadcasters), and FM stations (National Association of FM Broadcasters). Moreover, a separate and perhaps more potent lobbying group is made up of the three national networks whose Washington representatives work in a loose kind of alliance. Thus the broadcasting lobby is not truly monolithic, but is comprised of multiple associations supporting many different specific interests. These associations have tended to weaken the NAB's lobbying power, since it can rarely present a united front on regulatory policy questions. Nevertheless it is still a force to be reckoned with.

Second, the broadcasting industry no longer enjoys the same position that it did in the early decades of broadcast regulation.

Then the regulatory process was dominated by (and largely restricted to) three major participants—Congress, the FCC, and the industry itself. These were the three focal points of a closely-knit triangle of pressure, cooperation, and shifting alliances. The lines of influence and power were clear and the industry knew how to work for what it wanted, as Murray Edelman pointed out. But this balance of forces which prevailed for so long has been altered in the past decade by the increased involvement of three participants in broadcast regulatory policy-making: the public, in the form of citizens groups; the White House, by means of special advisory bodies and governmental bureaus; and the courts, in the form of judicial opinions prescribing and precluding FCC policy initiatives. Together, the development of these three activist participants in broadcast regulation has modified the Commission's role from one of making peace with Congress and a dominant industry to one of attempting to placate several often antagonistic interests.

CITIZENS GROUPS

Commissioner Nicholas Johnson has denied the charge that the Commission responds only to pressure from the broadcasting industry: "It responds to pressure from anybody." [25] However, until 1966, only those with a demonstrable economic stake in the outcome of a case were permitted to intervene in radio and television licensing proceedings. In a landmark decision, adopted in March 1966, the United States Court of Appeals for the District of Columbia Circuit allowed the Office of Communication of the United Church of Christ to challenge the license renewal of WLBT(TV), Jackson, Mississippi, on the ground that the station discriminated against its Negro viewers who constituted 45% of the City of Jackson. The Court held that responsible community organizations such as "civic associations, professional societies, unions, churches, and educational institutions or associations" do have the right to contest renewal applications. In a unanimous opinion written by Judge Warren Burger (later the Chief Justice of the U.S. Supreme Court), the Court of Appeals ruled that providing legal standing to those with such an obvious and acute concern with licensing proceedings as the listening audience is essential in order "that the holders of

broadcasting licenses be responsive to the needs of the audience without which the broadcaster could not now exist." [26] The Court granted standing, however, not to all listener groups, but only to those representing a substantial number of listeners and having a genuine and legitimate interest in the programming of matters of public importance.

The challenge by the United Church of Christ appeared to be unsuccessful when the FCC concluded its hearings by granting the license renewal to the owners of WLBT. But the Court of Appeals again encouraged citizen participation in 1969 by overruling the Commission's decision and ordering that the FCC consider new applications for the WLBT license.[27] The Court further directed the FCC to assign an interim license for this station to a new licensee, pending the outcome of the application hearings.

The long-term significance of the WLBT case was well summarized by *Broadcasting* magazine:

> The case did more than establish the right of the public to participate in a station's license-renewal hearing. It did even more than encourage minority groups around the country to assert themselves in broadcast matters at a time when unrest was growing and blacks were becoming more activist. It provided practical lessons in how pressure could be brought, in how the broadcast establishment could be challenged.[28]

The United Church of Christ, spurred by the WLBT decision and supported by grants of over $300,000 by various foundations, has helped hundreds of groups throughout the United States in monitoring broadcast stations and preparing petitions to deny renewal applications. Following the lead of the United Church of Christ, other citizens groups have focused their efforts on representing the public before the FCC and the courts and, in the process, have attracted foundation money and talented young lawyers. "Guide to Citizen Action in Radio and TV," a publication issued by the United Church of Christ, lists the following organizations which aid citizen efforts in broadcasting:

> *Citizens Communications Center, Washington, D.C.*—a resource center providing the public with guidance and legal advice and representation before the FCC and the Federal Courts on communications issues of social concern and public importance. It is devoted to encouraging television and radio programming more responsive to the diverse needs and

interests of all segments—including all minorities (whether they be racial, economic, political, etc.)—of the broadcast audience.

National Citizens Committee for Broadcasting (NCCB), Washington, D.C.—a citizen-supported non-profit organization whose primary purpose is to improve the quality of broadcasting through concerted citizen action. It conducts programs designed to identify public interest issues in the area of broadcasting, evaluates the programming and public service performance of radio and TV stations and networks, and provides forums for exchange of views on related issues.

Action for Children's Television (ACT), Newton Centre, Massachusetts—an organization concerned with promoting quality television programming for children. Its activities include consultations with network and station management, research studies, and legal action at the FCC and FTC. It is a clearinghouse on children's television and aids communities in organizing local groups and monitoring programs.

Black Efforts for Soul in Television (BEST), Washington, D.C.—an organization working for a media more responsive to the needs and aspirations of Black and other minority groups. It advises interested individual and community groups as to their rights in the media and can provide technical assistance in cases of organized license challenges, programming complaints or employment discrimination.

NAACP Legal Defense and Educational Fund (LDF), New York, New York—provides assistance to groups seeking to increase minority participation in the activities of the broadcasting community. The Division of Legal Information and Community Service organizes broadly-based community groups, conducts workshops on analyzing renewal applications and monitoring media services, and assists in the preparation of formal and informal complaints.

Mexican American Legal Defense and Educational Fund (MALDEF), San Francisco, California—a Chicano organization which promotes the positive contributions of Mexican-Americans and Rasa peoples. It fights the media's exploitation of false, insulting stereotypes of Spanish-speaking Americans. Its expertise in media is focused on citizen action in broadcasting, affirmative action in training and employment, and ascertainment of community needs and problems and programming.

Stern Community Law Firm, Washington, D.C.—a public interest law firm. Legal advice is offered by one Stern attorney in broadcasting and CATV matters. Specific areas of concern include the elimination of censorship in the broadcast media, fairness doctrine and equal time complaints, rights of access and other First Amendment issues.[29]

The foregoing listing indicates that despite the description of these groups by some commentators as guardians of the over-all public interest, many of the organizations tend to espouse the cause of a single special interest (e.g., blacks, Chicanos, and children).

Beginning in 1969, citizens groups for the first time entered into agreements with broadcast stations concerning programming and employment practices. In 1969, a number of black groups in Texarkana, Texas, aided by the United Church of Christ, negotiated an agreement with KTAL-TV, a local television station, under which a petition to deny the renewal application was withdrawn in exchange for a 13-point statement of policy by the station covering employment of blacks, minority programming, news coverage, and programs dealing with controversial issues. The FCC endorsed the KTAL-TV negotiations and agreement as a preferred means by which a station could fulfill its obligation to provide service to meet community needs and interests. In 1970, Capital Cities Broadcasting Corporation signed an agreement with the Citizens Communications Center to commit $1 million over a three-year period to minority programming over the Philadelphia, New Haven, and Fresno television stations which Capital Cities was acquiring from Triangle Publications, Inc. This pattern of negotiations by citizens groups has also been followed in Rochester, Charlotte, Atlanta, Nashville, Memphis, Mobile, Youngstown, Chicago, Fort Worth, Dallas, and Denver, and it is spreading throughout the country. In September 1971, *Broadcasting* magazine commented, "it is hard to find a community of any size without its organizations of blacks, Chicanos, Latinos, liberated women, activist mothers or other concerned types negotiating for stronger representation in broadcasting."[30]

The public attention accorded the WLBT case prompted individuals and groups in communities throughout the nation to ask the United Church of Christ for help in countering station practices that they considered to be unfair and violative of the Fairness Doctrine (a requirement that broadcasters air contrasting viewpoints on controversial issues of public importance). Public-interest law firms, such as the Citizens Communications Center and the Stern Community Law Firm, began to bring "test" cases before the Commission and the courts. The Office of Communication, together with several other religious groups and the National Citizens Committee for Broadcasting, filed amicus briefs with the Court of Appeals and the Supreme Court in the *Red Lion* case, in which the

Supreme Court in a landmark decision upheld the Fairness Doctrine, stating "it is the right of the viewers and listeners, not the right of broadcasters which is paramount." [31]

A rash of other cases were similarly successful. A university law professor, John F. Banzhaf, III, successfully invoked the Fairness Doctrine to obtain free time for the American Cancer Society's anti-cigarette spot announcements.[32] A group called the Business Executives' Move for Vietnam Peace persuaded the U.S. Court of Appeals for the District of Columbia Circuit to rule that members of the public have a First Amendment right to the airwaves and that, accordingly, a broadcaster who accepts paid commercial advertising cannot exclude those who want to buy time to present opinion on a controversial issue.[33] An environmentalist group, the Friends of the Earth, successfully argued to this same court that commercials promoting the sale of automobiles and leaded gasolines raise a controversial issue of public importance (namely, air pollution) and require the broadcast station to provide program balance.[34]

Primarily because of the indirect impact and complex nature of broadcast regulatory issues, the general public has been apathetic and uninformed. Until the late 1960's, the FCC had done little to promote greater participation by the public in its proceedings or to encourage a better understanding of the role citizens might play in broadcast regulation. In the late 1960's, however, Commissioner Nicholas Johnson began to use his considerable persuasive powers toward this end. Through various media, Johnson took directly to the public the issues which had been defeated by the whole Commission. At the same time he acted as a gadfly in prompting other Commissioners to take up the cause of greater public participation in broadcast regulation. Johnson "campaigned, through speeches, magazine articles, and a book, *How to Talk Back to Your Television Set,* to alert the citizenry to their rights to challenge a broadcast licensee at license renewal time—as it were, to 'vote' against or for his continuance as a station operator —which was, within the trade, the most unorthodox and unpopular thing an FCC commissioner had ever done." [35]

Such efforts to involve the public to a greater degree have been quite successful. After meeting with a group of Boston housewives from Action for Children's Television (ACT), Chairman Burch persuaded his colleagues to initiate a rulemaking proceeding on proposals to require television stations to carry 14 hours of

children's programming each week and to prohibit the broadcasting of commercials on such programs. More than 80,000 letters were filed in this proceeding by concerned members of the public. The Commission itself, reacting to pressure from Congress and the public, has taken a number of steps to encourage greater citizen participation, including the publication of an informational booklet on how to file complaints and intervene in renewal and transfer proceedings. It is also considering establishing a legal office in the Commission for the purpose of assisting citizens groups and members of the public, and requiring stations to broadcast announcements soliciting criticism during the entire license period.

The impact of citizen-group activity on the Fairness Doctrine and the FCC's license renewal procedures was tersely summarized by Dr. Clay Whitehead, Director of the White House Office of Telecommunications Policy, who made the following comment in a speech to broadcasters:

> You've always had criticism from your audience but it never *really* mattered—you never had to *satisfy* them; you only had to *deliver* them. Then the Rev. Everett Parker read the Communications Act. You all know the outcome of the *WLBT-United Church of Christ* case. Once the public discovered its opportunity to participate in the Commission's processes, it became inevitable that the rusty tools of program content control—license renewal and the Fairness Doctrine—would be taken from the FCC's hands and used by the public and the courts to make *you* perform to *their* idea of the public interest.[36]

Dr. Whitehead aptly emphasized the combination of "the public and the courts" as the key to effecting change. In Chapter 8, we will discuss the appeal of two citizens groups (the Citizens Communications Center and Black Efforts for Soul in Television) to the U.S. Court of Appeals for the District of Columbia Circuit which led to the overturning of an FCC policy statement involving license-renewal hearings. We now turn to a discussion of the unique role played by the courts as a participant in the FCC policy-making process.

THE COURTS

Even though only a very small proportion of the FCC's actions are reviewed by the courts, the significance of judicial review in

the Commission's policy-making process cannot be measured by statistical analysis alone. Judicial review, no matter how seldom invoked, hangs as a threatening possibility over each administrative or legislative decision. Thus, potentially every action of the FCC may be reviewed by the courts. Although the courts ordinarily allow other arms of government (such as the FCC and the Congress) to make policy, the judiciary exercises a crucial veto power. Consequently, the FCC must always keep one eye on the courts to make sure that the policies it adopts can successfully run the judicial gauntlet. The continual threat of judicial review thus tends to have an impact on the policies of the FCC even when these policies are not formally adjudicated.

Much of the influence of the judiciary on broadcast regulatory policy comes through the power of statutory interpretation. The vague public interest standard embodied in the Communications Act has given the courts a significant role in overseeing the FCC. As the Supreme Court observed:

> Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of "public interest." It is our responsibility to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear . . . in the public interest.[37]

Judge Harold Leventhal of the Court of Appeals for the District of Columbia Circuit has noted that the courts are normally more concerned with how a decision was reached than with the decision itself:

> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint even though the court would on its own account have made different findings or adopted different standards.[38]

Since the courts play an important role in the FCC policy-making process, it follows that other participants in this process

will attempt to influence court action. Obviously, the various interest groups cannot approach the courts through the same methods that would be appropriate in approaching Congress—there are no campaign funds and no ballot boxes with which to influence Federal judges.[39] Generally, there are only two methods by which pressure may be exerted on the courts. The first is through the appointment of judges. Here, influence must proceed indirectly through the President and the Senate. The other and more direct means of pressuring the court is through the regular procedure of litigation. Filing an appeal with the courts is largely a defensive maneuver, since by the time a group is forced to resort to judicial review, the policy has already been made by the FCC. But whereas the FCC and the Congress are most often influenced by politically powerful and wealthy groups, the courts may be influenced almost as easily by a single individual or very small groups as by a large and powerful interest. Even in cases where the outside groups are not parties to the case, the court may allow them to participate in the role of *amici curiae* ("friends of the court"). In litigation, the decisions of the court are frequently influenced by factors such as the strategic timing of a bona fide test case, the submission of a well-written brief, the rendition of persuasive oral argument, or the publication of a thoughtful law review article or book on the specific issue.

Under Section 402(b) of the Communications Act, appeals from FCC decisions in broadcast licensing matters must be filed with the United States Court of Appeals for the District of Columbia Circuit. (Appeals involving compliance with FCC rules and orders, on the other hand, must be filed with the Federal District Courts.) The Communications Act also provides that the decisions of the Court of Appeals shall be final, subject only to review by the Supreme Court of the United States upon issuance of a writ of *certiorari*. Congress established the writ of *certiorari* in 1925 to enable the Supreme Court to cut down the volume of its work. As a result, most cases are now finally decided by the Court of Appeals.

The Court of Appeals consists of nine judges, who are appointed by the President for terms of life with the advice and consent of the Senate. With few exceptions, the decisions of the Court of Appeals are made by panels of three judges. Since the late 1960's, the Court of Appeals for the District of Columbia Circuit has played an increasingly important role as a participant in the making

of broadcast regulatory policy. It has reversed Commission decisions on such basic issues as the right of litigants to participate in FCC proceedings, the obligations of broadcast stations under the Fairness Doctrine, and the need to hold hearings when listener groups protest a licensee's failure to justify a change in format, or when competing applications for a station's license are filed at renewal time.

The Court of Appeals has decided a large number of important cases *only* because citizens groups began raising questions that had never been subjected to the crucible of judicial review. Since the Anglo-American judicial system limits judicial review to properly presented cases and controversies involving real legal disputes, the courts are basically passive—they cannot reach out to solve problems, but must wait until the problems are brought to them. Issues are now being raised before the Court of Appeals which previously went unnoticed by the FCC and other parties. No one, for example, thought to file a Fairness Doctrine complaint against a nationally broadcast speech by President Eisenhower, whereas a Fairness Doctrine complaint is filed with the Commission and the courts virtually every time President Nixon's words are carried by the broadcast media.

Whether the FCC has reached "right" or "wrong" policy decisions is not the kind of issue that has brought the courts to their present activist role in broadcast regulation. As Steve Millard noted in a perceptive article entitled "Broadcasting's Pre-emptive Court":

> The problem has been, in case after case, that the commission simply has not grappled to the court's satisfaction with the issues raised by those who demand to be heard, whether at the commission itself or on the air. Whatever ambiguities may reside within the court's opinions, this much is clear: The court has installed the citizen—almost any citizen —as a party of primary interest in any case that may be before the FCC.[40]

THE WHITE HOUSE

Professor William Cary, a former Chairman of the Securities and Exchange Commission, has pointed out what should be apparent to any serious observer but is often overlooked or ignored: that the President is a person but the White House is a collection of

people.[41] The FCC, like most other government departments and agencies, does not deal with the President (except on matters of the greatest national or international importance) but with the White House staff. For example, beginning with the Kennedy administration, the FCC and other regulatory agencies have sent monthly detailed summaries of their principal activities and pending projects to a key Presidential aide. Different Presidents, moreover, have varied in their feelings about the FCC. Where Franklin D. Roosevelt had been very interested in FCC policy decisions (especially the question of ownership of radio stations by newspapers), his successor, Harry Truman, showed little or no concern about Commission policies. Again, Presidents Kennedy and Nixon were actively interested in broadcast matters, while President Johnson played a passive role, primarily because his family had ownership interests in broadcasting.

The Power of Appointment. The White House influences the FCC in a wide variety of ways. The most important of its formal controls is the power of the President to choose Commissioners as their terms expire and to appoint a Chairman. The appointment power enables the President to set the tone for the agency during his administration. Although the Communications Act specifies that only four commissioners may have the same party affiliation, the President has wide latitude in appointing those whom he thinks will reflect his own political and administrative ideas.

In making appointments to the FCC, the President is subject to diverse types of pressures from Congress, the industry, the press, and the public. According to the Hoover Report, the Senatorial power of confirming Commission appointments has often caused the President to consider not so much his appointees' abilities or qualifications for the job as the probability of their acceptance by the Senate.[42] Furthermore, since appointments to the FCC are closely watched by the regulated industries, the President rarely appoints a Commissioner if the regulated industries are politically aligned against him. As Roger Noll points out: "While the appointment process does not necessarily produce commissioners who are consciously controlled by the industry they regulate, it nearly always succeeds in excluding persons who are regarded as opposed to the interests of the regulated."[43] Trade press publications such as *Broadcasting, Television Digest,*

and *Variety* play an important role in influencing industry opinion on various candidates and in letting broadcasters know who is opposed to their interests. Since the early 1970's, however, minority groups have begun to influence the selection of Commissioners, as shown in the appointment of the first black (Benjamin Hooks) as an FCC Commissioner.

The Communications Act authorizes the President to designate one of the seven Commissioners as Chairman. Since the Chairman holds that position subject to the will of the President, it is to be expected that the conduct of individuals serving as Chairman might be influenced by the expectations and viewpoints which radiate from the White House. Moreover, both with respect to the Chairman and other Commissioners, a sense of loyalty and considerations of reappointment (or appointment to other governmental posts) may have a subtle influence on the thinking and behavior of those appointed.

The White House also exercises some informal control over major personnel selections at the FCC, including such positions as General Counsel, Executive Director, and Chief of the Broadcast Bureau. Prior to making high-level staff appointments, the Chairmen of the FCC have usually checked with the White House to secure a "political clearance." Commissioner Nicholas Johnson accused the Nixon administration of a "vendetta against Commission employees" who support the public interest. In testimony before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, Johnson cited Henry Geller, the FCC's General Counsel, as a prime example of an outstanding staff member who was a victim of White House pressure.[44]

The Office of Management and Budget. Another form of White House pressure is exerted through the Office of Management and Budget (formerly the Bureau of the Budget). This Office, one of the President's staff agencies, reviews and revises all departmental and agency budget estimates before they are presented to the Appropriations Committees of the House and Senate. In addition, agencies such as the FCC must submit their legislative recommendations to OMB before asking for Congressional consideration; further action depends upon word from the Director of OMB that a proposal is consistent with the President's program. Through its responsibility under the Federal Reports Act to give prior ap-

proval to all reporting forms, applications, and industry questionnaires, OMB is able to have an impact on the substance as well as the timing of FCC regulatory projects. OMB also has the power to authorize agencies such as the FCC to add "supergrade" (high-salaried) staff positions. In this connection, Professor Cary points out that a regulatory agency is paralyzed unless it is allowed to recruit able staff and fill vacancies at the top.[45]

Other Forms of Executive Influence. The White House also exercises its authority by supporting substantive legislation. Professor Cary believes that ". . . despite the jealousy that Congress may exhibit over White House participation in an agency's functioning, it is unlikely to enact constructive legislation on behalf of a regulatory agency unless it has some backing from the President."[46] A less tangible form of control is the mood set by the President and the White House for the regulatory agency. Especially at the beginning of an administration, the White House may be able to create a more hospitable political climate for the agency. President Kennedy's "New Frontier' theme, for example, set a favorable mood for a more active regulatory role by Newton Minow.

For purposes of this chapter we have included the Department of Justice in the White House since it is the President's legal arm. As the agency generally responsible for the enforcement of federal laws, the Justice Department exerts a strong influence on the FCC. The Solicitor General's Office of the Justice Department has authority to decide which cases the Federal Government should ask the Supreme Court to review and what position the Government should take in cases before the courts. At times, the Justice Department has even challenged FCC decisions by appealing them to the courts. When the Justice Department protested the Commission's approval of the proposed ABC-ITT merger, the case caption read: "United States v. Federal Communications Commission." The Justice Department's appeal was one of the factors that prompted ABC and ITT to abandon their plans for merger. In another Court of Appeals proceeding, the Justice Department intervened on the side of community groups who objected to the FCC's refusal to allow KTAL-TV, Texarkana, Texas, to reimburse the legal fees incurred by groups who challenged the station's renewal application.

The Justice Department's Antitrust Division has taken an activist role in FCC proceedings and was successful in breaking

up common ownership of a daily newspaper, CATV system, and television station in Cheyenne, Wyoming. In Beaumont, Texas, the Antitrust Division asked the FCC to deny an application to transfer the license of KFDM-TV to the publisher of the only daily newspaper in Beaumont. Faced with such opposition, the parties withdrew the application. The Antitrust Division also played a key role in FCC proceedings which resulted in a ban on cross-ownership of local television stations and CATV systems and the prohibition on a prospective basis of local cross-ownership of AM radio and television stations.

The White House has also been able to create leverage in the past by the formation of advisory commissions. During his administration, President Johnson created a Task Force on Communications Policy. The Report of this Task Force, issued in December 1968, contained a 16-month study of telecommunications problems which was the work of 15 departments and agencies of the Federal Government and a large number of consultants. The creation of the Task Force had the effect of delaying for several years FCC action on the controversial subject of communications satellites.

The Office of Telecommunications Policy. The most recent type of White House control, however, has been the transition from the use of ad hoc advisory commissions to the establishment of a permanent office in the Executive Branch designed to formulate policies and coordinate operations of the Federal government's communications system. In February 1970, President Nixon submitted to Congress Reorganization Plan No. 1 to create within the Office of the President a new Office of Telecommunications Policy (OTP).[47] This new Office would become the President's principal adviser on domestic and international telecommunications policy. According to the President, the OTP would not acquire any prerogatives or functions of the FCC, but would take over the functions of the Director of Telecommunications Management in the Office of Emergency Preparedness, In March 1970, FCC Chairman Dean Burch told the House Reorganization Subcommittee that the Commission favored "a strong, centralized entity to deal with telecommunications issues within the executive."[48] When neither the Senate nor the House voted to disapprove the Reorganization Plan within 60 days after its submission to Congress,

the Office of Telecommunications Policy became effective April 20, 1970.

At hearings in the House, Congressmen expressed concern that the new Office might dominate the FCC. A legal assistant to Commissioner H. Rex Lee viewed the OTP as a threatening and improper political encroachment upon the independence of the Commission. The FCC, he said, "is easily overwhelmed by the power, prestige and influence of the President." [49] The Wall Street Journal, in a front-page article on July 11, 1970, charged that OTP's tactics with respect to the FCC's decision on domestic satellites show that "the Nixon Administration is boldly trying to influence regulatory policy more than any previous Administration did." Chairman Burch, however, assured members of the House Subcommittee on Executive and Legislative Reorganization, that he had "absolutely no fear of either an actual or possible undue influence by the White House on the Commission by virtue of this Office." [50]

OTP, in the short time it has operated as an arm of the White House, has already made a significant impact on broadcast regulatory policy. In the Fall of 1971, OTP played a broker's role in bringing together representatives of the broadcasting, cable, and copyright industries and acted as a mediator in getting the parties to accept a compromise agreement on cable rules. In response to a proposal by OTP, the FCC initiated an inquiry in 1972 looking toward the de-regulation of radio, anticipating the lessening of regulatory controls on radio programming and commercial practices. OTP also took stands and thereby stimulated debate on a wide number of substantive issues, including standards on license renewals, the substitution of a limited right of paid access for the Fairness Doctrine, and the role of the Corporation for Public Broadcasting in financing network programming of the Public Broadcasting Service. Based on a study prepared by OTP, the FCC made extensive changes in the Emergency Broadcast System.

At the time OTP was being considered by the Congress, Commissioner Kenneth A. Cox predicted that the creation of this agency would definitely make a difference in FCC decision-making in view of the likelihood of greater contact between the Commission and the White House. However, Cox also said that he had never seen evidence that the President exercised much influence over the Commission on anything. If there were evidence of too much Presiden-

tial influence, Cox commented, "Congress would raise holy hell. The Commission isn't that easy to push around." [51]

NOTES

[1] Newton Minow, *Equal Time: The Private Broadcaster and the Public Interest* (New York: Atheneum, 1964), pp. 258–259.

[2] James M. Landis, *Report on Regulatory Agencies to the President-Elect*, published as a committee print by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 86th Congress, 2nd Session (1960), p. 53.

[3] Samuel P. Huntington, "The Marasmus of the I.C.C.: The Commissions, the Railroads, and the Public Interest," *Yale Law Journal*, LXI April 1962), 470.

[4] The analysis which follows is based primarily on articles by Lee Loevinger entitled "The Sociology of Bureaucracy," *The Business Lawyer*, XXIV (November 1968), 7–18, and "The Administrative Agency as a Paradigm of Government—A Survey of the Administrative Process," *Indiana Law Journal*, XL (Spring 1965), p. 1.

[5] Lee Loevinger, Review of William L. Cary, *Politics and the Regulatory Agencies*, in *Columbia Law Review*, LXVIII (1968), 382.

[6] "Lack of Direction Is Handcuffing the FCC," *Television/Radio Age* (April 3, 1972), p. 61.

[7] Bradley C. Canon, "Voting Behavior on the FCC," *Midwest Journal of Political Science*, XIII (November 1969), 593–594.

[8] Lawrence Lichty, "Members of the Federal Radio Commission and Federal Communications Commission: 1927–1961," *Journal of Broadcasting*, VI (Winter 1961–1962), 23–34.

[9] Lawrence W. Lichty, "The Impact of FRC and FCC Commissioners' Backgrounds on the Regulation of Broadcasting," *Journal of Broadcasting*, VI (Spring 1962), 97, 109.

[10] *Ibid.*, p. 108.

[11] Canon, "Voting Behavior on the FCC," pp. 609–611.

[12] Lichty, "The Impact of FRC and FCC Commissioners' Backgrounds on the Regulation of Broadcasting," pp. 108–109. However, Roger Noll contends: "Policies of multiheaded bodies such as regulatory commissions tend to be at the median position within the group. The middle-of-the-road individual can always lead a majority against any proposal that he opposes." Roger G. Noll, *Reforming Regulation* (Washington, D.C.: Brookings Institution, 1971), p. 43.

[13] Kenneth A. Cox, "What It's Like Inside the FCC," *Telephony* (September 5, 1970), pp. 56, 57.

[14] "How the FCC Takes Control," *Broadcasting*, February 21, 1966, p. 31, and "Heavy Hands on Government Controls," *Broadcasting* (February 21, 1966), p. 50.

[15] Minow, *Equal Time*, pp. ix–x.

[16] "Minow Observes a 'Vast Wasteland,'" *Broadcasting* (May 15, 1960), pp. 58, 59.

[17] Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton, N.J.: Princeton University Press, 1955), p. 279.

[18] Noll, *Reforming Regulation,* pp. 37–38.

[19] Landis, p. 71.

[20] Quoted in Victor G. Rosenblum, "How to Get into TV: The Federal Communications Commission and Miami Channel 10," *The Uses of Power: 7 Cases in American Politics,* Alan F. Westin, [ed.] (New York: Harcourt Brace Jovanovich, 1962), p. 196.

[21] Joseph C. Goulden, *The Superlawyers: The Small and Powerful World of the Great Washington Law Firms* (New York: Weybright and Talley, 1972), p. 6.

[22] Nicholas Johnson, "A New Fidelity to the Regulatory Ideal," *Georgetown Law Journal,* LIX (March 1971), 883, 884.

[23] Murray Edelman, *The Licensing of Radio Services in the United States, 1927 to 1947: A Study in Administrative Formulation of Policy* (Urbana: University of Illinois Press, 1950), pp. 220–221.

[24] Bruce Thorp, "Washington Pressures—Radio-TV Lobby Fights Losing Battle Against Rising Federal Control," *National Journal* (August 22, 1970), p. 1807.

[25] Nicholas Johnson, *How to Talk Back to Your Television Set* (New York: Bantam, 1970), p. 163.

[26] *Office of Communication of the United Church of Christ* v. *F.C.C.,* 359 F. 2d 994, 1002 (C.A.D.C., 1966).

[27] *Office of Communication of the United Church of Christ* v. *F.C.C.,* 425 F. 2d 543 (C.A.D.C., 1969).

[28] "The Pool of Experts on Access," *Broadcasting* (September 20, 1971), p. 36.

[29] Marsha O'Bannon Prowitt, *Guide to Citizen Action in Radio and TV* (New York: Office of Communication, United Church of Christ, 1971), pp. 34–35.

[30] Leonard Zeidenberg, "The Struggle Over Broadcast Access II," *Broadcasting* (September 27, 1971), p. 24.

[31] *Red Lion Broadcasting Co.* v. *F.C.C.,* 395 U.S. 372 (1969).

[32] *Banzhaf* v. *F.C.C.,* 405 F. 2d 1082 (C.A.D.C., 1968).

[33] *Business Executives' Move for Vietnam Peace* v. *F.C.C.,* 450 F. 2d 642 (C.A.D.C., 1971), *cert. granted,* 40 U.S.L.W. 3410 (February 28, 1972). A Washington, D.C. radio station had denied this group the opportunity to purchase spot announcements urging immediate withdrawal of American forces from Vietnam and other overseas military installations.

[34] *Friends of the Earth* v. *F.C.C.,* 449 F. 2d 1164 (C.A.D.C., 1971).

[35] Les Brown, *Television: The Business Behind the Box* (New York: Harcourt Brace Jovanovich, 1971), pp. 256, 257.

[36] Speech by Clay T. Whitehead before the International Radio and Television Society (October 6, 1971).

[37] *F.C.C.* v. *RCA Communications, Inc.,* 346 U.S. 86, 91 (1953).

[38] *Greater Boston Television Corp.* v. *FCC*, 444 F. 2d 841, 851 (1971).

[39] The following discussion is based on Loren P. Beth, *Politics, The Constitution and the Supreme Court* (New York: Harper & Row, 1962), Chapter IV.

[40] *Broadcasting* (August 30, 1971), p. 23.

[41] William Cary, *Politics and the Regulatory Agencies* (New York: McGraw-Hill, 1967), pp. 6–7.

[42] Hoover Report on the FCC, Part III, p. 42.

[43] Noll, *Reforming Regulation*, p. 43.

[44] Nicholas Johnson, "Consumer Rights and the Regulatory Crisis," *Catholic University Law Review*, xx (Spring 1971), 444.

[45] Cary, p. 12.

[46] *Ibid.*

[47] Reorganization Plan No. 1, H.R. Doc. No. 71-222, 91st Congress, 2nd Session (1970).

[48] Hearings before the Subcommittee on Executive and Legislative Reorganization of the House Government Operations Committee, *Reorganization Plan No. 1 of 1970*, 91st Congress, 2nd Session, p. 50.

[49] Edwin B. Spievack, "Presidential Assault on Communications," *Federal Communications Bar Journal*, xxiii (1969, No. 3), 157.

[50] Bruce Thorp, "Agency Report: Office of Telecommunications Policy Speaks for the President and Hears Some Static," *National Journal* (February 13, 1970), p. 343.

[51] *Ibid*, p. 345.

3

Congress: Powerful Determiner of Regulatory Policy

As a participant in the regulatory process, the Congress is noteworthy for the enthusiasm with which it has historically embraced the job of directing and overseeing broadcast regulatory policies. There has been a tradition of almost daily congressional intervention into the activities of the FCC. "When I was Chairman," Newton Minow has written, "I heard from Congress about as frequently as television commercials flash across the screen." [1]

CONGRESS AND THE FCC

Congress has been subject to recurring criticism for "its failure to provide guides and standards for the Commission to follow, and for its frequent and often premature interference in the Commission's rare attempts to formulate policy on its own." [2] In this chapter, we will be posing three questions about Congress as a determiner of regulatory policies: who do we mean when we speak of Congress, why does Congress involve itself so frequently and deeply in broadcast regulatory policy, and what form does this Congressional involvement take?

When we refer to Congress' role in the regulation of broadcasting, we are not talking about Congress as a whole, for power is distributed quite unevenly in Congress, especially in a specialized area such as broadcast regulation. The vital groups in Congress relevant to broadcast regulatory policy are the House and Senate Commerce Committees, and, specifically, in many cases, their Chairmen. A "highly placed [FCC] staff member" has said privately that the word of Senator Warren Magnuson, Chairman of the Senate Commerce Committee, is practically law to the FCC.

"They bow and scrape for him. He doesn't have to ask for anything. The commission does what it thinks he wants it to do." The same was true of Oren Harris, former Chairman of the House Interstate and Foreign Commerce Committee. "He cracked the whip lots of times down here."[3] Other committees, especially the Appropriations Committees of each chamber, take occasional interest in broadcasting and regulatory issues, but the two Commerce Committees undoubtedly are the center of Congressional interest and activity in the field of broadcasting.

Sometimes the Senate Commerce Committee takes particular interest in a policy (as it did in the FCC's license renewal procedures in 1970); at other times, Congressional activity comes mainly from the House Commerce Committee (such as the bill to block the FCC's consideration of commercial time limits).[4] In addition, individual Congressmen or Committee Chairmen may be principal actors involved in a particular policy. Congressional interest may actually be limited to only a few Congressmen who gain their impact in the FCC policy-making process because of their seniority or their influential standing in a committee. As a result, in Boyer's words, "an administrator must . . . sensitize his decision-making to the wishes and predilections of committee chairmen primarily and legislators generally."[5]

A main reason why Congress has involved itself so closely in broadcast regulatory policy is that it feels it has special obligations in this area. The FCC was established both as an independent regulatory commission and as "an arm of the Congress." Consequently, many legislators consider review of this agency's performance an integral part of Congress' mission. To Congress, the independence of regulatory commissions such as the FCC means independence from White House domination, not independence from its Congressional parent.

The power of the Congress over the Commission is both pervasive and multifaceted. Since the FCC has neither the political protection of the President or a cabinet official, nor an effective means of appealing for popular support, Congressmen have little fear of political reprisal when dealing with the Commission or any of the other independent agencies.[6] Newton Minow tells a trenchant story about the day, shortly after his appointment to the Commission, when he called upon House Speaker Sam Rayburn. Mr. Sam put his arm around the new FCC Chairman and said,

"Just remember one thing, son. Your agency is an arm of the Congress, you belong to us. Remember that and you'll be all right." [7] The Speaker went on to warn him to expect a lot of trouble and pressure, but, as Minow recalls, "what he did not tell me was that most of the pressure would come from the Congress itself." [8]

This pervasive atmosphere of Congressional concern with Commission activities makes the FCC extremely wary about possible reactions from Congress—a phenomenon which political scientists call the process of "anticipated reactions," "feedback," or "strategic sensitivity." In this connection William Boyer has commented:

> What matters here is not that an administrator is forced by a vote or an overt instruction of any legislative committee to initiate a particular policy, for seldom does this happen. More important is an administrator's assessment of the given ecology within which he must make his policy decisions. For efficacious policy initiation, he must attempt to perceive and anticipate the behavior of legislative committees and the environment reflected by them.[9]

CONGRESS AND THE BROADCASTING INDUSTRY

Congressional involvement in regulatory policy and its close supervision of the FCC may also be traced to the role of many Congressmen as advocates—sometimes even agents—of the broadcasting industry. As such they transmit their ideas and views to the FCC and mediate between the Commission and the industry. This community of views is sometimes attributed in part to the financial interests of Congressmen in broadcasting. However, direct or family-related investments of Congressmen in broadcasting are not as extensive as often thought. In the 92nd Congress, only six Senators and nine Representatives had either a direct or a family-related interest in broadcast stations; in the 91st Congress, five Senators and eleven Representatives had broadcast interests.[10] Congressional support for industry is more accurately viewed as attempts by legislators to satisfy the demands of important, prestigious, and useful constituents. That these efforts are generally successful has been indicated by Paul B. Comstock, former Vice President and General Counsel of the National Association of Broadcasters, who is quoted as saying: "Most of our work is done

with congressional committees. We concentrate on Congress. We firmly believe that the FCC will do whatever Congress tells it to do, and will not do anything Congress tells it not to do." [11]

This relationship between the broadcasting industry and Congress has been pithily described as a two-way umbilical cord.[12] An estimated 70% of U.S. Senators and 60% of Representatives regularly use free time offered by broadcast stations back home.[13] Such free time assists politicians in their efforts to get reelected, while broadcasters benefit from carrying "public affairs" programming when they apply to the FCC for license renewal. Robert McNeil's analogy describing the "tense mutual interdependence" of the Congress and the broadcasting industry is apt:

> Imagine the situation of a street peddler who sells old-fashioned patent medicines. He needs a license to stay in business, and the city official who issues them is dubious about most of the peddler's wares. Yet it just happens that one product, a magic elixir, is the only thing that will cure the official's rheumatism and keep him in health. So the two coexist in a tense mutual interdependence, the peddler getting his license, the official his magic elixir.[14]

Since political exposure over the airwaves is practically the *sine qua non* of election to Congress, the only politicians who dare criticize the media with relative impunity are national leaders, such as Vice President Spiro Agnew, who are too prominent for the media to ignore.[15] By contrast, a Congressman may be reluctant to criticize broadcasters if his reelection depends in great measure on the amount and tone of the exposure obtained from his local television station.

CONGRESSIONAL STRATEGIES FOR OVERSEEING BROADCAST REGULATION

Congressional influence on FCC policy-making assumes many forms, including control by statute, the power of the purse, the spur of investigations, the power of advice and consent, the continuing watchfulness of standing committees, multiple supervision by other committees, pressures of individual Congressmen and staff, and Congressional control by legislative inaction. Each of these forms of influence on broadcast policy-making will be examined

in turn and then documented at the end of the chapter by a detailed review of two years of Congressional-Commission activities illustrating these various types of influence.

Control by Statute. This most obvious and public Congressional activity is noteworthy for its relative unimportance in broadcast regulation. In fact, the Congress has infrequently chosen to influence the administration or formulation of policy by the FCC by enacting specific legislation.[16] We have already seen that the Radio Act of 1927 and the Communications Act of 1934 provide the Commission with little more guidance as to its goals, duties, or policies than a vague reference to the "public interest, convenience and necessity." Indeed, the absence of substantive guidelines for FCC policy making makes the Commission all the more vulnerable to other forms of Congressional influence. As Professor Louis Jaffe observes, the continuing threat of congressional investigation is virtually inevitable where the regulatory area is a "jungle without statutory directives."[17] Thus, *non-statutory* controls—frequently in the form of overseeing by raised eyebrow—are of key importance in the FCC's relationship with the Congress.

The Power of the Purse. Legislative appropriations take on special importance for the FCC which is governed by the Communications Act, a statute that Congress was unable or unwilling to write in detail. Through its hold on the purse strings, Congress has absolute discretion not only over the amount of money allocated to the Commission, but also over the purposes for which such funds are to be used. Appropriations committees have determined the direction of the FCC by limiting the use of funds for personnel. In 1942, for example, the House Appropriations Committee adopted an amendment denying funds for the payment of salary to an FCC foreign broadcasting agent whose appointment had been criticized.[18]

The "power of the purse" resides primarily at the subcommittee level of the Appropriations Committee of each house of Congress. Both the Senate and House Appropriations Subcommittees hold hearings each year for the purpose of examining the FCC's budget requests and questioning FCC Commissioners and top-level staff. Many opportunities arise, both at the hearings and on other occasions, for the Subcommittees to scrutinize Commission

behavior and to communicate legislative desires to the officials involved.

Another effective technique of legislative review involves the suggestions, admonitions, and directions conveyed to the FCC by means of Committee reports accompanying appropriations bills. Although the reports are not law, the Appropriations Committees expect that they will be regarded almost as seriously as if they were—an expectation which the Commission usually fulfills.

Perhaps more vividly than any other form of influence, the appropriations process underscores the myth of the FCC's "independent" status. Professor Cary has aptly described the FCC and other "independent" agencies as "stepchildren whose custody is contested by both Congress and the Executive, but without very much affection from either one."[19] These so-called independent stepchildren often suffer from malnutrition, subsisting on crumbs from the Federal budget. As a result, the FCC finds itself beholden to the source of its bread—which essentially means Congress.

The Spur of Investigations. Perhaps no other Federal agency has been the object of as much vilification and prolonged investigation by Congress as the FCC. From its inception, the Commission has almost always been under Congressional investigation or the threat of one; it is frequently "viewed by its progenitors on Capitol Hill as a delinquent creature, not to be trusted, and requiring frequent discipline."[20] The "punitive and often inquisitional character [of these investigations] over a long period of time has created in the public mind an image of depravity with respect to the FCC that severely handicaps the agency in the exercise of its function."[21] Often, the entire operation of the FCC has been dissected in klieg light hearings by hostile committees. One such investigation which received much public attention was initiated and conducted in the early 1940's by Representative Eugene Cox of Georgia, one-time supporter but then a bitter critic of the FCC. Cox was the author of a resolution calling for the establishment of a select committee to scrutinize the organization, personnel, and activities of the Commission.

Although some investigations (especially those marked by antagonism on the part of members of the Congressional committee) have had a debilitating impact on the Commission, other Congressional investigations have helped to keep the FCC viable

by focusing attention on problems posed by new technologies, by eliciting constructive approaches to deficient areas of regulation, or by uncovering areas such as payola where new legislation is necessary. Whether they are harmful or salutary, however, one inevitable result of Congressional investigative activities is to further attune the Commission to the wishes and expectations of Congress.

The Power of Advice and Consent. The statutory limitation of the tenure of Commissioners and the requirement that the Senate confirm all appointments to the Commission provide Congress with a further means of controlling the FCC. Senator Edwin C. Johnson, former Chairman of the Senate Commerce Committee, was of the view that "the existing system of giving the Executive the appointive power to the commissions which are the arms of Congress is basically unsound" since "it is only natural that those who owe their jobs to the Executive would be reluctant to oppose Executive policy and suggestions." He suggested that the appointive power be vested in the Speaker of the House and the confirmation requirement remain with the Senate.[22] Although this suggestion was not adopted, it is indicative of Congressional suspicions about Executive appointments. In the first three years of the Federal Radio Commission's existence, from 1927 until 1930, a distrustful Congress limited the tenure of Commissioners to one year. Even with the present seven-year terms (staggered so that the term of only one Commissioner expires in any one year), the need for confirmation by the Senate continues to be an important means of Congressional control for several reasons. First, before a President makes any nomination requiring Senatorial approval, he follows the custom of consulting a Senator who is from both the nominee's state and the President's party.[23] Second, if some powerful Senator has strong objections to a nomination, he has opportunities to delay or block the appointment.[24] Third, since every Presidential appointment and reappointment to the FCC is first passed upon by the Senate Commerce Committee, the opinions on communications matters expressed by individual Senators at confirmation hearings are likely to receive careful consideration by new Commissioners.

Continuing Watchfulness of Standing Committees. Under the Legislative Reorganization Acts of 1946 and 1970, each standing

committee of the Senate and the House is directed to exercise continuous watchfulness over the execution by administrative agencies of any law within its jurisdiction. The House Committee on Interstate and Foreign Commerce and the Senate Committee on Commerce are charged with making continuing studies of problems in the communications industry, and these committees have prime responsibility for the initiation and consideration of legislation affecting the FCC. One of the potential advantages of such continuous contact between an agency and a standing committee is that the members and staff of the Congressional committee acquire the substantive knowledge necessary to meet the agency's officials in a battle of the experts. As a result of such a continuing relationship, there develops in some cases "a healthy, mutual respect between the committee and administrator, both of whom have a common objective and, in substantial measure, a common fund of information." [25] Too often, however, the contacts between Congressmen and administrators are instead sporadic, ill-tempered, basically uninformed, and mutually aggravating.

Standing committees are frequently able to have a major impact on agency decisions merely by holding hearings. During these sessions, committee members have an opportunity to communicate their views to a captive audience of FCC Commissioners who usually try to portray themselves as flexible, hard-working members of a public-spirited agency.[26] The history of Congressional supervision of the FCC is replete with examples where policies of the Commission were shaped by a single Committee or its Chairman, often without even an official policy directive.

Multiple Supervision by Other Committees. Professor Cary has commented that Congressional supervision of agency policies "is sometimes wearing, almost unendurable, but is an integral part of the system." [27] During the past decade, the number of Congressional committees which have assumed an oversight function has increased significantly. Such supervision by multiple committees, of course, often leads to duplicative and overlapping legislative review. In recent Congresses, Commission oversight functions have been performed by the Senate and House Government Operations Committees, the Science and Astronautics Committees (in connection with satellite broadcasting), the Judiciary Committees (with respect to CATV, broadcast copyright laws, and antitrust

aspects of the communications industries), the Senate Foreign Relations Committee (concerning the ratification of broadcasting treaties), the Select Committee on Small Business (on such matters as spectrum allocation and TV advertising practices), and the Joint Economic Committee (with respect to the efficiency of the FCC and other regulatory agencies)—all in addition to the normal review of Commission activities by the House and Senate Commerce Committees and the appropriate House and Senate Appropriations Subcommittees.

In one case alone (when the Communications Satellite Act of 1962 was under consideration), the FCC Commissioners testified before the following nine committees and subcommittees: House Committee on Science and Astronautics, House Committee on Interstate and Foreign Commerce, Communications Subcommittee of the Senate Committee on Commerce, Senate Committee on Aeronautical and Space Science, Senate Committee on Commerce, Senate Committee on Foreign Relations, Antitrust Subcommittee of the House Judiciary Committee, Subcommittee on Monopoly of the Senate Select Committee on Small Business, and Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee.

Pressures of Individual Congressmen and Staff. Although it is difficult to measure their impact, the actions of individual members of Congress are frequently influential in shaping the course and direction of FCC policy. Newton Minow pointed out that "it is easy—very easy—to confuse the voice of one congressman, or one congressional committee, with the voice of Congress."[28] Professor Kenneth Culp Davis contends that day-to-day influences of members of Congress may be even more important to agencies than committee hearings, and that these individual influences seldom come to public attention. He cites as an example private meetings between the Chairman of the House Commerce Committee and the Chairman of the FCC for the purpose of "working over" CATV regulations prior to their being issued by the Commission.[29]

The influence of Congressional staff members in this process should not be overlooked. The staff members of the relevant Congressional committees maintain a close liaison with the FCC and impart the views and expectations of committee members to the

Commissioners, personnel of the FCC's Legislation Division, and other Commission staff members. Although they usually have low visibility, such committee staff members, especially lawyers, play a crucial role both in shaping the body of laws and in overseeing the activities of regulatory agencies.

Control by Legislative Inaction. Inaction by the Congress may in many instances have as great an impact on the Commission and its making of policy as has the enactment of legislation. Professor Louis Jaffe contends that where Congress is unable to determine a policy on issues which demand Congressional expression, the failure to act should be viewed as an abdication of its legislative authority and a delegation of power to the agency. Jaffe points out that it is not unusual for a problem to be left to administrative determination "because the issue is politically so acute, so much a matter of conflict that Congress is unable to formulate a policy."[30] Such irresolution, however, has not prevented Congress from later responding to a Commission interpretation with hostility. Even when Congress has been willing to delegate important decisions to the Commission, it has reserved the right to criticize and oppose these decisions. One of the tasks of the FCC, then, is to make crucial decisions when the *wishes* of Congress are quite unclear, but its *presence* is very real.

CONGRESSIONAL ACTIVITY RELATED TO BROADCASTING, 1969–1970

In the course of examining the multiple roles of Congress, we have identified eight different types of Congressional control or influence on broadcast regulation. We now turn to the record of the 91st Congress to review in some detail Congressional activities concerning broadcast regulation during the two-year span, 1969–1970. Instances of almost every form of Congressional involvement with broadcast regulation can be uncovered even in this relatively short time period.

Control by Statute. Except for the ban on broadcast advertising of cigarette commercials, Congress enacted no major laws affecting the broadcast industry during the two years, 1969 and 1970. The sole law passed—the Public Health Cigarette Smoking Act of 1969—was

more closely related to health than to communications, although it had a serious impact on the advertising revenues of the broadcast industry.

The Power of the Purse. The FCC decided to adopt a new fee schedule following a suggestion contained in the House-Senate Conference Report on the FCC's budget for fiscal year 1970.[31] This report urged the Commission to adjust its fee structure "to fully support all its activities so that the taxpayers will not be required to bear any part of the load in view of the profits regulated by this agency."[32] In February 1970, Chairman Burch promised members of a Senate Appropriations Subcommittee that the FCC's new fee schedule would be adopted by July 1, 1970. In a report dated May 7, 1970, the House Committee on Appropriations commended the FCC "for steps it has taken to increase its filing fees and service charges to recover operating costs."[33]

On June 24, 1970, the Senate Appropriations Committee commended the FCC for proposing to raise its fees but urged the Commission "to proceed with caution in this regard in order to insure that the new fees will be equitable in every respect and will not make operations prohibitive or unduly burdensome for the smaller licensees, and in particular, those located in the less-populated areas of the country."[34] On July 1, 1970, the FCC adopted the new fee schedule designed to produce revenues equaling its $24.9 million budget for fiscal year 1971, and revised the fee schedule to lessen the impact on broadcasting stations in smaller markets.[35]

The hearings on the FCC's budget give Congressmen an annual opportunity to make criticisms and suggestions on all aspects of FCC policy. During 1969 and 1970, both the House and Senate Appropriations Subcommittees devoted a substantial part of their budget hearings to questioning FCC Commissioners on steps taken to provide relief to land mobile radio users. A separate paragraph was included in the Report of the Senate Committee on Appropriations criticizing the FCC for failing to provide adequate relief for land mobile services and urging the FCC to "make further and more effective efforts to accomplish the relief which it has assured the committee is its goal."[36] In February 1970, the FCC formed a Spectrum Management Task Force to develop and carry out a program of decentralized frequency analysis and management for land mobile services. Three months later the Commission allocated an

additional 115 MHz of spectrum space for land mobile use and also adopted a plan permitting the land mobile services to use two of the lower UHF television channels in and near the largest 10 urban areas of the country. Thus the Congress used appropriations hearings to persuade the FCC to come to a quicker resolution of the land mobile controversy than it would otherwise have done.

The Spur of Investigations. Unlike previous Congresses where the entire operation of the FCC was reviewed in lengthy and well-publicized hearings by hostile committees, the investigations conducted during the 91st Congress were directed to specific subjects and primarily held in closed sessions. In two instances, the Commission was prompted to reverse its decisions as a direct result of Congressional investigations. In a report released May 19, 1969, the Special Subcommittee on Investigations of the House Interstate and Foreign Commerce Committee criticized the FCC's grant of applications filed by D. H. Overmeyer to transfer five UHF construction permits. The report charged that the FCC's failure to hold public hearings on Overmeyer's transfer applications "demonstrates the shocking abdication of regulatory responsibility and disregard for the public interest which have characterized Commission performance under the Communications Act and its own rules and policies." [37] In August 1970, the FCC reopened the Overmeyer case for a hearing to determine whether Mr. Overmeyer misrepresented his out-of-pocket expenses so as to make a forbidden profit on the transfer of the construction permits.[38] The Commission acknowledged that the hearing order resulted from information developed by the Investigations Subcommittee.

The House Special Subcommittee on Investigations also provided the FCC with information which ultimately led the Commission to reverse the decision it had made on October 3, 1969, to renew the licenses of WIFE AM-FM, Indianapolis. Immediately after the FCC announced the grant of the renewal applications, the Subcommittee requested that the Commission furnish it with all the records involved in the WIFE proceeding. Even after receiving a subpoena from the House Investigations Subcommittee, however, FCC Chairman Rosel Hyde refused to furnish the records. On October 31, 1969, Hyde's last day in office, the Interstate and Foreign Commerce Committee adopted a resolution proposing that he be cited for contempt of Congress. Following this threat, the Investigations Subcommittee was furnished with the WIFE records on

November 3, 1969, the expiration date for FCC reconsideration of the decision. No further action was taken on the proposed contempt citation. Later, the Subcommittee decided to defer its investigation until the FCC had examined the charges concerning the licensee. In early December 1970, the FCC designated for hearing the license renewal applications of WIFE AM-FM and other stations under the same ownership to determine whether the licensees had made misrepresentations to the public or had otherwise "so conducted themselves as to raise questions as to their qualifications to remain licensees." [39]

Based on the activity of the House Investigations Subcommittee, Star Stations of Indiana, Inc. (the owners of WIFE AM-FM) filed a petition for reconsideration in late December 1970. They requested that the Commission disqualify itself, terminate the proceeding, and grant the renewal applications of the five stations for the purpose of assigning the licenses to qualified buyers. Star Stations contended that Congressional activities in connection with the renewals had deprived the Commission of the impartiality and independence necessary to proceed with the hearing in a quasi-judicial capacity. Star Stations further argued that the intimidation of the Commission which began with the attempt to cite Chairman Hyde for contempt of Congress and which culminated with a secret meeting between Chairman Burch and Congressman Staggers on February 19, 1970, overshadowed the proceeding with a cloud of unfairness which jeopardized Star's right to an impartial hearing. In a Memorandum Opinion and Order released on June 29, 1971, the Commission rejected Star's petition. Thereafter, the U.S. Court of Appeals for the District of Columbia Circuit denied a motion to stay the hearing and dismissed Star's appeal.

The Power of Advice and Consent. In October 1969, the Senate Commerce Committee confirmed the nominations of Dean Burch and Robert Wells to be members of the FCC. The only public witness appearing at the confirmation hearings was Absalom F. Jordan, Jr., chairman of Black Efforts for Soul in Television (BEST), who opposed both nominees on the ground that they would retain the "white racist orientation of the broadcast industry." What the FCC needs, Jordan said, is a black Commissioner to help push American broadcasting toward what BEST regards as necessary radical changes in the treatment of issues and personalities. In May 1970, spurred in part by the filings of BEST and charges of racism, the

FCC adopted detailed rules and reporting requirements on equal employment opportunity practices of broadcast licensees. Senator Pastore, reacting to pressure applied by BEST at the confirmation hearings, was instrumental in persuading President Nixon to nominate a black (Judge Benjamin Hooks) as a Commissioner (see Footnote 23).

Continuing Watchfulness of Standing Committees. In addition to hearings at the beginning of the 91st Congress on the over-all activities of the FCC, the House and Senate Commerce Committees and their Communications Subcommittees held more than 70 days of hearings on subjects ranging from violence in television programming to permanent authorization of subscription television.

Perhaps the most significant activity of the Senate Communications Subcommittee was its review of the FCC's handling of competitive applications at renewal time. This subcommittee held eight days of hearings on S. 2004, a bill introduced by Senator John Pastore, Chairman of the Subcommittee, which would bar competing applicants for broadcast licenses at renewal time unless the licensee first had his license revoked by the FCC for failure to serve the public interest. The bill was co-sponsored by 25 Senators and had been introduced in the House by 114 Representatives. Spurred in large part by Congressional pressure, the FCC adopted a policy statement on January 15, 1970, which preserved the opportunity for filing rival applications but provided that a station's license would be renewed if the licensee was able to show that his program service had been "substantially attuned to the needs and interests" of his area and that his operation was not otherwise characterized by "serious deficiencies." [40] Senator Pastore indicated general approval of the Commission's policy statement and decided to defer taking any further action on S. 2004 until the policy had a fair test.[41]

Reports of the Commerce Committees also had an impact on FCC policies. The Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce issued a report entitled "The Fairness Doctrine and Related Issues," which examined the FCC's policies on the presentation of controversial issues of public importance, broadcast defamation and the equal time provisions embodied in Section 315 of the Communications Act.[42] After finding that the FCC's policy standards and interpetation of the Fairness Doctrine are excessively vague, the report recommended that once the Supreme Court acted in the then pend-

ing *Red Lion* case (*Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 372), the FCC should conduct a definitive rulemaking hearing on the entire subject of the Fairness Doctrine in order to promulgate comprehensive rules covering the extent and administration of the Doctrine. In June 1971, the FCC announced the initiation of a broad-ranging inquiry into the effectiveness of the Fairness Doctrine.

Multiple Supervision by Other Committees. More than 25 other committees and subcommittees of the Congress attempted to review some aspect of the FCC's regulatory practices and policies during 1969 and 1970. In many cases, this multiple supervision led to duplication and overlapping of efforts. The FCC's regulation of CATV, for example, was studied by the Judiciary and Commerce Committees of both houses. The adequacy of user fees was pursued not only by the Senate and House Appropriations Committees, but also by the Special Studies Subcommittee of the House Government Operations Committee. Hearings on satellite communications were conducted by the Subcommittee on National Security Policy and Scientific Developments of the House Foreign Affairs Committee as well as by the Subcommittee on Space Sciences and Applications of the House Science and Astronautics Committee.

A number of Congressional committees, including the Government Operations, Judiciary, and Commerce Committees of both houses, held hearings in 1969 and 1970 on legislation to provide Federal assistance for the establishment of independent consumer agencies and legal offices to provide more effective representation of consumer interests. Several of the hearings focused on the extent to which the FCC was representing consumer interests. Responding to this Congressional concern, the FCC's Procedure Review Committee proposed the establishment of an Office of Public Counsel to aid members of the public in filing applications, pleadings, and complaints, and it recommended the publication of a booklet explaining how members of the public may exercise their rights under FCC rules.

Congressional committees used a variety of techniques in attempting to influence FCC action. The Subcommittee on Activities of Regulatory Agencies of the House Select Committee on Small Business obtained an FCC license for a developmental land mobile station and demonstrated the equipment for this station at a special hearing. The FCC Commissioners attended the hearing and were urged to sit with the Congressmen at the Subcommittee table and

hear testimony on the need for the allocation of additional radio spectra for land mobile use.[43] Another instance involved the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee. In March 1970, the FCC formed a Procedure Review Committee and published a notice in the Federal Register soliciting suggestions for reform of its operations. Meanwhile, the Subcommittee on Administrative Practice and Procedure had sent each FCC Commissioner a questionnaire inquiring about the extent of citizen involvement. When the notice appeared in the Federal Register, the Subcommittee responded by printing the results of the questionnaire and filing written comments with the FCC.

In December 1969, the Space Sciences and Applications Subcommittee of the House Science and Astronautics Committee held hearings to assess current space communications technology and the applications of satellites to domestic U.S. communications. In a report released on March 3, 1970,[44] the Subcommittee asserted that governmental indecision had delayed the efficient adoption of new telecommunications technology. The Subcommittee concluded that the present utilization of domestic satellites is "patently unsatisfactory." Later that month, the FCC announced that it would accept applications for domestic satellite systems.

Pressures of Individual Congressmen and Staff. From time to time, individual Congressmen may espouse a particular cause with such vigor that their words alone have an impact on broadcast regulation. In April 1970, for example, Representative Paul Rogers wrote letters to pharmaceutical companies, major television networks, the National Association of Broadcasters, the FTC, and the Food and Drug Administration seeking to restrict television advertisements of mood drugs. Late the following fall Rogers announced that the NAB had adopted guidelines, to become effective February 1, 1971, on advertisements for nonprescription drugs, including stimulants, calmatives, and sleeping aids.

Senator John L. McClellan, Chairman of the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, in the Fall of 1969 sent a questionnaire to motion picture producers and the Motion Picture Association inquiring whether they contemplated selling to television stations films that had been classified as unsuitable for viewing by minors. He sent similar questionnaires to the National Association of Broadcasters, the National Cable Television Association, the networks, and commercial televi-

sion stations inquiring whether they believe that the showing of such films on television would be consistent with their responsibility to act in the public interest. As a result of Senator McClellan's prodding, many stations reconsidered their policies and decided against airing films in this category.

During the 91st Congress, the legal staff of the Special Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce was primarily responsible for instituting major investigations into such controversial subjects as trafficking in broadcast construction permits, deceptive broadcast programming practices, and the processing of license renewal applications.[45]

On January 19, 1970, Senator Thomas McIntyre introduced S. 3305, the Independent Media Preservation Act, a bill which he stated would "alleviate the trend toward concentration in the newspaper and broadcast media in the United States" by prohibiting the ownership of a broadcast station by a daily newspaper located in the same standard metropolitan statistical area. Prompted by McIntyre's views—and especially by the Antitrust Division of the Justice Department—the FCC instituted a rulemaking proceeding in March 1970. The proceeding was initiated to consider the adoption of rules prohibiting daily newspapers from owning an AM-FM broadcast combination or a television station in the same market.

Control by Legislative Inaction. Congressional failure to act on the issue of subscription television (STV) during the 91st Congress allowed the FCC to authorize STV on a permanent basis. In the previous Congress, the House Committee on Interstate and Foreign Commerce had adopted resolutions requesting that the FCC defer final consideration of STV operations. However, in the 91st Congress, the House Commerce Committee was almost evenly divided on this issue and the failure of the Congress to act resulted in the FCC's issuance of a final order authorizing STV stations in certain markets. Hearings on the FCC's pay television decision were conducted by the House Subcommittee on Communications in November and December 1969. After a dispute between the Communications Subcommittee—which essentially favored the proposed FCC rules—and opponents of pay TV on the full committee, the Commerce Committee by a vote of 15 to 13 approved a bill which would allow pay TV operations under much more restrictive regulations than those favored by the Subcommittee and the FCC. However, no further action was taken on the bill and in August

1970 the FCC authorized the first technical system for pay TV by granting advance approval to Zenith Radio Corporation's Phonevision System.

As noted in Chapter 2, the Congress, by its failure to act, permitted the creation of an Office of Telecommunications Policy to serve as the President's principal adviser on domestic and international telecommunications policy. Although fears of unseemly White House influence on the FCC were voiced, neither the Senate nor the House voted to disapprove Nixon's Plan within 60 days after its submission, and it automatically became effective in April 1970. (It is interesting to note that the House Government Operations Committee had issued reports in 1965, 1966, and 1967 urging the President to submit a reorganization plan to the Congress "to reconstitute the functions and responsibilities of the Director of Telecommunications Management in a separate office in the Executive Office of the President.") [46]

In a field such as communications, where the interests of powerful industry forces frequently collide, nothing is more unsettling to many lawmakers on Capitol Hill than the prospect of making a law! Thus, rather than enact new laws or amend the Communications Act, the Congress has preferred to use a variety of informal techniques in directing and overseeing the activities of the FCC. Such informal controls are naturally more pervasive since they are not subject to review by the whole Congress and enable legislators to advance personal or constituent interests without the need for a full-scale political battle. Hearings, investigations, and studies provide the Congress with an effective means of assuring that the FCC is constantly aware that it is an "arm of the Congress."

NOTES

[1] Newton N. Minow, *Equal Time: The Private Broadcaster and the Public Interest* (New York: Atheneum, 1964), p. 36.

[2] Robert S. McMahon, *The Regulation of Broadcasting,* Study made for the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Congress, 2nd Session, 1958, p. viii.

[3] Louis M. Kohlmeier, Jr., *The Regulators: Watchdog Agencies and the Public Interest* (New York: Harper & Row, 1969), p. 67.

[4] These policy controversies are examined in Chapters 7 and 8.

[5] William W. Boyer, *Bureaucracy on Trial: Policy Making by Government Agencies* (Indianapolis: Bobbs-Merrill, 1964), p. 46.

[6] Roger G. Noll, *Reforming Regulation* (Washington, D.C.: Brookings Institution, 1971), p. 35.

[7] Minow, Book Review of William Cary, *Politics and the Regulatory Agencies, Columbia Law Review*, LXVIII (1968), 383–384.

[8] Minow, *Equal Time*, p. 35.

[9] Boyer, *Bureaucracy on Trial*, p. 42.

[10] "Station-Ownership Ties in the 92nd Congress," *Broadcasting* (May 24, 1971), p. 58.

[11] Quoted in Bruce Thorp, "Washington Pressures," *National Journal* (August 22, 1970), p. 1809.

[12] Robert MacNeil, *The People Machine: The Influence of Television on American Politics* (New York: Harper & Row, 1968), p. 243, citing Bernard Rubin.

[13] *Ibid.*, p. 246.

[14] *Ibid.*, p. 243.

[15] Members of Congress often find that they can exploit the natural differences between affiliates and networks, permitting floor speeches that are critical of national programming or news coverage while simultaneously finding the local broadcaster's efforts praiseworthy. Similarly, Vice President Agnew has primarily criticized the networks rather than individual stations.

[16] Exceptions to this generalization will be examined in Chapter 6, which deals with the All-Channel Receiver Law, and Chapters 7 and 8, which probe the attempts by Congress to pass bills dealing with commercials and license renewal procedures.

[17] Louis Jaffe, *Judicial Control of Administrative Action* (Boston: Little, Brown, 1965), p. 48.

[18] Carl J. Friedrich and Evelyn Sternberg, "Congress and the Control of Radio-Broadcasting," *American Political Science Review*, XXXVII (December 1943), 807.

[19] Cary, p. 4.

[20] Emery, *Broadcasting and Government*, pp. 395, 396.

[21] *Ibid.*, p. 400.

[22] Edwin G. Johnson, "Carrying Coals to Newcastle," *Federal Communications Bar Journal*, X (1949), 183.

[23] The views of key Senators are given great weight in the President's selection of a nominee. In response to a question posed at the confirmation hearing of Judge Benjamin Hooks as to background on the steps leading to the appointment of Hooks, Senator Howard Baker (R.-Tenn.), ranking minority member on the Senate Communications Committee, said that the idea of naming a black originated with Senator Pastore and that the two of them later found a "sympathetic ear" for the proposal at the White House. Baker looked for a candidate in Tennessee, one who was not a Republican (the FCC had its full statutory complement of four Republicans) and who would not be "a special-interest commissioner." He selected Judge Hooks, whom he had known for a long time, and discussed his nomination with Senator Pastore and then the White House. "Road Looks Clear for Hooks, Wiley," *Broadcasting* (May 29, 1972), pp. 28, 29.

[24] Senator Tobey of New Hampshire launched a one-man crusade

against a favorable report on the renomination of Colonel Thad Brown in 1940 and used the hearings to condemn Brown for his handling of monopoly charges against the networks. Commissioner Brown's renomination was rejected by the Senate. Friedrich and Sternberg, "Congress and the Control of Radio Broadcasting" pp. 806–807.

[25] Nathaniel L. Nathanson, "Some Comments on the Administrative Procedure Act," *Northwestern Law Review*, XXXXI (1946), 421, 422.

[26] William L. Morrow, *Congressional Committees* (New York: Scribner's, 1969), p. 162.

[27] Cary, p. 137.

[28] Minow, *Equal Time*, p. 35.

[29] Kenneth Culp Davis, *Discretionary Justice*, (Baton Rouge: University of Louisiana Press, 1969), p. 148.

[30] Jaffe, *Judicial Control of Administrative Action*, pp. 41, 43–44.

[31] H. R. Rept. No. 91–649, filed November 17, 1969.

[32] An earlier report of the House Committee on Appropriations dated June 19, 1969 (H. R. Rept. No. 91–316) called upon the FCC to review and adjust upward its charges with the objective of making the activities of the Commission more self-sustaining.

[33] H. R. Rept. No. 91–1060.

[34] S. Rept. No. 91–949.

[35] *Schedule of Fees*, 3 F.C.C. 2d 880 (1970).

[36] S. Rept. No. 91–521, issued November 6, 1969.

[37] H. R. Rept. No. 91–256.

[38] *D. H. Overmeyer Communications Co., Inc.*, 25 F.C.C. 2d 442 (1970).

[39] *Star Stations of Indiana, Inc.*, 25 F.C.C. 2d 442 (1970).

[40] *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C. 2d 424, 425 (1970). An extensive discussion of the events preceding and following the FCC's policy statement is contained in Chapter 8.

[41] See H. H. Goldin, "Spare the Golden Goose—The Aftermath of WHDH in FCC License Renewal Policy," *Harvard Law Review*, LXXXIII (1970), 1014, 1020.

[42] H. R. Rept. No. 91–257.

[43] In hearings held in June and July 1969 and in a report released in April 1970, the Subcommittee on Activities of Regulatory Agencies of the House Select Committee on Small Business urged the FCC to "press forward with all possible vigor to provide adequate, additional usable frequency spectrum for land mobile radio users." As noted earlier, the FCC, in May 1970, provided some relief for land mobile radio users by permitting sharing of one or two of the lower seven UHF channels in the 10 largest areas where the channels are not assigned and by reallocating UHF television channels 70-83 for land mobile use.

[44] H. R. Rept. No. 91–859.

[45] Remarks of Rep. Paul Rogers on the death of Robert W. Lishman, Chief Counsel of the Special Subcommittee, 116 *Congressional Record* 11949 (daily ed., Dec. 17, 1970).

[46] H. R. Rept. No. 91–930, p. 5.

4

Broadcast Regulation: An Analytic View

It is remarkable that the independent regulatory commissions, and in particular the FCC, have never been subject to rigorous, analytical examination. Rather, the literature on regulatory commissions is replete with formalistic, legalistic, and purely descriptive accounts of how such agencies are structured, what their legal powers and authority are, and what they have done or not done. One looks in vain for studies of the independent regulatory commissions which approach their inquiry with theoretical and conceptual vigor.

Yet, theory is both useful and necessary in order to organize the abundance of data, phenomena, and information concerning the regulatory process and to allow for the development of meaningful generalizations rather than the continued accumulation of episodic descriptions. Theory serves to link the specific to the general, to direct attention to politically significant events and relationships, and to integrate such findings by the use of concepts, generalizations, and hypotheses. Former FCC Commissioner Lee Loevinger has commented, "mere observation will not suffice to establish the relations between institutional structures and functions and social values." Scientific analysis, he maintains, "requires both observations and coherent theories to direct and relate the observations"—"theories without observations are mere illusion; observations without theories are pure confusion."[1]

A SYSTEMS ANALYSIS APPROACH TO BROADCAST REGULATION

This chapter will present the politics of broadcast regulation in terms of an analytical framework or model termed "the FCC Policy-

Making System." The purpose of this examination is to demonstrate the usefulness of a "systems approach" to the regulatory process and to suggest to scholars a framework for conceptually oriented research in this area.

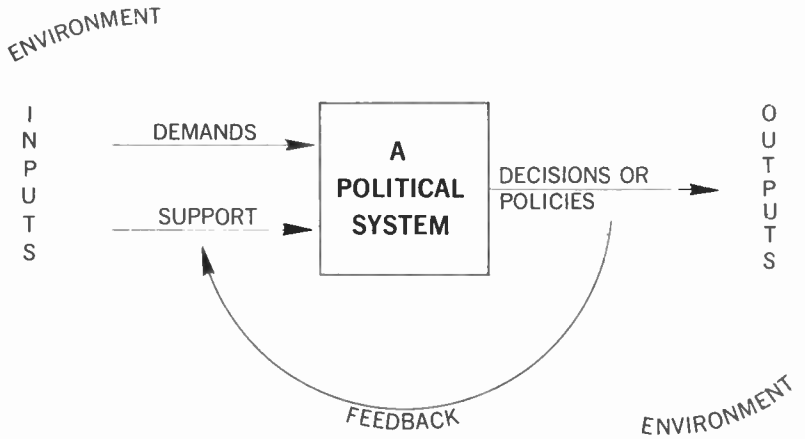
As is the case with any model, the model utilized here is an analogy or metaphor—a schematic representation of the way things are conceived to be. As such, it is by definition a simplification of reality. Yet to simplify is to streamline, to strip off surface complexities in order to show the essential elements of a system. Because virtually any economic or political process may be graphically analyzed in terms of this systems approach, it also affords a uniform way to evaluate and compare a variety of different complex situations or processes. A model directs attention to, and focuses it on, key relationships and activities, and, by doing so, helps define order in the multiple phenomena of the subtleties of the real political world. An analytic system of this type is, in the words of Robert A. Dahl, "an aspect of things in some degree abstracted from reality for purposes of analysis." [2] Its primary test is not whether it is elegant or neat, but whether it fosters an understanding of the political process or processes being studied.

Figure 1 presents a simplified and general version of an input-output systems model. This particular model was created by political scientist David Easton as part of his development of a general systems theory of political processes.[3]

In this basic model, policy-making (or in Easton's terms, the authoritative allocation of values for the society as a whole) occurs through the conversion activities of a political system which transforms *inputs* of *demands* and *support* concerning various policy alternatives (including the alternative of no policy) into policy outputs. This conversion occurs in a "core" of authoritative decision-making activities or agencies (the middle box in Figure 1), and results in *outputs* of public *policies* and *decisions* which themselves return, by means of a *feedback* link, through the general *environment* to constitute and influence new inputs.

Figure 2 offers an elaboration and adaption of the basic model presented in Figure 1. In this representation of "the FCC Policy-Making System," input-output systems analysis is utilized in a specific policy area. The system here is no longer a general one, but rather a subsystem of a larger political system. Only those participants which regularly and significantly involve themselves in regu-

FIGURE 1. THE POLITICAL SYSTEM



latory policy-making are included in Figure 2, and it incorporates only those aspects of their activities having to do with broadcast regulation.

Unlike Figure 1, the "core," or middle part, of Figure 2 is opened up and its component elements identified. The six recurring participants in the regulatory process--which are identified and discussed in Chapters 2 and 3—are the authoritative decision-making agencies within the "core." In addition, Figure 2 charts the various channels of influence among these six participants. It is significant that there is no one pathway through this core of the FCC policy-making system, and any one of various different routes necessarily involves multiple participants.

The role of three of the principals (the White House, courts, and citizens groups) is usually less immediate and direct than that of the other three (the FCC, Congress, and industry). Thus the primary channels of influence, information, and contact are traced among these three points of the outer triangle in Figure 2. And, because ultimately it is the FCC which performs the vital task of converting demands into outputs, it must be considered the key participant in the system. Hence its position in Figure 2 at the point

adjacent to *authoritative outputs*. One might also say that the FCC is the final recipient of all inputs and appears graphically to be at the spot where they converge.

In addition to suggesting the interplay among the participants in the policy-making process, Figure 2 places this "core activity" in the context of an input-output system essentially similar to Figure 1. This model, then, is a conceptualization of the sequential process through which inputs of policy demands and supports are converted into outputs of authoritative decisions about broadcast regulatory policy. The outputs are FCC rules and decisions, which bestow rewards or impose deprivations upon the various affected interests. Reactions to these system outputs are subsequently channeled back through feedback loops to become new input demands and supports relevant to future policies.

This conversion process, of course, does not operate in a political vacuum, but rather is carried out in the context of an *environment* shaped by such factors, identified in Chapter 1, as the historical development of broadcast regulation, the basic characteristics of broadcasting, and legal prescriptions. The environment of broadcast regulation also encompasses other factors such as generalized public attitudes toward broadcasting and governmental regulation and the actions of related systems—the Federal Trade Commission, for example—which may at times inspire and influence the FCC policy-making system. These various contextual factors together not only constitute constraints upon the conversion process, but also determine to a considerable degree the character and substance of many of the input demands and supports themselves.

In the course of the evolution of public policy, various *demands* and *supports* concerning policy alternatives are transmitted to the different participants involved in the making of public policy. Some inputs are specific, such as a detailed recommendation for the frequency shift of a broadcast service,[4] whereas others are more general, such as the "mood" cast over independent regulatory commissions by a President, or by the current public image of a regulatory agency. It is important to realize, too, that the system does more than merely respond to demands; it also molds both political demands and policy preferences.

Outputs are the authoritative decisions resulting from interaction among those various participants represented in the central core

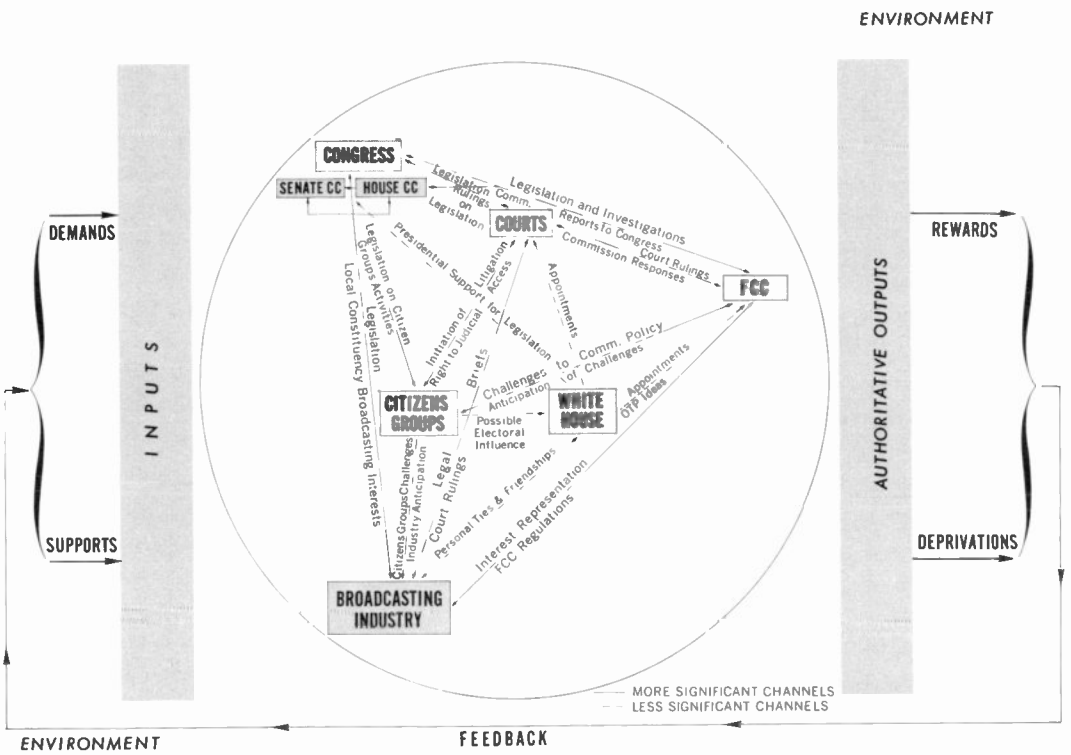


FIGURE 2. THE FCC POLICY-MAKING SYSTEM

area of the FCC policy-making system. These may take the form of legislation, such as the statutory requirement that all television sets sold after a certain date have UHF as well as VHF receiving capability.[5] Or they may take the form of agency decisions—for example, that broadcast stations should be compelled to follow voluntary industry standards limiting commercial time,[6] or that incumbent licensees should have preferred status in renewal challenges.[7]

Conflict over outputs (either actual or anticipated) is an inevitable feature of a policy-making system which allocates scarce values. There is a distinction, however, between conflict over policy outputs, and severe stress threatening the survival of the system itself. When outputs fail to manage the stress present in the system, output failure results. But, although conflict over policy outputs is unavoidable as long as scarcity of rewards continues, output failure is not inevitable. The ability of a system to produce outputs productive of its own survival, and the willingness of participants in a system to act to promote systematic survival, are important variables in the analysis of a political system.

Policy *outputs*, the immediate policy decisions, should be distinguished from policy *outcomes*, which are the longer term consequences of such decisions. As Easton puts it, "an output is the stone tossed into the pond and its first splash; the outcomes are the ever widening and vanishing pattern of concentric ripples. The actual decisions and implementing actions are the outputs; the consequences traceable to them, however long the discernible claim of causation, are the outcomes." [8] The "success" of an output, then, is measured by means other than the degree to which it meets an immediate social need; it also includes the effect of the outputs on patterns of present and future inputs.

Where a policy output fails to meet expectations of the affected parties or is seen as an inappropriate or inadequate solution to the problems giving rise to such expectations, the output is likely to be overturned by subsequent actions as frustrated demands rise anew. Again, if the system is perceived as being unresponsive to the expectations of key participants over a substantial period of time, the system itself then may prove vulnerable. In either case, it is the feedback loop which links policy outputs with inputs, and it is the policy-making system which converts these new inputs into future policy decisions.

AN EXAMPLE OF THE INPUT-OUTPUT SYSTEM

During the television freeze of 1948–1952, when no new television stations were being authorized pending a re-examination of the TV frequency allocation table, residents in states which had no television service demanded that the freeze be partly lifted. These demands were transmitted by the Colorado Congressional delegation which made strong representations both on Capitol Hill and to the FCC for interim channel assignments in areas without television. Support for the existing freeze, however, arose from some broadcasting interests (especially those with stations already on the air) desiring a careful study of possible interference prior to the authorization of additional stations.

Colorado's interests were well represented at the time by its Senator, Edwin C. Johnson, who held the influential chairmanship of the Senate Commerce Committee. Despite Johnson's pivotal position with its built-in access both to the FCC and to the entire Senate, the Commission refused to make interim TV assignments. The resulting policy output deprived Colorado of immediate television and rewarded those who felt that additional TV service had to be based on an allocation table designed to protect (at least from the standpoint of spectrum engineering) existing broadcasters. Interests favoring more TV stations, however, then shifted their efforts from seeking interim television assignments to requesting that the Commission bring its study of the TV allocation table to a speedy conclusion. Thus, the feedback process provided new inputs for the FCC as it tried to deal with the development of postwar television.

GENERAL PATTERNS IN FCC POLICY-MAKING

The operation of the FCC in specific instances of regulatory policy-making is inherently unique; each policy-making situation is likely to differ in some important respect from all others. However, certain recurring patterns in the politics of broadcast regulation can be identified. Six such patterns in the FCC policy-making process are proposed: [9]

1. Participants seek conflicting goals from the process. Pluralism and dispersion of power in policy-making do not by themselves

suggest that the process is typically a struggle for control or influence. Conceivably, the participants in such a process could share common perspectives concerning what is to be done. Such is rarely the case, however, in the FCC policy-making process. As the case studies in Chapters 5 through 8 will show, the gains of one set of participants are usually won at the cost of the interests of another. The policy demands of different groups are seldom compatible, and they must usually compete for scarce rewards.

2. Participants have limited resources insufficient to dominate the process in hierarchical fashion. In a pluralistic complex such as the one outlined in Figure 2, policy-making power tends to be somewhat divided and dissipated. Although the FCC frequently initiates policy proposals, it lacks the ability to implement them singlehandedly. To prevail, it must have significant support from other participants. Similarly, none of the other five participants has hierarchical control over the policy-making process. In such a system, policy-making results from the agreement—or at least the acquiescence—of all participants, not from domination by one.

3. Participants have unequal strengths in the struggle for control or influence. Inequality among participants can arise because one side is inherently stronger, cares more, or develops its potential more effectively. In the 1940's, for example, FM broadcasters had considerably less political strength than established and well-financed AM networks, and their ability to influence the policy-making process was correspondingly affected (see Chapter 5). Favorable public opinion, legal symbols, Congressional allies, and the like are potential sources of strength which participants possess in differing degrees, and which they may use with varying success on different issues.

4. The process follows certain informal rules of procedure, such as policy progression by small or incremental steps rather than by massive changes. One means of minimizing opposition to a policy initiative is to show its close relationship to existing and generally accepted policy. Frequently, earlier actions are cited to prove that the desired change is not an unprecedented step but a logical outgrowth of past concerns and policies. (One of the beauties of administrative law is that precedents can usually be found for almost

any initiative!) Such slow and gradual shifts in policy are not only strategic, but probably inevitable, given the multiplicity of participants with conflicting goals, unequal strengths, and limited resources. The four case studies which follow indicate that the political resources necessary to accomplish significant policy innovations are greater than those necessary to achieve more clearly incremental changes.

5. *Legal and ideological symbols play a significant role in the process.* Throughout the evolution of policy, a recurring theme song of various participants is the legal and ideological implications of alternatives. Some policies are seen as threatening (or protecting) the legal rights of licensees; others may be viewed as destructive (or supportive) of free speech or of the right to private property. Often stock phrases become cherished in and of themselves. In the case of the FCC policy statement on license renewals discussed in Chapter 8, not one citizens group contesting the statement had actually filed a competing license application, but they were profoundly interested in preserving their "right" to do so. They perceived the FCC's expressed concern for "industry stability" as synonymous with indifference to the rights of the broadcast audience. Thus ideological concepts became symbols which superseded real actions in importance.

6. *The dominant pattern in the process is that of mutual adjustment among participants.* Participants in broadcast policy-making do not customarily attempt to destroy one or more of their opponents. Rather, the process is characterized by consensual, majority-seeking activities. This mutual adjustment among participants may occur in a variety of ways, including negotiation, the creation and discharge of obligations, direct manipulation of the immediate circumstances in which events are occurring, the use of third persons or political brokers capable of developing consensual solutions, or partial deferral to others in order to effect a compromise. Only one case study —the advertising controversy—will not show a pattern of mutual adjustment. Possible reasons for this exception will be suggested in Chapter 9.

In the case studies, we will be looking at the politics of broadcast regulation in actual instances involving struggles over policy alternatives. Evaluating each case in terms of the generalizations

just presented, we will see the six participants using their varying, limited (perhaps insufficient) financial, political, and social resources to obtain desired goals in the face of probable or actual opposition from other participants. We will see that, if they wish to be successful—even incrementally—the participants must be relatively moderate in their goals, must respect legal and ideological symbols, and must exhibit a willingness to adjust their positions.

NOTES

[1] Lee Loevinger, introduction to Glendon Schubert, *The Political Role of the Courts: Judicial Policy-Making* (Chicago: Scott, Foresman, 1965), pp. iii–iv.

[2] Robert A. Dahl, *Modern Political Analysis*, 2nd ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1970), p. 9.

[3] See David Easton, *The Political System* (New York: Knopf, 1953), "An Approach to the Analysis of Political Systems," *World Politics*, IX (April 1957), 383–400, *A Framework for Political Analysis* (Englewood Cliffs, N.J.: Prentice-Hall, 1965), and *A Systems Analysis of Political Life* (New York: John Wiley, 1965), p. 247. Figure 1 was presented for the first time in the 1957 *World Politics* article, and can be found there on page 284.

[4] See Chapter 5, "FM Broadcasting Is Smothered With Commission Kindness."

[5] See Chapter 6, "UHF Television: The Fading Signal Is Revived After Only Ten Years."

[6] See Chapter 7, "Commercial Time Fiasco."

[7] See Chapter 8, "License Renewal Challenges: The Non-Independence of an Independent Regulatory Commission."

[8] Easton, *A System Analysis of Political Life*, p. 352. In Figure 2, some of the "outcomes" can be seen as part of the feedback.

[9] The generalizations which follow are adapted from Charles E. Lindblom, *The Policy-Making Process* (Englewood Cliffs, N.J.: Prentice-Hall, 1968).

PART TWO

FOUR CASE STUDIES

5

FM Broadcasting Is Smothered with Commission Kindness

The early history of Frequency Modulation (FM) broadcasting in the United States shows how an important technical innovation was delayed and nearly destroyed by an FCC decision based heavily upon unstated social and economic factors as well as stated technical considerations.

When FM broadcasting developed in the latter part of the 1930's, it promised many advantages over existing AM radio, including: (1) a static-free signal; (2) increased frequency range allowing for high-fidelity broadcasting; (3) the ability to exist quite close to other FM stations on the same frequency without the mutual interference experienced with AM; (4) the opportunity for a significant increase in broadcast competition through large numbers of new stations in a new frequency band; and (5) the resulting possibility of a challenge to network control of programming through diversification of broadcasting services.

These advantages made FM a potential threat to the dominance of existing AM broadcasting. Moreover, as FM developed, it found itself in direct competition—for frequencies, advertisers, audience, and financial support—with television, a technical innovation heavily backed by traditional broadcasting interests. The inability of FM to develop as a major broadcast service in the immediate postwar period, however, was ensured when the FCC in 1945 decided to uproot this sapling medium from its existing frequencies and to move it into a higher band, thereby making obsolete all existing FM receivers and transmitters. This action, together with the growth of television in the late 1940's, compelled FM radio to wait until the late 1950's and early 1960's to find a secure place in American broadcasting.

Full commercial FM broadcasting was initially authorized by

the FCC in May 1940, following a five-year experimental period. The Commission allocated thirty-five channels for commercial FM in the 43-50 mc. range and reserved five more channels in the 42-43 mc. band for educational use. The Commission at this time gave FM a strong endorsement. It noted that engineers in both the manufacturing and broadcasting industries were agreed that FM was highly developed and ready for full commercial development.[1] The Commission, however, hedged on the finality of its decision to authorize FM broadcasting in the 44 mc. band by stating that the effect of skywave interference would not be known until additional stations were placed in operation, and that the use of higher frequencies might be reconsidered after evaluating the performance of these new stations.[2]

Starting with the FCC's authorization in 1940, FM began to make some progress, but its development was halted in 1942 following the United States' entry into World War II. No further licenses were granted, and the scarcity of electronic parts kept many stations already authorized from going on the air. FM was frozen at a critical stage of development during the war years. A total of 47 stations were on the air and approximately 500,000 sets in operation as of June 30, 1944, but there was no immediate hope of expansion. As the end of the war drew near, a massive backlog of over 400 applications for FM stations accumulated and General Electric officials predicted that FM radio sales in the immediate postwar years would be well over five million.[3] Great expectations were held for FM broadcasting. It was heralded as providing not only considerable economic gain, but also "radio's second chance" for diversity and improvement.

During this time, however, the FCC was beginning to reconsider its 1940 spectrum allocations. As it often does, the Commission attempted to determine the sense of the industry about a given problem, and it requested broadcasters to coordinate their views concerning frequency allocations. As a result, the Radio Technical Planning Board (RTPB), an advisory committee of industry engineers, under the chairmanship of W. R. G. Baker of General Electric, was established in late 1943. The task of the RTPB was to recommend an allocation of frequencies, taking into account such problems as the incessant demands of television for additional spectrum space. Panels were established for the various broadcast services, and after much consideration, Panel Five on FM, under

the chairmanship of C. M. Jansky, Jr., a consulting engineer, voted 19-4 against recommending a shift in FM allocations to a higher band. The Panel concluded that there was no technical proof that skywave interference would be reduced if FM were shifted to a different frequency location.[4] Changes were proposed, however, which would considerably expand the existing band to allow 75 commercial FM channels in the 41 to 56 mc. range. This change would have added greatly needed channels to FM while not rendering existing equipment obsolete.

Despite RTPB's recommendations for continued low band FM, the Commission unanimously issued a report on January 15, 1945, suggesting that FM be reestablished in the frequencies between 84 and 102 mc. In a statement accompanying the report, the FCC rejected the conclusions of the RTPB and discounted the efforts of FM broadcasters and the extent of FM set sales up to that time. Using the convenient justification of the "public interest," the Commission declared, "Public interest requires that FM be established in a permanent place in the radio spectrum before a considerable investment is made by the listening public in receiving sets and by the broadcasters in transmitting equipment." [5]

The FCC believed that the technical imperative to move FM into a region free of skywave interference far outweighed the economic readjustments which such a shift would require. However, its expectation that FM would be technically superior in the higher band was not shared by chief exponents of FM. *Broadcasting* magazine, the day following the Commission's January 15 report, commented that "no clairvoyance is needed to deduce that there will be a storm of protest from Major E. H. Armstrong and his disciples for booting FM up the spectrum on grounds of interference." [6]

The technical case against low frequency FM (on which the Commission based its decision) largely rested on the testimony of K. A. Norton of the Signal Corps. Norton believed that "sporadic E" and "F_2 layer" interference would plague FM in the next few years at its present frequency as the sunspot maximum approached. In its *Annual Report for 1945*, the Commission referred to such factors as "ground wave coverage, skywave interference, transmitting and receiving equipment, present investment, and other matters of a minor character." (p. 20). The exact nature of the "other matters" was not specified. Norton testified under a cloak

of military secrecy, making it very difficult to rebut his testimony. During Senate Commerce Committee hearings on *Progress of FM Radio* in 1948, Senator Tobey expressed "a sense of outraged feelings and indignation" about the Norton testimony and later reports based upon it. Indeed, there were serious shortcomings of the 1944 testimony on propagation at various frequencies. In the middle 1930's, Marconi had performed experiments demonstrating that signals in the 40–100 mc. band could be picked up at a greater distance than "theory" would predict—even as late as 1944.

The Norton testimony was generally accepted as true. And, since everybody agreed that moving FM in a few years would be much worse than changing the band before expanded postwar service began, it was argued that such a frequency shift should be undertaken at once. Based on its perception of the political and economic costs of a later move, the Commission felt compelled to make an immediate decision even though conclusive technical data was not yet available.

It is very difficult to judge the merits of the technical arguments of the antagonists in this battle. FCC and industry engineers stated that they were simply trying to give FM the best possible frequencies for broadcasting,[7] yet Major E. H. Armstrong and others who had fought hardest to see FM develop as a wide-band, high fidelity, static-free service wanted FM to stay in the "interference-ridden" lower band. The dispute seems to have revolved on the weight to be given projections of *future* interference. On the one hand, FCC engineers expressed great fear about a dramatic increase in low frequency FM problems in future years; on the other, Major Armstrong held that "we can't predict sunspot interference."[8] This debate was carried out in papers submitted to the 1945 Institute of Radio Engineers Convention by Norton, Armstrong, and E. W. Allen of the FCC's Technical Information Division, and it came to a head in conflicting technical testimony offered at an FCC hearing on February 28 of that year. C. M. Jansky, Jr., Chairman of RTPB Panel Five, told the Commission they could "believe Norton and the errors he has made" or "Dellinger, Beverage, and Armstrong," three of the leading propagation experts in the country.[9] The errors noted by Jansky were mistakes in Norton's figures which Armstrong pointed out, and ones which Norton admitted as errors in November 1947.[10] At the time, however, the Commission was inclined to accept, as the factual basis

for its FM decisions, testimony based on classified (and hence unquestioned) propagation data because of Norton's standing as the FCC's former Assistant Chief Engineer on wartime loan to the Signal Corps.

Between January and May, 1945, the Commission held numerous hearings on frequency allocations for FM and other services. Those testifying or filing briefs for the FM move included manufacturers committed to speedy development of TV (Philco, Crosley, Motorola, and Hallicrafters), the three national radio networks preparing to enter extensively in TV, the Television Broadcasters Association, and individual television broadcasters. Those opposed to changing the FM frequencies included RTPB Panel Five, Major Armstrong, FM Broadcasters, Inc., an established FM regional network (the Yankee Network), manufacturers with FM interests (Zenith, General Electric, and Stromberg-Carlson), and individual FM broadcasters. Throughout this time, however, the Commission continued its official position that it had not made a final decision concerning FM allocations, and that its proposed allocations of January 15 were only suggestions for the purpose of eliciting comments from the affected parties.[11] This, of course, is a very useful position for any flyer of a trial balloon.

On May 16, 1945, the FCC made final allocations for all spectrum space being considered *except* the 44–108 mc. band. The Commission announced that it was considering three alternatives for FM, all of which would entail a shift from its present assignments: 50–68 mc., 68–86 mc., or 84–102 mc. (the proposal of January 15).[12] Each of these plans would give FM 18 mc. instead of the then existing 8 mc., thereby providing more than double the number of possible stations; however, each proposal also would entail a shift of FM into an entirely new band. In effect, the Commission was ruling that FM broadcasting would have to start anew, thereby rendering 500,000 FM radios obsolete.

In its May 16, 1945, announcement, the Commission indicated that it would defer a final decision until the completion of a summer-long series of propagation studies. Since 90% of sporadic E occurs during the summer months, this seemed a favorable time to determine the effect of such interference on FM at various frequencies. The FCC felt it had the time for these tests since the War Production Board had given its assurance that production of AM, FM and TV transmitters or receivers would not be possible

during 1945 and was unlikely during the first quarter of 1946.[13] Subsequently, however, the War Production Board reversed itself and advised the Commission that the manufacture of AM, FM, and TV transmitters might begin at a much earlier date than originally indicated. Thus, the anticipated ending of the war made it necessary for the Commission to come to an immediate decision on FM allocations. The data which had been developed to date suddenly became the basis for decision—without the proposed FM propagation studies.

One significant change in the pattern of forces occurred at this point. The Television Broadcasters Association and the FM Broadcasters, Inc. aligned for the first time, and, with the Chairmen of RTPB Panel Two (allocations), Panel Five (FM), and Panel Six (TV) as well as eleven manufacturers of FM receivers, requested the adoption of the first alternative—the 50–68 mc. band —for FM.[14] Despite the position of the TBA, however, most interests favoring speedy television development continued to support a shift of FM to a higher band and the use of the lower frequencies for television. The late alliance in favor of low-band FM did not succeed, for pressure for a quick resolution of this allocations problem forced the FCC to revert to its earlier stand favoring high-frequency FM. Consequently, in a surprise move on June 27, 1945, the Commission, by unanimous vote, allocated 92–106 mc. for commercial FM,[15] and rejected the second alternative—(68–86 mc.)—as "completely unfeasible." The Commission based its decision against the widely-supported first alternative on the assumption that "the region of the spectrum above 84 megacycles is markedly superior to the region below 68 megacycles with respect to sporadic E." The Commission said that it would not propose to provide "an inferior FM service during the decades to come merely because of the transitory advantage which may be urged for an inferior type of service." [16]

By justifying its action on the basis of the long-range technical interests of FM, the Commission drew upon general support for long-range planning in broadcast regulation, and thereby made opposition to its goal of technical perfection seem shortsighted and greedy. The decision to evict FM from the 44 mc. band on grounds of the undesirability of those frequencies, however, appears contradictory in light of the subsequent assignment of the same frequencies to TV—which is far more susceptible to interference than

FM—and later to the land mobile services—such as police and fire department radios, where static-free service is even more crucial.[17]

Major Armstrong's immediate reaction to the decision was one of resignation: "The allocation has been handed down. Now it's up to all of us to do everything we can to have a service ready for the people at the earliest possible moment." [18] Armstrong, nevertheless, continued to seek limited use of the 40 mc. band for a few regional FM stations and FM inter-city relay. He was also unsuccessful in this endeavor.

Congress took no meaningful action while the FCC was considering the FM shift.[19] Senator Burton K. Wheeler, Chairman of the Senate Commerce Committee, told *Broadcasting* magazine that the allocation of frequencies is generally a technical matter and that Congress gave the Commission full authority to allocate frequencies.[20] The technical nature of the dispute, together with the unquestioned authority of the Commission to act in this area, made Congressional involvement unlikely in the actual decision-making process. Major Congressional investigations did occur later, but not until 1947, and their main function was reviewing what had already occurred. Safety and special broadcasting services had occupied the 40–50 mc. band by that time, and all FM could hope for as a result of Congressional activity was the possibility of a few high-powered relay stations somewhere in the lower band.[21]

The FM shift impeded the growth of this new service for several crucial years while TV developed. In many respects, FM's history can be seen as the story of its rivalry with TV; two innovations were competing for public acceptance (as well as frequency allocations).[22] In the postwar years, the result of this struggle became evident—FM station authorizations fell and TV expanded. In its *Annual Report for 1949* (page 2), the Commission noted "a sudden surge in TV applications and a leveling off of FM requests." Recognizing a further reduction in authorized FM stations in 1950, the FCC concluded that this decline " . . . was largely due to economic problems and uncertainties occasioned by the rapid growth of television and the limited number of satisfactory FM receivers which have been purchased and placed in use." [23] Instead of the expansion anticipated in the late 1940's, there was a gradual reduction in FM service [24] coupled with an extremely small sale of FM sets into the 1950's. Not until the late 1950's and early

1960's, with the high-fidelity boom and the development of FM stereo, did FM broadcasting achieve the stability and growth expected of it fifteen years earlier.

It can be argued that the FCC's policy crippled FM broadcasting at a crucial time. Although the shift provided space for more than twice the number of existing FM stations and thereby permitted the subsequent development of FM some 20 years later, such expansion of FM frequencies was also provided for in virtually all the frequency proposals considered by the FCC in 1945, including the various plans for low frequency FM. The uprooting of FM from its existing band coupled with its reassignment to a band which was technically less desirable (at least in the eyes of FM's promoters) undercut the new service at a key point in its development. Perhaps the most generous assessment of the FCC's role in this case is that the Commission initiated the proposal to shift FM out of genuine concern for the technical future of FM and a desire to provide additional broadcasting channels, but without realizing the destructive impact of such a move upon a developing service. Faced with an imperative to make a decision—any decision that could be legitimized—the Commission settled on its initial proposal of high frequency FM. This was a convenient choice for the FCC, which had been marshalling arguments in favor of this decision for some time, but it was the one least helpful to the future of FM.

The FCC was able to prevail largely because its policies favored powerful, well-established broadcasting interests pushing the development of postwar television. The development of FM broadcasting posed a triple threat—to the dominance of established AM stations and networks, to RCA's hopes for quick postwar development of TV, and to RCA's patents. A delay in the expansion of FM, such as resulted from the FM shift, may thus not have seemed undesirable to these interests. Fred W. Albertson, lawyer and broadcast engineer, believes that RCA wanted to suppress FM: "The best way to pull the rug out from under FM was to throw everything out the window and move the system upstairs. . . . There was a definite effort by RCA to oppose FM."[25] As early as the 1930's RCA had Armstrong remove his experimental FM apparatus from the Empire State Building in order to make way for some experimental television equipment.[26]

Although the FCC's policy was suggested and justified on

purely technical grounds, the potential economic effects were quite clear to most participants, and, in fact, largely defined involvement in the dispute. The interests supporting low-band FM, such as the Yankee Network and the FM Broadcasters Association, however, were far fewer in number and less influential—in terms of their ability to obtain effective access to the FCC—than those well-established interests which stood to gain from the shift, such as RCA, television broadcasters, and television manufacturers. Those groups supporting low-frequency FM were mostly newcomers to broadcasting and as such were powerless to make demands on the FCC policy-making process. Appeals to other participants—such as to Congress or even the public—"to save FM," were unlikely to succeed because of the "purely technical" nature of the dispute. Moreover, none of the participants seriously questioned the legal authority (and functional duty) of the FCC to determine bands of frequencies to be used by various broadcast services. Consequently when the Commission—under the pressure of time—unanimously adopted an earlier proposal based on faulty technical data, FM interests had little recourse but to accept the policy as authoritative. In effect, the feedback process was closed to them. The technical nature of the dispute made it impossible for these dissatisfied groups effectively to oppose a decision supposedly made "in the best interest of FM broadcasting."

NOTES

[1] Quoted in FCC, *Annual Report for 1940* (Washington, D.C.: U.S. Government Printing Office, 1941), p. 66.

[2] Murray Edelman, *The Licensing of Radio Services in the United States, 1927 to 1947: A Study in Administrative Formulation of Policy* (Urbana, Illinois: The University of Illinois Press, 1950), p. 26.

[3] Lawrence Lessing, *Man of High Fidelity: Edwin Howard Armstrong* (New York: J. B. Lippincott, 1956), p. 256. Although a number of these sales would be to replace sets worn out during the war years, the vast majority would represent real expansion for FM.

[4] FCC, "Statement on FM Broadcast Service," in Docket 6651, January 15, 1945. Reprinted in *Broadcasting* (January 16, 1945), p. 17.

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

[6] "Allocation Proposals Announced by FCC," *Broadcasting* (January 16, 1945), p. 13.

[7] Washington interview with E. W. Allen, Chief Engineer of the

FCC, October 18, 1965. In the FCC *Annual Report for 1945,* the Commission expressed the fear of "serious skywave interference nullifying to a great extent the possibilities of interference-free reception expected of FM" (p. 20).

[8] "Military to Confide Secret Data to Radio," *Broadcasting* (March 5, 1945), p. 67. *Broadcasting* observed that Norton's figures ". . . have been attacked as 'theory' not based on fact but on his predictions of what the next sunspot cycle maximum will be." "Shifting of FM Upward in Spectrum Seen," *Broadcasting* (March 19, 1945), p. 18.

[9] *Broadcasting* (March 5, 1945), p. 66.

[10] W. Rupert Maclaurin, *Invention and Innovation in the Radio Industry* (Philadelphia: The Macmillan Company, 1949), p. 231, and "Armstrong of Radio," *Fortune* (February 1949), p. 209. While admitting the errors in his calculations, Norton has maintained over the years that these mistakes did not meaningfully affect his conclusions. See: Kenneth A. Norton, *The Five-Dimensional Electromagnetic Spectrum: A Major Economic and Engineering Research Responsibility (or The Silent Crisis Screams),* partially completed book manuscript, 1967, Vol. II, appendix 21, especially pp. 21.27–21.29.

[11] "FCC Has Open Mind on FM and Television," *Broadcasting* (February 12, 1945), p. 15.

[12] "FM Decision Delayed as FCC Allocates," *Broadcasting* (May 21, 1945), p. 13. Each plan also recognized the "high-fidelity" nature of FM by assigning 100 kc for each station's channel, thus providing for a 15,000 cycles per minute frequency range. A narrower band would have limited FM to a 10,000 cycle range, and thus made impossible FM's later development as part of the hi-fi boom. See Major E. F. Armstrong, "Discussion of Postwar Broadcasting," *FM and Television* (October 1944), p. 24.

[13] "FM Decision Delayed as FCC Allocates," *Broadcasting* (May 21, 1945), p. 13.

[14] "WPB to Lift Construction Bans on V-J Day," *Broadcasting* (June 11, 1945), p. 15. Like the other plans, this alternative would have meant the obsolescence of all existing FM sets and transmitters; however, FM backers preferred the lower band for reasons of greater transmission distance for less cost and the possibilities of direct off-the-air relay for FM networks.

[15] 88–92 mc. were reserved, as they are today, for educational noncommercial broadcasting. 106–108 mc. were added to the FM band on August 24, 1945.

[16] "FCC Report on Allocations from 44 to 108 Megacycles," Docket No. 6651, June 27, 1945, reprinted in *Broadcasting* (July 2, 1945), pp. 64 and 68.

[17] Lawrence P. Lessing, "The Television Freeze," *Fortune,* xxxx (November 1949), 127. See also Lawrence Lessing, *Man of High Fidelity: Edwin Howard Armstrong,* p. 258.

[18] Quoted in "Industry Supporting Decision on FM Move," *Broadcasting* (July 9, 1945), p. 18.

[19] Neither the White House, preoccupied with the war, nor the courts, due to the apparent lack of ambiguity in the Commission's legal authority, involved themselves in these events. The entry of citizens groups into the regulatory process was still a development far in the future.

[20] "FCC Allocates 88–106 Mc. Band to FM," *Broadcasting* (July 2, 1945), p. 13.

[21] Lessing, "The Television Freeze," p. 157.

[22] Maclaurin, p. 230. See also Lessing, *Man of High Fidelity: Edwin Howard Armstrong*. As early as 1940, Paul Porter, then legal counsel for CBS, who became Chairman of the Commission in 1944, stated that "if there is a conflict, as there appears to be in the allocation problem with respect to television and frequency modulation, it is the opinion of the Columbia Broadcasting System that preference should be given to the new public service of television rather than an additional system of aural broadcasting."

[23] FCC, *Annual Report for 1950* (Washington, D.C.: U.S. Government Printing Office, 1951), p. 109.

[24] From the 1946–1950 totals of 55, 238, 458, 700 and 733, the number of "on the air" FM stations began to drop in 1951 and 1952 to 676 and 637, hitting a low, in 1957, of 530 stations—the vast majority of which operated at a loss. Most of these stations did not contribute to program diversity since they simulcast the broadcasts of AM stations.

[25] Washington interview with Fred W. Albertson, October 19, 1965.

[26] See Lessing, *Man of High Fidelity*, pp. 219–223. See also Brinton, *op. cit.*, p. 88.

6

UHF Television: The Fading Signal Is Revived After Only Ten Years

One of the persistent problems plaguing the FCC throughout the 1950's and early 1960's was Ultra High Frequency (UHF) television. Introduced in 1952 on an intermixed basis with VHF stations (Channels 2 to 13) in the same markets, UHF television (Channels 14 and above) was unable to compete with VHF for advertisers or audience. While the Commission repeatedly expressed its concern during this period about the development of UHF television, it failed to implement any reliable plan for strengthening the infant medium. By 1961, the Commission was faced with a failing broadcast service.

The roots of UHF's problems go back to 1945 when the Commission allocated only 13 VHF channels (subsequently cut to 12) to serve all the needs of television. Its action rested on two assumptions: (1) that twelve VHF channels would fill TV's immediate needs, and (2) that when UHF broadcasting became technically feasible, this new service could be introduced as either a supplement to, or a replacement for, VHF television. Neither of these assumptions, however, proved to be true. In 1952, the Commission issued its *Sixth Report and Order* on television allocations, which rejected "all-UHF" television—either nationally or in selected areas—as economically disastrous for existing broadcasting. As a result, although authorized in the same report as a supplement to VHF television, UHF faced crippling competition from established, economically secure VHF stations.

Throughout the 1950's the FCC spent much time dealing with the consequences of this 1952 decision. UHF broadcasting did not prove economically feasible during this period, and the Commission involved itself in a series of controversial, inconclusive, and ultimately unsuccessful moves to remedy this situation. Among

these were: (1) the consideration and rejection, in 1954, of proposals for the "deintermixture" [1] of seven markets currently assigned both VHF and UHF television—these to be made all UHF; (2) the reconsideration, in March of 1955, of five of these deintermixture proposals; (3) the decision, in November of that year, not to undertake deintermixture in these five cases—or in any of the 30 other proceedings which meanwhile had been initiated; (4) the statement, on January 20, 1956, that deintermixture was, of course, a very real possibility and that the FCC was still considering it; (5) the announcement, on June 25, 1956, of plans to deintermix 13 markets (including five twice rejected earlier); and (6) the failure, during the period from 1956 to the 1960's, to implement deintermixture in even the majority of these 13 cases.

Only five of the 13 deintermixtures proposed in 1956 actually were carried out, and these did little to help the UHF industry generally. It is likely, moreover, that the lengthy debates and disputes over UHF during the 1950's served more to point out its sickness to advertisers and viewers than to relieve its problems.

By 1961, the condition of UHF had deteriorated to such an extent that some new initiative seemed required. The production of all-channel television sets capable of receiving UHF as well as VHF channels, had fallen to a record low of 5.5% of all new sets, thus giving the 83 commercial UHF stations still on the air little hope of increasing their already tiny audiences.[2] Lack of audiences made UHF unattractive to advertisers, and lack of advertising revenue spelled an end to operations for many UHF broadcasters. These conditions greatly concerned the "New Frontier" FCC, especially its new Chairman, Newton N. Minow, who had been outspoken about the need to counter the "vast wasteland" of TV's standardized programming fare through the development of additional channels offering program variety and diversity—channels that could come only through an unprecedented utilization of the UHF band.

Stimulated by these concerns and hopes for the future of UHF television, the Commission announced, on July 27, 1961, a package proposal including such varied items as: (1) deintermixture of UHF and VHF in eight markets, (2) a "shoe-horning" in of new VHF assignments at less than the standard mileage separation in eight other cities, and (3) a request for Congressional action on legislation authorizing the FCC to require that all new sets be

capable of receiving both VHF and UHF television.[3] (The idea of dealing with UHF problems by attacking the low level of all-channel receiver penetration was not new. Proposals had been made by the House Judiciary Committee during the 1950's for some type of legislative requirement that all new television sets be capable of receiving both VHF and UHF channels, and in 1957 Congressman Emanuel Celler had suggested that the heart of the problem was in the limited sales of TV sets with UHF receiving capabilities.[4])

If the combination package of the FCC's three different plans seems unwieldy and somewhat contradictory, it was because on specific proposals—such as that calling for renewed efforts at deintermixture—the Commission was split 4-3, and was able to obtain a final unanimous vote on the package only by combining several items.[5] (Such a combination of diverse proposals had one advantage which may have been anticipated by some FCC Commissioners and staff—one part of the package could be easily jettisoned at a later time to aid the prospects of other parts of the package. Such is, in fact, what happened.) The FCC was, however, unanimous in deciding to request all-channel television legislation.[6]

The two most important elements of the 1961 package were the plans for renewed efforts at deintermixture, and the request for all-channel television legislation. This combination created considerable fear that the FCC was moving toward an all-UHF television system. Dr. Frank Stanton of CBS confessed to feeling "nervous when the Commission talks about deintermixture at the same time it talks about all-channel sets."[7] Chairman Minow tried to calm such fears by pointing out that Robert E. Lee was the only Commissioner who then favored a shift of all television to UHF—a possibility which Commissioner Lee himself later described as "an exercise in futility."[8]

While the combination of deintermixture and all-channel television made broadcasters nervous, deintermixture by itself distinctly alarmed them. Unlike the 1955 and 1956 proposals which would, in most cases, have eliminated VHF assignments unfilled as of 1956, the Commission was now proposing to move existing VHF stations to the UHF band. In an editorial on the new deintermixture proposals, *Broadcasting* magazine warned:

There was a time—before the new VHF stations were built in single station markets—when deintermixture would have been workable with

minimal injury to the public and broadcasters. Any change now may be a major wrench and we have the notion that the public will make itself heard.[9]

All eight members of the Congressional delegation for the State of Connecticut, for example, opposed the proposal to shift Hartford's only VHF station to the UHF band.[10] By early 1962, *Broadcasting* reported that almost all Senators and Congressmen representing markets slated for deintermixture were against the plan.[11] Those industry groups opposed to deintermixture were to make good use of such Congressional opposition.

During much of 1961, while controversy developed over deintermixture, little action occurred on all-channel television legislation. In late September 1961, however, Chairman Minow suggested that such a bill might resolve many of the same problems as deintermixture.[12] In January 1962, Minow announced that the all-channel television bill was the FCC's "chief legislative proposal of 1962." [13]

Bills designed to grant the Commission the desired all-channel authority were introduced by Senator John Pastore of Rhode Island, Chairman of the Senate Communications Subcommittee and Representative Oren Harris of Arkansas, Chairman of the House Interstate and Foreign Commerce Committee. Both bills gave the FCC authority to make rules requiring that television sets shipped in interstate commerce have the capacity to receive all channels—UHF as well as VHF—allotted to television. Hearings on this legislation were held by the Senate Commerce Committee in February 1962 and by the House Committee on Interstate and Foreign Commerce in March.

Much of the testimony at these hearings revolved around the topic of deintermixture rather than all-channel television. Many bills had been introduced to halt deintermixture, and strong sentiment seemed to exist in both Commerce Committees for a rider to any all-channel television bill which would specifically prohibit changes in existing VHF assignments designed to achieve the deintermixture of television markets. As *Broadcasting* jubilantly concluded, "It was made clear in both the Senate and House Committee proceedings that there will be no all-channel bill without a commitment to forego deintermixture now." [14]

In an attempt to head off such a legislative prohibition, Chairman Minow testified against any statutory moratorium on de-

intermixture proceedings: "Unless Congress wants to go into the frequency allocation business, we should be left free to make such decisions."[15] It soon became clear, however, that unless the Commission abandoned its deintermixture plans, any all-channel receiver legislation which might pass would be certain to contain a provision prohibiting further deintermixture proceedings. Consequently, the Commission, on March 16, sent Chairman Harris a letter stating:

> . . . if the all-channel receiver television legislation is enacted by this Congress, it is the judgment of the Commission . . . that it would be inappropriate, in the light of this important new development, to proceed with the eight deintermixture proceedings initiated on July 27, 1961, and that, on the contrary, a sufficient period of time should be allowed to indicate whether the all-channel receiver authority would in fact achieve the Commission's overall allocations goals. . . . Before undertaking the implementation of any policy concerning deintermixture, the Commission would advise the Committee of its plans and give it an appropriate period of time to consider the Commission's proposals.[16]

Thus, in the words of Commissioner Robert E. Lee, "Congress in effect made a deal with the Commission—drop deintermixture, and we get the all-channel television bill."[17] Legislative support for the bill quickly increased, and included a number of Representative Harris's Committee members representing districts threatened by the Commission's deintermixture proposal.[18] Thus, the linking of deintermixture and all-channel television in the original 1961 package greatly enhanced the prospects of the all-channel television bill in 1962.

With the support of those opposing deintermixture, the all-channel television bill faced comparatively little opposition. Some Congressmen had reservations about the "loss of freedom" involved in requiring people to purchase television sets equipped in a certain way, and vocal but isolated concern was expressed by the Electronic Industries Association about the rise in set costs—variously estimated as from $25 to $40 retail—which would result from having to include a UHF tuner in each set.[19] This opposition, however, was minor compared with support for the bill by the President, industry groups such as the three networks, major manufacturers such as General Electric and RCA (despite the Electronic Industries Association stand), and several industry trade organizations, including the National Association of Broadcasters.

Favorably reported out of the House Committee on Interstate and Foreign Commerce on April 9, the bill passed the House by a vote of 279–90 on May 2. The Senate version was favorably reported by the Senate Commerce Committee on May 24, and was approved by the Senate by a voice vote on June 14. Minor differences between the Senate and House bills were settled in the House by a voice vote on June 29, and on July 10, 1962, President Kennedy signed the legislation into law. As the last stage in this process, the FCC availed itself of its newly conferred authority on September 13, 1962, by instituting rule-making to require that all television sets shipped in interstate commerce be all-channel television receivers.[20] This rule was adopted on November 23, 1962, to go into effect April 30, 1964.

In one respect, the history of UHF is an exact reversal of the FM shift proceeding—no one seemed to realize how *well* the all-channel television law would work.[21] Because of the boom in portable TV sets and the great growth in color TV sales, the percent of all-channel receivers increased more quickly than anticipated.[22] In its Annual Report for 1971, the FCC noted that the proportion of TV homes with UHF-VHF receivers was 54.9% in January, 1969, and projected a proportion of 68% by mid-1970.[23]

The politics of this controversy were rather curious, for, as has been suggested, the threat of deintermixture was the major reason that the all-channel receiver bill passed in 1962. The opposition to deintermixture was particularly strong, since in every area considered for deintermixture in 1961, existing VHF stations would have been affected. This strong resistance to deintermixture was transformed into positive support for an alternative policy—the all-channel receiver bill. Combining a highly unpopular measure with a proposal acceptable to VHF interests, then, ensured sufficient support for passage of the all-channel receiver bill by Congress and its implementation by the Commission—once the unpopular idea had been publicly dropped. In this controversy the interests of industry converged with those of the FCC. Broadcasters sought to avoid a repugnant policy at almost any cost, while the Commission wanted to provide for diversity and additional competition in TV broadcasting. The result was a pattern of forces favoring the all-channel receiver bill sufficient to ensure its adoption as definitive public policy.

The initiation of the request for action on all-channel receiver legislation came from the Commission itself—although, as earlier

noted, the idea of such legislation derived from a suggestion contained in the 1957 House Judiciary Committee report on "The Television Broadcasting Industry." The FCC, fresh from berating the television industry's "vast wasteland," took a renewed interest in UHF as a means of broadening program choice for viewers. In addition, the Commission had been under pressure from the Senate Commerce Committee for more than five years to find some means of alleviating UHF's woes. The result of this Commission interest and Congressional pressure was the package of proposals on July 27, 1961. The subsequent focus on all-channel legislation as the chief means of UHF development, however, came about largely because it alone, of the various proposals, did not face immediate overwhelming opposition.

To obtain Congressional support for all-channel set requirements, the Commission gave up only a proposal on deintermixture which was limited in applicability and backed by a slim majority of Commissioners. In return, the FCC received authority to implement a policy which had favorable results beyond all expectations. In this sense, those UHF investors and operators who had so long suffered financially "really won," for in the successful FCC initiative to obtain the manufacture and sale of all-channel sets, the means were found for at least the potential realization of long-held hopes for UHF television.

NOTES

[1] 'Deintermixture" involves the reallocation of television channel assignments so that each community would have either VHF or UHF stations. As a result of "deintermixture," no community would have both VHF and UHF stations.

[2] "Statistical Analysis, 1946–63: The Television Industry," table titled "The UHF Story," *TV Factbook No. 34 for 1964*, p. 38a. It should be noted that this all-channel receiver production figure of 5.5% was a national average, and in some areas, such as central Illinois, where major network service was provided largely or entirely by UHF stations, the all-channel set "penetration rate" was much higher—even up to 65% or 70%. These areas, however, were outnumbered by markets where network service was supplied by VHF stations, and UHF stations, if they existed at all, had but second-rate programs to broadcast to an audience largely unequipped to receive UHF transmission.

[3] FCC Public Notice: "Comprehensive Actions to Foster Expansion of UHF TV Broadcasting," (July 28, 1961, mimeo). See also *Broadcast-*

ing (August 7, 1961), p. 54. Since the Communications Act did not explicitly provide the FCC with authority to adopt uniform receiver standards, Congressional legislation appeared necessary to require the manufacture of all-channel receivers.

[4] U.S. House, House Judiciary Committee, *Report of the Antitrust Subcommittee Pursuant to House Resolution 107 on the Television Broadcasting Industry*, 85th Congress, 1st Session, March 15, 1957, p. 9.

[5] Washington interviews with Commissioner Robert E. Lee, October 25, 1965, and Phil Cross, legal assistant to Commissioner Robert T. Bartley, October 25, 1965.

[6] U.S. Senate, Senate Commerce Committee, *Hearings on All-Channel Television Receivers*, 87th Congress, 2nd Session, February 20, 21, and 22, 1962, p. 31.

[7] "Is the FCC Ready to Take Half a Loaf?," *Broadcasting* (March 12, 1962), p. 44.

[8] Washington interview with Commissioner Robert E. Lee, October 25, 1965.

[9] "Too Much Too Late?" *Broadcasting* (August 7, 1961), p. 114.

[10] "Hill Rallies to Save V's," *Broadcasting* (August 21, 1961), p. 50.

[11] "Richards Urges NAB Focus on Hill," *Broadcasting* (February 26, 1962), p. 56.

[12] "Parting Shot," *Broadcasting* (October 2, 1961), p. 4.

[13] This speech to the National Press Club on January 11, 1962, can be found in Newton Minow, *Equal Time: The Private Broadcaster and the Public Interest* (New York: Atheneum, 1964), Chapter VI.

[14] "Wedding of the U's and V's," Editorial in *Broadcasting* (March 12, 1962), p. 106.

[15] "FCC's All-Channel Set Bill Falters," *Broadcasting* (February 26, 1962), p. 100. The legal right stressed here was the same as the one on which the FCC based its FM shift 17 years earlier, namely, the Commission's legal power to assign frequencies to the various broadcast services.

[16] U.S. House, House Committee on Interstate and Foreign Commerce, *All-Channel Television Receivers*, House Report No. 1559, 87th Congress, 2nd Session, April 9, 1962, pp. 19–20. The deintermixture proceedings were officially terminated on September 12, 1962.

[17] Interview with Commissioner Robert E. Lee, October 25, 1965. One might ask why Congress and the broadcasting industry felt a "deal" was necessary—why wasn't, for example, a prohibition of deintermixture considered in the absence of an All-Channel Receiver Bill? The answer seems to be that the events of early 1960's including the quiz-show scandals, reports of improper industry-Commission contacts, and the general stir over Chairman Minow's criticisms of television, had put the broadcasting industry, and its Congressional allies, on the defensive. Thus, a purely negative response to the Commission's attempts to alleviate the problems of UHF television seemed untenable.

[18] "House Passes Set Bill," *Broadcasting* (May 7, 1962), p. 50.

[19] "All-Channel Sets Minow's Goal," *Broadcasting* (January 15,

1962), p. 28. Contrary to these predictions, however, retail prices did not increase at all or increased only $5 or $7 per set. Washington interview with Jack Wyman, Staff Director of Consumer Products Division, Electronic Industries Association, October 20, 1965.

[20] FCC, "Notice of Proposed Rule Making," Docket No. 14769, September 13, 1962.

[21] One observer views the All-Channel Receiver Television Law as a mistake and suggests that if the law is not repealed (an action which he sees as unlikely in view of FCC inflexibility), it should, at least, not be strengthened. Douglas W. Webbink, "The Impact of UHF Promotion: The All Channel Television Receiver Law." *Law and Contemporary Problems* XXXIV (Summer 1969,) 535–561. Webbink argues that the law's primary effect was to provide a considerable subsidy to UHF stations (paid by consumers and manufacturers) with comparatively minor returns in terms of new stations and diversity of UHF programming.

[22] John Serrao of Kaiser Broadcasting, a company with large investments in UHF television, credits color and portable television with much of the growth of UHF television, but also says, "We wouldn't have gone into UHF without the all-channel bill." Quoted in Morris J. Gelman, " 'U' as in Upward," *Television Magazine* (October 1965), p. 56.

[23] FCC, *Annual Report for 1970* (Washington, D.C.: U.S. Government Printing Office, 1971), p. 41. A survey of financial data on UHF stations showed that the UHF industry's losses were reduced from 34% in 1969 to 5.9% in 1970. "Typical U Can See Break-even Point," *Broadcasting* (August 23, 1971), p. 49.

7

Commercial Time Fiasco

In the preceding two cases, the FCC was struggling with problems arising from the development of new broadcast services—innovations that promised to alleviate the scarcity of existing AM radio and VHF television facilities. The controversy examined in this chapter is rather different, for in proposing to limit broadcast commercial time, the Commission was attempting not to expand program variety, but to regulate a scarce commodity.

On March 28, 1963, the FCC announced it was contemplating policies designed to control the number and frequency of advertisements broadcast by radio and television stations. Although later conceded by Chairman E. William Henry to have been "a radical departure from previous regulation in terms of procedure," [1] the Commission's concern about advertising abuses was not new in substance. In its 1946 statements on *Public Service Responsibility of Broadcast Licensees* (popularly known as the "Blue Book"), the FCC stated that in issuing and in renewing the licenses of broadcast stations, particular consideration would be given to program service factors relevant to the public interest, including the elimination of excessive ratios of advertising time to program time.[2] The Commission recognized the broadcasting industry's efforts at self-regulation; however, it found "abundant evidence" that the Codes of the National Association of Broadcasters were being flouted by some stations and networks.[3] As late as 1963 less than half of all radio stations and less than three quarters of all television stations were Code subscribers.[4] And, since the FCC had not actively pursued its early interest in advertising practices in the years between 1946 and 1963,[5] the Commission's decision in 1963 was widely considered an unprecedented involvement by the government in an area traditionally left to broadcasters.

In this connection, it is interesting to recall that Secretary of

Commerce Herbert Hoover had strongly opposed all broadcast advertising, telling the First Annual Radio Industry Conference in 1922, "It is inconceivable that we should allow so great a possibility for service . . . to be drowned in advertising chatter." The industry repesentatives at this conference responded with a resolution "that advertising . . . be absolutely prohibited and that indirect advertising be limited to the announcement of the call letters of the station and the name of the concern responsible for the matter broadcasted." [6]

The Commission, in its public notice of March 28, 1963, had not indicated a specific approach to the problem of over-commercialization. Although all seven Commissioners agreed on the need for action, they were split on whether to regulate advertising on a case-by-case basis or to institute rulemaking proceedings.[7] They did try to reach agreement on "a program for action to be taken before [initiating] the more bloodthirsty approach;" [8] however, these attempts at consensus failed. Consequently, in May 1963 the Commission proposed (by a narrow vote of 4 to 3) the adoption of rules requiring all broadcasting stations to observe the limitations on advertising time contained in the NAB Radio and Television Codes.[9] The Commission announced that it wanted to receive a broad cross section of comments and specifically invited the comments of all organizations and members of the public concerned about the broadcasting of commercial advertising.

The Commission's decision to adopt existing industry codes rather than set its own standards was an interesting one. By proposing standards that the industry claimed to be following, the Commission could argue that it was only trying to do the industry a favor. As reported by *Broadcasting:* "One of the appeals the NAB Codes have for Chairman Minow and some others in the agency is that they were drafted and adopted by the broadcasting industry, not imposed by the government." [10]

The incorporation of private industry standards should have made the Commission's task easier; instead, it led to an attack by the industry on the adoption of any Code standards for advertising time. One of the major advantages of the Code, in the eyes of the industry, was the flexibility it provided the broadcaster who could not live with the time standards—he could just stay out.[11] If the FCC made these standards universal, the flexibility would be lost. In attacking the Code, *Broadcasting* magazine editorialized that "No

fixed rules can successfully be written to cover all kinds of time periods on all kinds of stations." [12] Both *Broadcasting* and its subsidiary *Television Magazine* called upon NAB to scrap all Code time standards on advertising.[13] By proposing to regulate advertising time and suggesting the adoption of NAB Code standards, the Commission had, in the words of one broadcaster, "opened a hell of a big can of worms." [14]

Opposition to the Commission's plans continued to increase. In late June, 1963, the NAB voted to oppose commercial time limitations, and formed committees of broadcasters in each state to contact Congressmen.[15] The Commission scheduled hearings on its proposals for December 9 and 10; however, the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce anticipated this by holding earlier hearings on November 6, 7 and 8 on a bill, introduced by Subcommittee Chairman Walter Rogers to prohibit the Commission from adopting any rules governing the length or frequency of broadcast ads.[16] Testimony highly critical of the FCC was offered at these hearings by some thirty broadcasting and four Congressional witnesses. Their objections, briefly summarized, were: (1) the Commission was not empowered to make such rules; (2) the proposed rules would entail an undesirable increase in regulation; and (3) uniform standards for all stations would be undesirable. Support for the Commission came mainly from poorly-organized sources such as the League Against Obnoxious TV Commercials and the National Association for Better Radio and Television.

The Rogers bill, H.R. 8316, was unanimously approved by the House Interstate and Foreign Commerce Committee on November 18, in the absence of one Committee member who opposed it. (Earlier in November an appropriations subcommittee of the Senate Appropriations Committee had added injury to insult by cutting $400,000 from the Commission's fiscal 1964 budget request, while criticizing the FCC for straying into policy areas not intended by Congress.) [17] The Rogers bill was then sent to the floor of the House where it waited while the FCC held its planned December 9 and 10 hearings. These events prompted *Broadcasting* to report on December 16 that "the FCC's controversial commercial-time standards reached the end of the road last week, battered and all but friendless." [18]

The membership of the FCC had shifted during this time. Lee

Loevinger joined the Commission on June 10, 1963, filling the spot made vacant when Commissioner Henry was made Chairman (following Chairman Minow's resignation). Without Minow, the Commissioners were deadlocked 3-3, and Commissioner Loevinger held the deciding vote. "I knew I had the vote, but Henry kept it bottled up," he said. Because the Chairman kept the proposal from coming to a vote, Loevinger explained, "the false impression was given that the withdrawal [of the FCC proposal] was due to the Rogers bill." [19] Without Loevinger's support for the proposals of March and May of 1963, however, there was no hope for their adoption, and, on January 15, 1964, when the commercial proposal was finally voted upon, the FCC unanimously terminated the rulemaking proceedings.[20]

The House continued its deliberations on the Rogers bill in order to make sure the Commission fully understood its feelings. On February 24, 1964, the NAB dispatched memos to all broadcast stations marked "URGENT URGENT URGENT":

> Broadcasters should immediately urge their Congressmen by phone or wire *to vote for* H.R. 8316. . . . [A] vote for the bill is a vote of confidence in the broadcasters in his district. A vote against the bill would open the door to unlimited governmental control of broadcasting . . .[21]

Three days later the House passed the Rogers bill by a resounding vote of 317 to 43.

No action occurred on this bill in the Senate, and, in fact, it has been suggested that the Senate Commerce Committee would not have favored it.[22] Nevertheless, the episode was conclusive for the FCC. As Commissioner Lee summarized it, "for all practical purposes we will not attempt anything such as this in the conceivable future." [23] The adoption of rules limiting advertising, then, seemed unfeasible, but the question remained: could the Commission still regulate ads on a case-by-case basis? In its action of January 15, 1964, terminating the rulemaking, the Commission had expressed its intention to examine new and renewal applications for advertising excesses, and Chairman Henry, in a speech early in February, promised that the Commission would build policy in this area on a case-by-case basis "so that you will know and we will know what

the rules of the game are to be." [24] By July, 1964, however, Chairman Henry had lost the control of the Commission on this issue to Loevinger (by 4–3), and *Broadcasting* reported, "Indications are that only the most extreme cases of overcommercialization will be brought to the Commission's attention." [25] According to Chairman Henry, the campaign against excessive advertising "almost came to a halt . . . until Ford was replaced by Wadsworth [in February, 1965]. . . Now we are questioning new applicants and renewals." [26] The departure of Chairman Henry from the Commission in May 1966, made Nicholas Johnson, a newly-appointed Commissioner in June 1966, the possible swing man between Lee, Cox and Wadsworth, who favored case-by-case scrutiny of excessive commercialization, and Chairman Hyde, Bartley, and Loevinger, who opposed such activity. By June 1967, the Commission's scrutiny of individual renewal applications had led one participant to charge that the FCC had revived its use of NAB standards on a case-by-case basis. The direction of Commission activity in the post-1966 period was heavily toward a case-by-case consideration of commercial time abuses, with the FCC taking great care to avoid any appearance of making general rules.

The Commission had tried in 1963 to institute a bold policy for the regulation of broadcasting.[27] That it failed to implement this policy, however, can be attributed not only to industry pressure and to the massive Congressional opposition which developed, but also to the inability of the initial majority of four in 1963 to convert any of the other three Commissioners to their cause. Not one of these men shifted his position, and the policy initiative consequently lost following the Presidential appointment of a fourth man, in the middle of 1963, who felt he could not support the establishment of commercial time limits. The confusion over the legal authority exercised by the Commission, the differing value preferences held by the major participants in the regulatory process, the very definite economic interests at stake in the regulation of advertising, and the opposition of a united industry and militant House added to the difficulties facing the proposed policy. Perhaps the clearest result of the Commission's decision to abandon across-the-board rules on overcommercialization was the loss suffered by the FCC itself, not in terms of changes in its statutory authority, but in terms of a political reversal and prohibition of its initiatives.

NOTES

[1] Washington interview with Chairman Henry, October 22, 1965.

[2] Federal Communications Commission, *Public Service Responsibility of Broadcast Licensees* (Washington, D.C.: F.C.C., 1946), p. 55.

[3] *Ibid.*, p. 43.

[4] Newton N. Minow, *Equal Time: The Private Broadcaster and the Public Interest* (New York: Atheneum, 1964), p. 25.

[5] See Richard J. Meyer, "Reaction to the 'Blue Book'," *Journal of Broadcasting*, VI (Fall 1962), 295–312; and his "'The Blue Book'," *Journal of Broadcasting*, VI (Summer 1962), 197–207.

[6] Murray Edelman, *The Licensing of Radio Services in the United States, 1927 to 1947: A Study in Administrative Formulation of Policy* (Urbana: University of Illinois Press, 1950), pp. 83–84.

[7] Washington interview with Chairman E. William Henry, October 22, 1965.

[8] Personal letter from former FCC Commissioner Frederick Ford, June 16, 1967.

[9] In 1962, a similar proposal to adopt the NAB Codes had been rejected by a 4–3 vote. Commissioners Minow, Henry, and Lee voted in the minority, and Commissioners Hyde, Bartley, Ford and Craven in the majority. The replacement of Commissioner Craven by Cox in late March, 1963, swung the vote in May the other way with Minow, Henry, Lee and Cox now constituting the majority.

[10] "Commission May Put Ceiling on Commercials," *Broadcasting*, (April 1, 1963), p. 84. However, Commissioner Ford contended that the FCC's adoption of the NAB Code would undermine the desire for self-regulation: "What would be the use of trying if Government is going to move in and make industry's efforts at self-regulation a matter of law? There would be no incentive, self-regulation would be destroyed, and the benefits of a very valuable regulatory tool would be lost." Speech before the Convention of the National Religious Broadcasters, January 23, 1963.

[11] *Broadcasting* stated that: "Some stations are known to have stayed out of the Code because they cannot command high enough rates to make a living from the number of commercials now permitted per program period." "Is This The Way Out of the Trap?," *Broadcasting* (June 17, 1963), p. 34.

[12] Editorial in *Broadcasting* (December 23, 1963), p. 78.

[13] Editorials in *Broadcasting* (June 3 and July 1, 1963), and *Television Magazine* (January 1964).

[14] Quoted in "Now a Crisis in the Radio-TV Codes," *Broadcasting* (May 27, 1963), p. 27.

[15] "NAB Boards Resolve to Fight Back," *Broadcasting* (July 1, 1963), p. 44.

[16] U.S. House of Representatives, House Committee on Interstate and Foreign Commerce, *Hearings on Broadcast Advertisements*, 88th

Congress, 1st Session, November 6, 7 and 8, 1963. Robert Lewis Shayon of the *Saturday Review* noted: "Congressmen who want the FCC to handle limitation of commercials on a case-by-case basis know that the Commission is made least effective this way. Its standards become loose and lack uniformity." "Forecast for the FCC," *Saturday Review* (January 11, 1964), p. 51.

[17] "Where It Hurts," *Broadcasting* (November 11, 1963), p. 5.

[18] "FCC Unhorsed in Commercial Crusade," *Broadcasting* (December 16, 1963), p. 38.

[19] Washington interview with Commissioner Loevinger, October 25, 1965. Chairman Henry agrees with him that "the shift in personnel shifted the policy by a shift in votes—not Congressional action." Washington interview with Chairman Henry, October 22, 1965.

[20] Although the official vote was unanimous, it must be remembered that the sentiment of the Commissioners was split 4–3. Washington interview with Phil Cross, Legal Assistant to Commissioner Robert T. Bartley, October 25, 1965.

[21] Quoted in Erik Barnouw, *The Image Empire: A History of Broadcasting in the United States* (Vol. III—from 1953) (New York: Oxford University Press, 1970), p. 251.

[22] Washington interviews with Nicholas Zapple, Counsel to the Senate Commerce Committee, October 21, 1965, and FCC Chairman E. William Henry, October 22, 1965.

[23] Washington interview with Commissioner Robert E. Lee, October 25, 1965.

[24] Remarks of Chairman F. William Henry before The Advertising Federation of America, February 4, 1964 (mimeo), p. 4.

[25] "FCC Again Rebuffs Chairman," *Broadcasting* (July 27, 1964), p. 34.

[26] Washington interview with Chairman E. William Henry, October 22, 1965.

[27] The initiation of the policy within the Commission came from Commissioner Lee who said that the idea for the proposed regulation came from a broadcaster. Personal letter from Commissioner Lee, June 14, 1967. In a broader view, however, the policy grew out of a perceived need—especially vivid to New Frontier Commissioners such as Minow and Henry—to meet the problems of advertising excesses.

8

License Renewal Challenges: The Non-Independence of an Independent Regulatory Commission

On January 22, 1969, the FCC, by a vote of 3 to 1, refused to renew the license of Boston television station WHDH and instead granted the license to a competing applicant.[1] The decision aroused great anxiety in the broadcast industry. For the first time in its history, the FCC had refused to renew the license of a broadcast station which had an "average" record of performance, and had awarded the license to an applicant who, it was said, would be more actively involved in the station's operation and would add to the diversity of control over mass communications media in the area.

Three years later, the Herald-Traveler Corporation asserted before the Supreme Court that loss of its authority to operate WHDH would jeopardize the jobs of 2,600 employees of the Boston *Herald-Traveler* and would mean the death of the newspaper. In March of 1972, after all legal appeals had been exhausted, the Herald-Traveler Corporation was forced to relinquish control of Channel 5. A few months later, the newspaper stopped publication and its assets were sold to a competitor.

The FCC's action was obviously of great consequence to the communications media in the Boston area, yet for the broadcasting industry it portended something far more threatening: broadcasters holding immensely valuable licenses might lose them in competitive hearings at renewal time.

The initial reaction to the FCC's WHDH decision in 1969 was one of confusion and shock. The FCC vote itself—involving only four of the seven Commissioners—was described by the trade press as "strange" and "weird."[2] The three-man majority consisted of Commissioners Bartley, Johnson, and Wadsworth (who was generally regarded as a moderate or a conservative). Commissioner Cox,

on the other hand, did not participate because he had dealt with the case when he was Chief of the Broadcast Bureau. Commissioner H. Rex Lee was absent, visiting El Salvador on an educational television matter. Chairman Hyde abstained, issuing an unusual statement to the effect that he could not make up his mind![3] The position of Commissioner Robert E. Lee, however, was clear—he had provided the lone dissenting vote. Some industry observers, seeking a bright side to the decision, felt that the voting lineup was unique—"Hyde normally will vote to let [a] satisfactory operator keep [his] station; Wadsworth may revert to [a] similar view in other cases; no one knows which way Rex Lee might go; even Cox isn't absolutely rigid on this front—though he likes to keep pressure on licensees."[4]

Confusion also resulted from both the majority and the various concurring and dissenting statements in the WHDH case. The majority decision noted that the case was an unusual one, involving a challenge by three applicants against WHDH, which had never received a regular three-year renewal because of charges by the Department of Justice in the late 1950's and early 1960's of improper private conferences between the station's former President and the then Chairman of the FCC. In his dissenting opinion, however, Commissioner Robert E. Lee commented that he was "very much afraid that this decision will be widely interpeted as an absolute disqualification for license renewal of a newspaper-owned facility in the same market. Competing applications can be anticipated against most of these owners at renewal time."[5] In a similar vein (but from the opposing viewpoint), Commissioner Johnson's concurring statement concluded: "The door is thus opened for local citizens to challenge media giants in their local community at renewal time with some hope for success before the licensing agency where previously the only response had been a blind reaffirmation of the present license holder."[6]

The WHDH decision was immediately attacked by those who feared that the stability of the broadcast industry would be threatened by license renewal challenges. Professor Louis L. Jaffe of Harvard Law School, for example, characterized the decision as a "desperate and spasmodic lurch toward 'the left'" which "overrules an administrative practice of at least eighteen years standing" and probably places "all licensees at hazard every three years, a proposition which would work a revolution in the industry and cause

serious problems of financing." [7] In an article entitled "$3 Billion in Stations Down the Drain?," *Broadcasting* magazine asserted that the potential impact of the WHDH decision and related FCC proposals aimed at promoting greater diversity of control of mass media "could jeopardize broadcast holdings that, in the top 50 markets alone, are valued at more than $3 billion. . . . [T]he shockwaves of the losses would be felt by thousands of big and small stockholders alike, threatening the financial underpinnings of the broadcast industry and possibly swamping many small broadcast groups." [8] In an accompanying editorial, *Broadcasting* commented that "Congress has become the broadcasters' only real hope for a restoration of order in an FCC that has clearly gone out of control." [9]

Whether the FCC had intended its decision in the WHDH case to be a special case or the initiation of a broad new policy on license renewal challenges will not be discussed here. The importance of the precedent-shattering WHDH decision lies in the sequence of political events it triggered. It stimulated widespread controversy in the broadcasting industry, the Congress, the White House, and the public. It led, a year later, to the FCC's adoption, under pressure from Congress and the broadcasting industry, of a policy statement on license renewal challenges. (Seventeen months later, that statement itself would be overturned by the courts.) Most importantly, it provoked a whirlwind of lobbying and legislative activity intended to safeguard the interests of broadcast licensees.

Shortly after the release of the WHDH decision, the National Association of Broadcasters began a lobbying campaign to obtain Congressional passage of a bill that would prevent the FCC from considering competing applications when acting on the renewal application of a licensee. Senator John Pastore, Chairman of the Communications Subcommittee and one of the most influential members of Congress in broadcasting matters, delighted broadcasters at the NAB Convention in March 1969 by his remarks on harassment at license renewal time: "It is my deep-seated conviction that public service is not encouraged nor promoted by placing the sword of Damocles over the heads of broadcasters at renewal time. The broadcaster must have reasonable assurance that if he does his job —and does it well—he's going to remain in business and not have his investment go down the drain." [10] At the NAB Convention, broadcasters met with Clay Whitehead and Abbott Washburn, White

House staff aides, and urged them to push for legislation on license renewal changes and the appointment of sympathetic Commissioners to replace Rosel Hyde and Kenneth Cox.[11]

On April 29, 1969, Senator Pastore introduced S. 2004, which would amend Section 309 of the Communications Act to provide that the FCC could not consider competing applications for a license at renewal time unless it had first found, based on the licensee's renewal application, "that a grant of the application of a renewal applicant would not be in the public interest, convenience and necessity. . . ." [12]

By the time that the Commission acted on requests for rehearing by the parties in the WHDH case, over 55 Representatives in the House had introduced bills identical or similar to S. 2004.[13] In a decision on May 19, 1969, the FCC denied the rehearing requests but also emphasized that the WHDH proceeding was unique since, for reasons stemming from circumstances surrounding the original grant, the existing licensee of WHDH was "in a substantially different posture from the conventional applicant for renewal of broadcast license." [14]

In June 1969, *Television Digest* reported that, as a result of a massive lobbying campaign by the industry following the WHDH decision, the prospects were bright for Congressional passage of S. 2004.[15] In addition to Pastore, sponsors of S. 2004 included Senators Mike Mansfield, Majority Leader; Warren Magnuson, Chairman of the Commerce Committee; Norris Cotton, ranking minority member on the Commerce Committee; and Hugh Scott, ranking minority member on the Communications Subcommittee.

Hearings on S. 2004 were held by the Senate Communications Subcommittee on August 5, 6 and 7, 1969. During the three days of hearings, all but one of the witnesses testified in favor of S. 2004. Those supporting the bill included broadcasters from Rhode Island, Nebraska, Utah and Pennsylvania, the President of the Federal Communications Bar Association, the General Manager of the American Newspaper Publishers Association, and the Dean of Temple University's School of Communications. Testifying in opposition was Earle K. Moore, general counsel of the National Citizens Committee for Broadcasting.

At this point, however, a combination of events and circumstances impeded the momentum of the broadcasters' campaign and raised doubts among many Congressmen, including several sponsors

of S. 2004, about the wisdom of the bill. During August, the hearings were cut short because of the lengthy Senate ABM debate and the Senate's late summer recess. Other pressing business subsequently forced postponement of the resumption of hearings (which had been tentatively rescheduled for the middle of September),[16] and they were finally reconvened in December. During the intervening months, minority groups were increasingly active in protesting the grant of license renewals of television stations which they contended cater almost exclusively to white, middle-class viewers. Also, articles appeared in *The New York Times*, *Harper's*, and *Time* magazine critical of S. 2004. An unsigned billboard appeared on Sunset Boulevard in Los Angeles:

> Watch for this coming subtraction!
> S. 2004
> Freedom's closing number brought
> to you by
> ABC, CBS & NBC Television.[17]

At the time of the Pastore hearings in August 1969 six of the seven FCC Commissioners were opposed to S. 2004. However, in October of 1969, President Nixon appointed to the Commission Dean Burch, a former Administrative Assistant to Senator Barry Goldwater, and Robert Wells, a Kansas broadcaster, both favorable to this type of legislation. At the confirmation hearings for Burch and Wells, Senator Pastore said he was irked by the "cliché" that S. 2004 was tantamount to giving licensees a license in perpetuity. This cliché, he said, "sounds good, very dramatic, but I am surprised so many people are beginning to believe it. It was never intended as that." [18]

When Congressional hearings resumed on December 1, 1969, members of Black Efforts for Soul in Television (BEST) were picketing NAB offices in Washington, New York, and Los Angeles and network-owned stations in Boston, Chicago, Philadelphia, and San Francisco to protest S. 2004 as a form of "backdoor racism," a "Congressional charade." The picketers read the following statement:

This bill represents backdoor racism because it is a subtle, and therefore more vicious attempt to limit the efforts of the black community to

challenge the prevailing racist practices of the vast majority of TV stations. . . . The Pastore bill . . . attempts to keep the media safely in the grips of monopolistic and politically selfish private white owners. It would deny black citizens the opportunity to demonstrate their ability to manage a TV station in a manner more consistent with the public interest than the station's present white owners. . . . Sen. Pastore seeks to protect the media barons who operate to satisfy their personal economic greed.[19]

The mood of the December hearings is perhaps best illustrated by one heated exchange between Senator Pastore and the audience. "When you say I introduced a racist bill you offend me," the Senator shouted. "The one thing I don't want you people to do is go away and say this is a racist bill!" Blacks in the audience shouted back: "It is, it is!"[20] Senator Pastore was shocked and cited his strong civil rights record whenever a witness intimated that S. 2004 was a racist bill. "I'm not a patsy for the broadcasting industry. I'm nobody's patsy." Pastore also got into a shouting match with John Banzhaf, head of Action on Smoking and Health, who charged: "The bill which bears your name is unnecessary, unfair and unworthy of the support of any Senator . . . and even its consideration at this time is a waste of the Committee's time and a gross misallocation of its resources."[21] The lack of interest and support by other members of the Subcommittee was evidenced by the fact that Pastore was often the only Senator present at the December hearings.

On December 1, 1969, the FCC testified in opposition to S. 2004. Commissioner Robert Bartley, as the senior Commissioner voting for the FCC's majority position, presented the majority statement, noting that it was originally adopted by a 6-to-1 vote (before Burch and Wells succeeded Hyde and Wadsworth) but now could claim only a 4-3 majority. Bartley said that the Commission does not support the bill because it "is unnecessary and would, in our opinion, have significant disadvantages to the public interest."[22] The majority statement emphasized that "the spur to a lagging broadcaster posed by the threat of competitors at renewal time is an important factor in securing operation in the public interest."

Concurring statements were delivered by Commissioners Cox, H. Rex Lee and Johnson. In a 49-page attack on S. 2004, Commissioner Johnson accused the "hear-no-evil-see-no-evil-speak-no-evil"

leaders of the NAB of "taking the broadcasters themselves—jovial, prosperous, and martini in hand—down a jungle road into the longest ambush from an outraged citizenry ever unleashed upon an unsuspecting American industry." He questioned whether S. 2004 was constitutional since it would place "restrictions upon the ease with which individuals or groups could enter the field of broadcasting." Johnson contended that "S. 2004 may easily do more to continue racism in this country than any other single piece of legislation now pending before the Congress" and warned that "its passage will leave a frustrated people with no recourse except perhaps to engage in more violent protests and other actions that serve the interests of no one."

Dissenting statements were given to the Subcommittee by Chairman Burch, Robert E. Lee and Robert Wells. Burch's testimony was significant because he suggested the following language as a substitute for the Pastore bill:

> In any comparative hearing within the same community for the frequency or channel of an applicant for renewal of a broadcast license, the applicant for renewal of license shall be awarded the grant if such applicant shows that its program service during the preceding license term has been substantially, rather than minimally, attuned to meeting the needs and interests of its area, and the operation of the station has not otherwise been characterized by serious deficiencies.[22]

At the conclusion of the hearings the chances for S. 2004's passage seemed remote. Pressure was placed on the FCC to devise a way of avoiding legislative defeat for Senator Pastore, the 22 Senate cosponsors of S. 2004, and the more than 100 sponsors in the House. The first hint of possible FCC action along this line came in the December 29, 1969, issue of *Broadcasting*, which predicted that the FCC's first action in January would be a "breakthrough in station licensing policy to alleviate [the] 'strike' application chaos triggered by WHDH-TV Boston revocation case." (p. 5) (In Commission usage, strike applications are those filed without any intention of operating a station, but solely to prevent another applicant from getting a license without a hearing.) *Broadcasting* indicated that the Commission would adopt a policy whereby an applicant's license would be renewed following a comparative hearing if he demonstrated that his program service was substantially attuned to the needs and interests of his area.

Stimulated by these predictions in the trade press, the Citizens Communications Center (CCC) and Black Efforts for Soul in Television (BEST) filed a complaint on January 7, 1970, with the United States District Court for the District of Columbia. The complaint sought to enjoin the Chairman and members of the FCC from "promulgating any policy, rule or interpretation or making any other change" in the standards applicable to comparative broadcast license renewal proceedings without first giving all interested parties notice and an opportunity to be heard. On the same day the complaint was filed, the District Court denied their request for a temporary restraining order and, shortly thereafter, dismissed the action for lack of jurisdiction.[23] The FCC attorney told District Court Judge Matthew McGuire that the two groups were simply "guessing" that the Commission would take an action to which they would object and that they had no complaint until it did. The District Court agreed with the FCC's contention that exclusive judicial review jurisdiction of the Commission's action is vested in the Courts of Appeal under Section 402(a) of the Communications Act.

In another effort to dissuade the FCC from issuing a new policy statement on license renewal challenges, CCC and BEST, on January 9, filed a petition for rule making with the Commission, urging that the issue of comparative hearings be dealt with in a formal rule making proceeding. In addition, even though the FCC had not yet publicly announced any new policy, the United Church of Christ and the National Citizens Committee for Broadcasting issued statements opposing the adoption of a revised policy on license renewal challenges.[24]

These attempts to forestall FCC action failed. On January 15, 1970, the Commission, by a vote of 6 to 1, issued a "Policy Statement on Comparative Hearings Involving Regular Applicants." Under the Policy Statement, the renewal hearing was to be divided into two stages. In the first stage, the past performance of the applicant for renewal of a license would be examined. If the renewal applicant "shows 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 operation of the station has not otherwise been characterized by serious deficiencies . . . his application for renewal will be granted." If the Examiner did not agree that the applicant's service had been so attuned, the hearing would continue into the second stage, in which the incumbent licensee

would be deprived of any preference due to incumbency. The Commission stressed that the policy of preferring an incumbent who had compiled a good broadcast record over a rival applicant whose promises were untested was firmly grounded in administrative precedent and was necessary to preserve industry stability.

In a dissenting opinion, Commissioner Johnson said that the American people had been deprived of substantial rights by the Commission's action. It would have been much wiser, he observed, for the Commission to have used traditional rule making procedures on such a controversial issue, but "there are legal and public relations considerations involved in issuing this statement as *fait accompli* rather than as proposed rule making for public comment." Johnson, in the closing paragraphs of his dissent, said that he could not avoid reference to the "significance of this necessary kind of compromise with broadcasting's power":

> The record of Congress and the Commission over the years shows their relative powerlessness to do anything more than spar with America's "other government," represented by the mass media. Effective reform, more and more, rests with self-help measures taken by the public. Recognizing this, the broadcasters now seek to curtail the procedural remedies of the people themselves. The industry's power is such that it will succeed, one way or another. This is sad, because—unlike the substantive concessions it has obtained from Government from time to time—there is no turning back a procedural concession of this kind once granted. Not only can the industry win every ball game, it is now in a position to change the rules.[25]

On the same day the Policy Statement was adopted, the FCC, by a vote of 6 to 1, denied the petition submitted by CCC and BEST requesting the institution of a rule making proceeding to codify standards for all comparative proceedings.[26] According to the Commission, the Policy Statement did not change existing law, and this area was simply not conducive to a formal rule. The Commission also observed that

> parties may seek revision of the policy as cases come before the Commission, and may do so in the context of specific factual situations. Interested persons, such as petitioners, may seek to present their views in such cases as amicus curiae. If the requested policy changes are rejected, resort may be had to the courts if such rejection is believed unlawful,

or to the Congress, if it is regarded as unsound policy. While, for all these reasons, we believe that further proceedings would not be helpful, it does serve the public interest to insure that our present policies, based largely on established precedents, are clearly stated. The policy statement does that.[27]

Senator Pastore praised the Policy Statement and stated that his Subcommittee would not take any further action on S. 2004 until the policy had a fair test:

I think the Commission ought to be given a chance. It's a step in the right direction. All I ever wanted to do right along was to make sure that a good licensee had a reasonable chance to stay in business, without harassment. The FCC policy doesn't eliminate competing applications, but in large measure it eliminates the element of harassment. It will have a salutary effect. It will discourage those engaged in piracy.[28]

Television Digest commented that the FCC's Policy Statement "has something for every Commissioner (except Johnson, who dissented)—and [the] truth is that implementation will be everything." Thus, in the future, both the toughest and most lenient Commissioners would be able to rest their decisions solidly on material in the Policy Statement. *Television Digest* further observed that the document had received near-unanimous approval because most of the industry's critics on the Commission infinitely "prefer this easily modified, flexibly interpretable policy—rather than imbedding into law the Pastore bill." [29]

On February 16, 1970, CCC and BEST filed with the FCC petitions for reconsideration and for repeal of the Policy Statement and a petition for reconsideration of the Commission's denial of their petition for rule making. Other groups also seeking reconsideration of the Policy Statement were Hampton Roads Television Corporation and Community Broadcasting of Boston, Inc., two applicants for television channels in competition with renewal applicants in Norfolk, Virginia, and Boston.

On July 21, 1970, by a vote of 5 to 1 (with Commissioner Bartley absent), the FCC denied the various petitions for reconsideration, emphasizing that the Policy Statement was not a rule and was not intended to have the effect of a rule.[30] Again, Commissioner Johnson alone dissented. He contended that the Policy Statement violated the Administrative Procedure Act, was an abuse of

agency discretion, violated the hearing requirement specified by the Communications Act, and violated the First Amendment.[32] In view of the "political events" surrounding the adoption of the Policy Statement, he believed that the Commission's position could not be considered reasonable or fair:

The impact of citizen outrage measurably slowed the progress of S. 2004, and many Senate observers began to predict the Bill would never pass. Then, without formal rule making hearings, or even submission of written arguments, the Commission suddenly issued its January 15, 1970 Policy Statement—achieving much of what Congress had been unable or reluctant to adopt.

There were many parties who had invested substantial time and money fighting the threatened diminution of their rights, and who no doubt would have opposed our January 15, 1970 Policy Statement on numerous grounds. In challenging S. 2004, many of these parties claimed to represent the interests of important segments of our population: the minorities, the poor, and the disadvantaged. By refusing even to listen to their counsels, this Commission reached a new low in its self-imposed isolation from the people; once again we closed our ears and minds to their pleas.[32]

On April 1, 1970, CCC and BEST submitted an appeal to the United States Court of Appeals for the District of Columbia Circuit challenging the legality of the Policy Statement. The two broadcasters who filed a petition for reconsideration of the Policy Statement (Hampton Roads and Community Broadcasting) joined CCC and BEST in the appeal. RKO General, Inc. and WTAR Radio-TV Corporation, the incumbent licensees in the Boston and Norfolk renewal proceedings, also intervened and filed briefs defending the Policy Statement. CCC and BEST argued that the Policy Statement deprives a new qualified applicant of his right to a comparative hearing and deprives emerging minority groups of equal protection of the laws:

Since the beginnings of broadcasting, Congress has repeatedly and expressly declared that a broadcast license shall not be a monopoly in perpetuity. Broadcasters for their part have sought to maintain in perpetuity the exceedingly valuable monopoly that is the exclusive privilege to broadcast on one of the limited number of radio or TV frequencies. The intent of the Congress remains in the silent statute books; the broadcasters daily whisper in the corridors of the Commission. The Policy

Statement challenged in this appeal represents the FCC's final capitulation to the industry.[33]

During the summer of 1970, when the appeal was pending before the Court, the FCC's Policy Statement became the subject of a study by the staff of the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce. In a report released in late November, 1970, the staff study charged that the Policy Statement "is not a policy but a flagrant attempt to repeal the statutory requirements and to substitute the FCC's own legislative proposal that a hearing is not required when it involves a license renewal proceeding having several competing applicants." The study further asserted that it "was not until now that any agency has had the temerity to usurp congressional power and by way of a 'policy statement' repeal a constitutional and statutory requirement in the interest of easing Commission workload requirements." The Policy Statement, the study concluded, "exemplifies both an unwarranted solicitude for the economic well-being of the licensee who enjoys a wealth-producing permit to use the public's precious airwaves and an indifference to the public interest including the right of viewers and listeners to have access to viewpoints and programs from diversified sources."[34]

The staff study was not endorsed by members of the Subcommittee or its Chairman, Harley Staggers, who merely forwarded the document to the FCC with a request that the Commission submit a detailed legal opinion on the staff's conclusions by December 21, 1970. Acting with unaccustomed haste, the Commission submitted a detailed response three days in advance of the deadline, declaring its innocence of the study's charges.[35]

On June 11, 1971, a three-judge panel of the Court of Appeals found the FCC's Policy Statement illegal and ordered that the FCC redesignate all comparative renewal hearings to reflect the Court's judgment. In a decision written by Judge J. Skelly Wright, a Kennedy appointee, and supported by Judges George E. MacKinnon and Malcolm R. Wilkey, both recent Nixon appointees, the Court said that its action "today restores healthy competition by repudiating a Commission policy which is unreasonably weighted in favor of the licensees it is meant to regulate, to the great detriment of the listening and viewing public." According to Judge Wright, the Commission's suggestion that "it can do without notice

and hearing in a policy statement what Congress failed to do when the Pastore bill . . . died in the last Congress is, to say the least, remarkable." The Policy Statement, Judge Wright observed, in effect administratively enacted the Pastore bill, and in his view the FCC's issuance of the Statement without a prior public hearing raised additional serious questions.[36]

Judge Wright further held that "superior performance" should be regarded as "a plus of major significance in renewal proceedings" and that a new applicant had a heavy burden to produce sufficient evidence to displace an incumbent licensee in a comparative proceeding. He ordered the FCC to define both quantitatively and qualitatively what constitutes "superior programming service." Interestingly, the Court of Appeals decision relied heavily on language contained in the House Investigations Subcommittee staff study and the dissenting opinions of Commissioner Johnson.

The decision of the Court of Appeals was not welcomed by the industry. *Broadcasting* editorially condemned it as "a new prescription for anarchy in broadcast regulation," adding, "It is a formula for dismemberment of the system." The decision, *Broadcasting* asserted, "will create infinitely more chaos than prevailed in the year between the FCC's WHDH-TV decision and its adoption of the Policy Statement." The editorial concluded that the remedy must be found in Congress—"nothing less than survival is at issue."[37] Although most Commissioners believed that the decision could lead to considerable instability in broadcast ownership, they agreed neither to seek a rehearing of the case by the full nine-judge panel of the Court of Appeals nor to ask for review by the Supreme Court for fear that further judicial review "might make things worse."[38] The FCC instead decided to interpret the decision in a manner that would permit the agency to exercise discretion in license renewal proceedings and to try to establish policy through the hearing process. Buffeted by S. 2004 and burned by its attempt at *de facto* rule making on license renewal challenges, the Commission now prepared to seek the public interest on a difficult case-by-case basis.

NOTES

[1] *WHDH, Inc.*, 16 FCC 2d 1 (1969).

[2] "The Strange Ch. 5 Decision," *Television Digest* (January 27, 1969), pp. 1, 2.

[3] "On the first round I voted against WHDH, Inc. On the second round, in light of certain changed circumstances, I cast my vote for WHDH, Inc. This is now the third round and it is no less difficult for me to choose among those competing applicants. In view of my previous participation and finally the fact that my vote is not essential to resolution of the matter, I have simply abstained." *WHDH, Inc.*, 16 F.C.C. 2d at pp. 23–24.

[4] *Television Digest* (January 27, 1969), p. 2.

[5] 16 F.C.C. 2d at p. 27.

[6] *Ibid.*, p. 28.

[7] Louis L. Jaffe, "WHDH: The FCC and Broadcasting License Renewals," *Harvard Law Review*, LXXXII (1969), 1693, 1700.

[8] "$3 Billion in Stations Down the Drain?" *Broadcasting* (February 3, 1969), p. 19.

[9] Editorial, "Boston Stake: $3 Billion," *Broadcasting* (February 3, 1969), p. 84.

[10] "Ironics of TV Spotlighted at NAB," *Television Digest* (March 31, 1969), p. 3.

[11] "The White House Looks Into FCC's Future," *Broadcasting* (March 31, 1969), p. 36. The term of Rosel Hyde expired on June 30, 1969, but President Nixon asked him to continue as Chairman until a successor was confirmed. Commissioner Cox's term expired on June 30, 1970.

[12] Pastore Submits Antistrike Bill," *Broadcasting* (May 5, 1969), p. 58.

[13] William H. Wentz, "The Aftermath of WHDH: Regulation By Competition or Protection of Mediocrity?" *University of Pennsylvania Law Review*, CXVIII (1969), 368.

[14] 17 F.C.C. 2d at p. 872.

[15] "July Hearings on Renewals," *Television Digest* (June 9, 1969), p. 3.

[16] Wentz, p. 395.

[17] Nicholas Johnson, *How to Talk Back to Your Television Set* (New York: Bantam, 1970), p. 205.

[18] "Pastore Hits Renewal-Bill Opposition," *Television Digest* (October 20, 1969), p. 2.

[19] "Picket Lines Due," *Broadcasting* (December 1, 1969), p. 10.

[20] "Pastore & Blacks Clash on 'Racism'," *Television Digest* (December 8, 1969), p. 2.

[21] *Ibid.*, p. 4.

[22] The excerpts quoted from the statements of the FCC majority and each of the Commissioners are contained in *Hearings Before the Communications Subcommittee on S. 2004*, 91st Congress, 1st Session, Part 2, December 1, 2, 3, 4 and 5, 1969, pp. 375–412.

[23] "A Return to Order in Renewals," *Broadcasting* (January 12, 1970), p. 36.

[24] "Renewal Protection–Program Performance," *Television Digest* (January 12, 1970), p. 3.

[25] 22 F.C.C. 2nd 430 and 433 (1970). In hearings on S.3434, before the Subcommittee on Administrative Practice and Procedure, Senate Committee of the Judiciary (July 2, 1970), Johnson claimed that the Commission had worked with White House approval in adopting the Policy Statement.

[26] 21 F.C.C. 2d 355 (1970).

[27] *Ibid.*, p. 357.

[28] "FCC Renewal Policy Supplants Pastore Bill," *Television Digest* (January 19, 1970), p. 1. The Policy Statement did in fact discourage competing applications. In 1969 when the WHDH decision was announced, eight renewal applicants were challenged. However, during 1970, not one renewal application was challenged.

[29] *Ibid.*, p. 2.

[30] 24 F.C.C. 2d 383 (1970).

[31] *Ibid.*, p. 386.

[32] *Ibid.*, p. 389.

[33] Brief of CCC and BEST, Case No. 24,471, p. 5.

[34] "Analysis of FCC's 1970 Policy Statement on Competitive Hearings Involving Regular Renewal Applicants." Staff Study for the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 91st Congress, 2nd Session (November 1970).

[35] "FCC Disputes Hill Report on Renewals," *Television Digest* (December 21, 1970), p. 2.

[36] *Citizens Communications Center* v. *F.C.C.*, 447 F. 2d 1201 (C.A.D.C. 1971). Judge Wright's Opinion appears at pp. 1202–1215.

[37] Editorial, "Life or Death?," *Broadcasting* (June 21, 1971), p. 108.

[38] "No More Appeal on Renewal Policy," *Broadcasting* (July 5, 1971), p. 44.

A CLOSING LOOK

Reflections on Broadcast Regulation

The preceding chapters have taken the reader beyond organization tables and formal procedures in an effort to provide the flavor and detail of what we have called the politics of broadcast regulation. In this closing chapter we propose to examine that political process as a totality—to provide the connecting links between the analytical and theoretical material in the first four chapters and the specific facts of the four case studies.

THE CASE STUDIES ANALYZED

Emmette S. Redford has suggested that these questions are central to evaluating the regulatory process: "What fashioned this decision?" "What has fashioned the subsequent lines of policy?" "Who got what out of the process?" [1] Like Harold Lasswell, he sees the politics of administrative decision-making in terms of "who got what, when, and how" (see Introduction, page 2). Along similar lines, we shall pose the following questions to compare the four case studies just presented:

Who initiated the policy proposal?
Why?
What determined involvement in the dispute?
Who won?
Why?
What were the ultimate results of the policy—who really won?

Table 2 analyzes the four case studies in terms of these common questions. Table 3 carries this comparative analysis one step further by summarizing who was on which side in each case.

TABLE 2. COMPARISON OF THE FOUR CASES

	1945 FM SHIFT	1961–1962 ALL-CHANNEL RECEIVER BILL	1963–1964 ADVERTISING LIMITS	1970 LICENSE RENEWAL POLICY STATEMENT
1. Who initiated the policy proposal?	Commission (unanimous)	Commission (unanimous)	Commission (split)	Commission (split)
2. Why?	1) To develop technically superior FM; 2) to make available low-frequency space for more critical needs	To meet need for diversity of programming through development of UHF	To meet problems of advertising excesses	To calm fears of broadcasters raised by the WHDH decision
3. What determined involvement?	Economic interests—although clothed in terms of technical debate	Economic interests; opposition to deintermixture and desire to block it through All-Channel TV Bill	Economic interests; fear of potential implications of such regulation	Economic interests in terms of costs of litigation, devaluation of investments, and possible loss of license
4. Who won?	FCC (in part only); established interests	FCC; UHF interests	Broadcasting industry; Congress	Broadcasting industry; FCC
5. Why?	Technical character of dispute; unquestioned legal authority of Commission; power of dominant interests	Fear of deintermixture; need to take some positive action	Split in Commission; strong industry and Congressional pressure; confusion over Commission's authority; economic issues potentially at stake	Major industry concern; key Congressional support for a compromise agreement
6. What were the results—who really won?	TV interests and others opposed to FM growth	FCC; UHF interests; those VHF interests threatened by deintermixture	Broadcasting industry and Congress	As a result of a subsequent ruling of the Court of Appeals, citizens groups and critics of broadcasting industry

TABLE 3. WHO SIDED WITH WHOM IN THE FOUR CASES

	For the Proposal	*Against the Proposal*	*Result*
FM Shift in 1945	United FCC; TV and certain AM interests; manufacturers; and prospective broadcasters	FM backers; RTPB Panel 5; Television Broadcasters Association (very late)	Implemented
The All-Channel Receiver Bill in 1961–1962	United FCC; generally united industry (when coupled with deletion of deintermixture); President Kennedy	Electronic Industries Association	Implemented
Regulation of Commercial Time in 1963–1964	Split FCC (4–3)	United Industry; House of Representatives	Not Implemented
Licenses Renewal Policy Statement in 1970	Split FCC (6–1); industry; key Congressmen	Citizens groups; House Committee staff report	Implemented (but later struck down by Court of Appeals)

Certain generalizations emerge from a study of Tables 2 and 3. The FCC initiated all four of the policies under consideration. In three of the cases, the FCC succeeded in having its desired policy implemented. However, none of the cases were clear-cut victories for the Commission. In one, the Commission had to pay the price—albeit a modest one—of dropping deintermixture to obtain passage of the All-Channel Receiver Bill. The "win" in the FM shift controversy turned out to be a very hollow victory, for while the Commission achieved its immediate goal of reestablishing FM in a higher band, it failed to accomplish its professed ob-

jectives. The "victory" in the Renewal Policy Statement was short-lived since the Court of Appeals struck down the Policy Statement less than six months after its adoption. The key role of the FCC in initiating regulatory policy is evident, but the case studies underscore that the fate of such policy is determined by the struggle among various participants for control or influence over the policy-making process. In most instances, involvement in a policy conflict is a direct result of perceived economic threats or benefits from the proposal.

Division and Alliance Among Participants. Division within any of the participants severely weakens its effectiveness. For example, the dissenting opinions in the advertising time and license renewal Policy Statement controversies contributed measurably to the ultimate ineffectiveness of the FCC on these issues. The degree of broadcasting industry unanimity is no less important. If the industry is divided, as is frequently the case, a policy which favors the most powerful groups is likely to fare better than a policy which is opposed by these groups. In the FM and All-Channel Receiver cases, for instance, groups with long-established working relationships with Congress and the FCC were better able to impose their views upon the Commission than new groups.

The case studies also demonstrate that, in order to initiate and implement a policy successfully, the FCC needs support from either industry or Congress; if the Commission itself is divided, it needs support from both. Since Congress will generally oppose FCC policy only when the united industry does, the Commission can usually satisfy Congress by satisfying the industry. Because of this possibility of neutralizing two participants by neutralizing one, the process of interaction among industry, Congress, and the FCC would appear to have a built-in bias toward industry consultation and mollification.

In recent years, however, the increasing involvement of the courts and of citizens groups has tended to weaken Congressional support for the broadcasting industry. In effect, the politics of broadcast regulation has shifted from a simple tripartite system of industry, Congress, and Commission to a more complex set of interrelationships which includes the White House, the courts, and citizens groups. The Congress, the courts, and the FCC have devised ways to encourage greater citizen participation in the

regulatory process, and this has further expanded the number of possible participants on either side of any controversy.

The All-Channel Receiver case, where an FCC request resulted in widely supported legislation, suggests the potential for constructive cooperation between Congress and the Commission. The success of the FCC in this case, as well as its failure to regulate commercial time or to implement policy restricting license renewal challenges, could conceivably "condition" the Commission to limit itself to politically acceptable types of policies and means of policy introduction. It should be noted, however, that the courts remain in an effective position to thwart an FCC-Congressional alliance.

Under various circumstances, one or more of the six major participants in broadcast regulation may appear to wield considerable power. As pointed out in Chapter 4, however, none has hierarchical control over the policy-making process. The FCC was able to succeed in its policy initiative in the All-Channel Receiver case, and to prevail (at least initially) in two cases, *only* because of significant support from other participants. And, although industry and Congress were able through a united struggle to block the Commission's proposed regulation of advertising time, neither could unilaterally dominate the policy-making process.

Mutual Adjustment of Conflicting Goals. In Chapter 4 we noted that although the participants in broadcast regulation seek different goals—and feed conflicting demands and supports into the system—the prevalent pattern in such controversies is one of mutual adjustment or compromise. Throughout the All-Channel television proceedings, the Commission sought to ensure greater diversity in programming—a goal little shared by the VHF television broadcasters. Final policy development took the form of a compromise proposal: no disruption of existing VHF channels through deintermixture, and long-term strengthening of UHF broadcasting through the required manufacture of all-channel television receivers. This resolution had the considerable advantage of not immediately affecting existing VHF broadcasters while holding out hope for the future prospects of UHF.

The goals of the FCC and the industry most clearly clashed in the advertising time controversy—the Commission asserting its authority to outlaw broadcasting excesses and the industry equally

determined to retain freedom of action. Here a mutually adjustive solution was not found. Rather than allowing the Commission some means of gracefully modifying or withdrawing its rulemaking proposal, the broadcasting industry and the House of Representatives insisted on censuring the FCC politically.

Why was mutual adjustment not the pattern in this case? The answer lies partly in the political weakness of the Commission, which had initiated the rule by only a one-vote majority. In addition, the FCC's proposal was seen by many broadcasters as a threat to the very lifeblood of commercial broadcasting. Some quickly concluded that the same rationale might be used to justify regulation of programming or—even worse—of such vital matters as rates, income, and profits. These industry fears that symbolic legal or ideological rights could be violated aroused a fierce protectiveness in Congress, and the FCC was sternly rebuked.

GOALS AND STRATEGIES IN FCC POLICY-MAKING

In the diagram of the input-output system for broadcast regulation (see Figure 2, Chapter 4), the FCC occupies a crucial position as the principal (though by no means the most powerful) agent in the regulatory process. Because of its key relationship to authoritative outputs and also because the future of broadcast regulation in the United States is squarely in the lap of the Commission, it is worthwhile to extract from the case studies some aspects of the modus operandi which has characterized the FCC's actions and procedures over the last thirty years of its existence.[2]

Modest Change. The FCC strives generally for only modest change—some acceptable level of goal accomplishment short of maximization. Charles Lindblom has described the strategy of opting only for modest change as one which "satisfices" (satisfies and suffices) rather than maximizes. This strategy evolves naturally out of certain structural and attitudinal features of the regulatory process—namely, the limited resources of the regulatory body (the FCC) and the conflicting goals of the participants.

Throughout the All-Channel television case, the FCC was aware that UHF's prospects might be significantly improved by the development of an all-UHF television service. However, it

never seriously considered this policy because of the high economic —and political—costs entailed in uprooting all existing VHF stations. The Commission had no stomach for imposing upon VHF television broadcasters or set owners the kind of disruption it had earlier forced upon FM. But, while all-UHF was rejected as too drastic, the All-Channel Receiver bill did not go far enough to provide substantial relief for UHF interests. Although the bill required new sets to receive all 82 VHF and UHF channels (which was helpful), it did not require these sets to have click-stop tuners for the UHF channels. Consequently, even though the sets could receive UHF programming, many viewers were discouraged from watching UHF because of tuning difficulties.

Similarly, the FCC did not, in 1963, suggest the regulation of commercial content, placement, or frequency—problems often noted. Instead it limited itself to proposing the adoption of industry-established standards governing the maximum total minutes of commercial time per hour. It is clear that many affected interests considered this proposal extreme; nevertheless, a very good case can be made for its modesty. In non-prime television, for example, an acceptable total of advertising time according to these standards would be 27.2%. More than 16 minutes of commercials in each hour would thus be sanctioned as broadcasting in the public interest.

The principle of modest change was also operative in the Commission's decision on license renewal policies in comparative hearings. In this case, the FCC did not try to adopt the provisions of the Pastore bill, which would have prohibited the filing of a competing license application at renewal time unless the FCC first found that a grant of the renewal application would not be in the public interest. Instead, the FCC endorsed the compromise approach originally suggested by Chairman Burch at Senate hearings on S. 2004. In adopting the Policy Statement, the FCC emphasized that the policy of preferring an incumbent who had compiled a good broadcasting record over a rival applicant whose promises were untested was firmly grounded in prior Commission precedent and did not change existing law.

Flexibility and Sensitivity to Feedback. One advantage of modest change is that it can usually be reversed—if necessary—more easily than sweeping innovations. Thus, the FCC attempts to remain

flexible in its policy choices so as not to make irreversible decisions —it values the second chance.

The shift of FM in 1945, however, was essentially an irreversible decision, based on faulty technical data and made under the pressure of time. Similarly, the Commission issued the Renewal Policy Statement suddenly—apparently in response to pressures from Congress and the industry to act—without waiting for the submission of written or oral arguments by interested parties. Yet, this is not the typical pattern. Much of the history of broadcast regulation can be described in terms of FCC vacillation and indecision.

In the all-channel television case, the FCC requested that Congress act to relieve UHF's problems. Throughout this case, the tentative commitment of the Commission to all-channel television legislation was evident. The FCC frequently indicated that it considered such legislation to be the best immediate solution. However, it reserved the right to reconsider, after suitable time, the consequences of the legislation.

In the advertising time controversy, however, the Commission got caught in a politically costly policy initiative from which it could not extract itself in time to avoid punitive action. The FCC had left open the escape hatch of dropping its proposed rule-making proceeding; however, internal inertia prevented it from responding quickly enough to avoid industry condemnation and the House approval of the Rogers bill. In this case, the necessary flexibility was lacking.

In the FM shift, advertising time, and license renewal cases, the Commission initiated proposals under the pressure of time that later proved to be irreversible. In these same cases, the Commission, for various reasons, did not have time to make substantive changes in policy in response to feedback. The effectiveness and flexibility of the FCC then, seem to be partly a function of the time it has for policy development. Sufficient time to collect adequate data on which to base policy choices—and sufficient time to respond to political reactions to these choices—are usually necessary for successful policy-making.

Focus on Short-Range Ills—Breaking Bottlenecks. Given limited resources for the accomplishment of its goals, the FCC is forced to direct its attention to those problems which give the greatest promise of resolution with the least amount of difficulty for the

agency. For this reason, the Commission tends to focus on short-term problems—to deal with the immediate rather than with the interminable.

The clearest instance of such a focus on policy bottlenecks occurred in the all-channel television case. In the 1950's, the development of UHF television seemed to depend upon making television markets either all VHF or all UHF. When this proved politically unfeasible, the Commission turned its attention in 1961 to the problem of ensuring at least a potential audience for UHF programming. Unable to reach most existing sets, few UHF license holders were prepared to broadcast—and few advertisers were prepared to buy—commercial time.

The policy which the Commission finally developed in 1962 to assist UHF broadcasters was primarily a short range solution directly aimed at this significant bottleneck. The Commission was of the opinion that the desire to broadcast and to advertise on UHF frequencies would result from wider distribution of all-channel sets. With over 60% of all television sets now able to receive UHF, its prospects have become somewhat brighter. Further obstacles to UHF prosperity—tuner problems, programming difficulties, and competition from CATV—are now under active consideration by the Commission, but the essence of breaking such bottlenecks is to approach only one problem at a time.

Similarly, the Renewal Policy Statement was adopted in response to the short-term, immediate problem of the increased filing of competitive applications at renewal time. Confronted with the complex problem of formulating standards for comparative renewal proceedings, the FCC chose a policy that would obviate the need for a hearing in most situations as long as the renewal applicant had shown that its program service during the preceding term had been substantially attuned to community needs and interests and that its operation had not been marred by serious deficiencies.

The Policy Statement was designed to discourage the filing of competing applications at renewal time and thereby to alleviate the concern of broadcasters about the stability of their licenses. It did not, however, deal with the larger problem of standards to be applied to renewal applicants and challengers in competitive renewal hearings. The staff report of the House Investigations Subcommittee in effect criticized the FCC's focus on policy bottlenecks by charging that the Statement usurped Congressional power

and repealed "a constitutional and statutory requirement in the interest of *easing Commission workload requirements.*" [3]

Sequentialism and Incrementalism. As discussed in Chapter 4, short-range, sequential policies are less likely to violate the existing ideological and legal consensus, and they therefore make policy acceptance easier. This is probably why the FCC sees its policy-making as serial or sequential—a never-ending process of successive steps in which continual nibbling is a substitute for a good bite. Reviewing the case studies in the light of this hypothesis, it is at first difficult to see the FM and advertising disputes as part of a sequence of gradual, incremental steps. There was certainly nothing moderate in the effects of these policies upon key participants. Yet the FCC had been concerned for some time with the efficient use of the lower frequencies, and it doubtless regarded the lengthy hearings and collection of relevant data as logical steps leading to the final decision to shift FM upstairs in the spectrum.

In the same way the regulation of advertising time had at least a general precedent—the Commission's long concern, in its determination of the public interest, with the overall performance of broadcasters. All that was really new in 1963 was that the FCC's expectations about commercialization were formalized and the proposal made that they be imposed upon licensees as a definite requirement.

FCC sequentialism is most aptly illustrated by the All-Channel Receiver proposal. This was a policy which evolved step-by-step amid an agony of indecisions, as a means for dealing with a given problem: the intermixture, on an unequal technical, economic, and programming basis, of VHF and UHF stations. Because sequentialism is essentially in the eye of the beholder, however, all of the case studies actually fit the sequential model. What seems to the FCC to be only incrementally different from existing policy may be vigorously condemned by industry or citizens groups as violating established legal or ideological taboos, opening up or eliminating new avenues of regulation and control, or foretelling different and harsher procedures.

When the Commission majority proposed a policy that was not clearly incremental (such as making a voluntary industry advertising standard compulsory), the Commissioners may have felt they were "only trying to do industry a favor" by regulating

over-commercialized stations. But the method and substance of the proposal failed to communicate this benevolence to the industry. Similarly, in the Renewal Policy Statement, the six Commissioners favoring the policy may have regarded their action as merely a codification of existing policies and prior precedent. In both instances, the Commission apparently did not expect the intense reactions to its proposals that rapidly appeared.

A BROADER VIEW OF THE "PUBLIC INTEREST"

In an effort to encourage the ventilation of contrasting viewpoints, the FCC has recently been holding public hearings and panel discussions of outside spokesmen on major policy issues, including cable television, communications satellites, children's programming and the Fairness Doctrine. Direct confrontation and robust debate provide FCC Commissioners with a wider perception of the public interest. Moreover, public proceedings are useful in the Commission's relations with other institutions such as the courts and the Congress. Chairman Burch acknowledged that one of the objectives of the Fairness Doctrine Inquiry—which included the filing of voluminous comments by interested parties, oral argument, and panel discussions before the full Commission—was to improve the FCC's position before the courts by showing that the agency had the benefit of all shades of opinion and could demonstrate that it had agonized over the issues.[4] In the future, the FCC should encourage the submission of a broader spectrum of ideas and proposals by inviting the participation not only of parties directly affected by proposed policies but also of qualified professionals and citizens without an economic interest in the outcome.

We have seen that the Commission usually seeks modest goals, is flexible in its policy choices and sensitive to feedback, directs its attention to immediate problems in a series of serial or sequential steps, focuses on bottlenecks, and limits its consideration to proposals which are, in its view, only incrementally different from existing policies. One of the deficiencies of this type of approach is that the FCC tends to be reactive rather than innovative and to adopt short-term measures rather than long-range solutions. The basic issues in each of the case studies—fostering the full growth of FM and UHF, the form of advertising restrictions, and the standards for judging re-

newal applicants against challengers—remain unresolved and are still perplexing the Commission today. To enlarge its focus from bottlenecks to broad policy questions, the Commission established in 1967 a Research and Policy Studies Program to provide guidance on complex policy questions and technical issues. There is a need to strengthen to a considerably greater degree the Commission's capabilities to study alternative policies, to evaluate the submissions of outside parties and to conduct its own independent research.

One of the questions traditionally posed about the FCC and other independent regulatory agencies is "Why doesn't the Commission regulate the industry more vigorously?" Such a question assumes that the public interest will be furthered by greater regulation. However, the history of regulated industries such as transportation and broadcasting has shown that stricter governmental controls may in fact disserve the public interest. Moreover, calls for the imposition of more restrictive regulations by the FCC usually do not take into account the highly complex, politically sensitive, and rapidly changing character of the communications industry. Under the system of regulation established by the Congress, the FCC has operated within a sequential, bargaining policy-making process. America's stake in broadcasting is too fundamental and precious to be subjected to drastic or politically unpopular policies which do not allow the FCC to modify policies without excessive loss if new information indicates unexpected troubles.

A more relevant question might be "Does the FCC operate in the public interest?" Although an agency which seems preoccupied with incremental or marginal changes may seem less than heroic, this approach does tend to raise the level of competence of policy decisions. Such a strategy concentrates the Commission's analysis on familiar, better-known experience and reduces the number and complexity of factors it has to analyze. The Commission, moreover, is much more than an "inert cash register" whose actions are dictated by the most politically powerful forces. As a policy-maker the Commission does have the ability to unbalance the forces which seem to limit sound public policy. By testing certain regulatory possibilities, other means of accomplishing the same ends may develop. The very act of proposing regulation may reveal hidden or unknown defects. Attempts to initiate unpopular policy need not be merely an exercise in futility, for they may lead to the eventual establishment of different and more effective policy.

The policies of the FCC are not abstract theories, but political decisions allocating material rewards and deprivations—decisions, in Laswellian terms, concerning who gets what, when, and how. The development of policy in this manner is not easy. Before any proposal can emerge as public policy, it must survive trial after trial, test after test of its vitality. The politics of broadcast regulation offers no escape from that imperative.

NOTES

[1] Emmette S. Redford, "Perspectives for the Study of Government Regulation," *Midwest Journal of Political Science*, VI (February 1962), 2.

[2] The following discussion is an extension and application of hypotheses developed by Charles E. Lindblom in "Strategies or Dodges," *The Policy-Making Process* (Englewood Cliffs, N.J.: Prentice-Hall, 1968), pp. 24–27.

[3] "Analysis of FCC's Policy Statement on Comparative Hearings Involving Regular Renewal Applicants," staff study for the Special Subcommittee on Investigation, the House Committee on Interstate and Foreign Commerce, 91st Congress, 2nd Session (November 1970), p. 111.

[4] "Chance to Get Fairness Under Control," *Broadcasting* (April 10, 1972), p. 62.

Bibliography

GENERAL WORKS ON REGULATORY AGENCIES

While the literature on independent regulatory commissions is immense, the number of studies dealing with the political aspects of regulation is very limited. Three works which provide insights on the politics of regulation are Merle Fainsod's essay, "Some Reflections on the Nature of the Regulatory Process," in Carl J. Friedrich and Edward S. Mason, eds., *Public Policy: 1940* (Cambridge, Mass.: Harvard University Press, 1940); the study by Samuel P. Huntington, "The Marasmus of the Interstate Commerce Commission: The Commission, the Railroads, and the Public Interest," *Yale Law Journal*, LXI (April 1952); and the work by William W. Boyer, *Bureaucracy on Trial: Policy Making by Government Agencies* (Indianapolis: Bobbs-Merrill, 1964). A study by Professor William L. Cary, *Politics and the Regulatory Agencies* (New York: McGraw-Hill, 1967) illuminates many aspects of the regulatory process but only partially defines the political context of the problems he encountered as Chairman of the Securities and Exchange Commission.

Valuable background material on independent regulatory commissions may also be found in the classic studies by Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Oxford University Press, 1941) and Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton: Princeton University Press, 1955). A helpful book of readings edited by Samuel Krislov and Lloyd P. Musolf, *The Politics of Regulation* (Boston: Houghton-Mifflin Co., 1964) emphasizes the interrelations of social interests and regulatory outcomes. *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* (Washington, D.C.: Government Printing Office, 1971) contains recommendations by the President's Advisory Council on Executive Organization on restructuring regulatory agencies as well as a selected bibliography

on articles, books, reports, and studies useful for understanding the regulatory process. A thoughtful evaluation of the Advisory Council's report is Roger G. Noll, *Reforming Regulation* (Washington, D.C.: Brookings Institution, 1971).

LITERATURE ON BROADCAST REGULATION

No definitive work exists on the political problems of the Federal Communications Commission, although Walter B. Emery's *Broadcasting and Government: Responsibilities and Regulations* (East Lansing, Mich.: Michigan State University Press, rev. ed., 1971), offers a comprehensive study of the legal aspects of broadcast regulation. Emery's study provides useful insights into the backgrounds of Commissioners, the various governmental agencies concerned with broadcasting, and Commission-Congressional relationships. Considerable material concerning broadcast regulatory policy prior to 1948 is contained in the published doctoral dissertation of Murray Edelman, *The Licensing of Radio Services in the United States, 1927 to 1947: A Study in Administrative Formulation of Policy* (Urbana, Ill.: The University of Illinois Press, 1950). A well-written case study of *ex parte* influences in TV assignments is Victor G. Rosenblum's "How to Get into TV: The Federal Communications Commission and Miami's Channel 10," in Alan F. Westin, ed., *The Uses of Power: 7 Cases in American Politics* (New York: Harcourt Brace Jovanovich, 1962). A valuable discussion of the role of Congress during the the 1920's and 1930's is contained in the study by Carl J. Friedrich and Evelyn Sternberg, "Congress and the Control of Radio-Broadcasting," *The American Political Science Review*, XXXVII (October and December 1943).

Participant-oriented material on the FCC can be found in several "first-person" books. Bernard Schwartz's *The Professor and the Commissions* (New York: Knopf, 1959) is a controversial account of abuses at the FCC by a New York University Law Professor who was hired by the House Committee on Interstate and Foreign Commerce in 1957 to study the regulatory commissions. Schwartz claimed that he was fired by the Committee in 1958 after he proposed to expose violations of the *ex parte* rules and other laws that were politically embarrassing to the FCC, certain Congressmen, and the administration. Based on his experiences at the FCC, Charles S. Hyne-

man's *Bureaucracy in a Democracy* (New York: Harper & Row, 1950) is a thoughtful examination of government regulation. A collection of Newton Minow's speeches when he was Chairman of the FCC appears in a book edited by Lawrence Laurent entitled *Equal Time: The Private Broadcaster and the Public Interest* (New York: Atheneum, 1964). *How to Talk Back to Your Television Set* (Boston: Little, Brown, 1970; reissued with added bibliography and an index by Bantam Books, 1970) is a lively, readable synopsis of Commissioner Nicholas Johnson's views on various regulatory issues which gives practical advice on how to change television programming. Perceptive articles on the regulatory process by Commissioner Lee Loevinger are cited in Chapter 2.

Textbooks. There are several excellent textbooks which provide background facts on the historical, economical, technical, sociological and regulatory aspects of broadcasting. Perhaps the best is Sydney W. Head's *Broadcasting in America: A Survey of Television and Radio* (Boston: Houghton-Mifflin, 2nd ed., 1972). Broadcast law textbooks focusing on regulation of programming, multiple ownership, and other legal issues include Donald M. Gillmor and Jerome A. Barron, *Mass Communication Law: Cases and Comment* (St. Paul: West Publishing Co., 1969; now available with 1971 supplement) and Harold L. Nelson and Dwight Teeter, Jr., *The Law of Mass Communications: Freedom and Control of Print and Broadcast Media* (Mineola, N.Y.: Foundation Press, 1969; with 1971 notes). An evaluative review of these textbooks is contained in an article by Christopher H. Sterling, "Broadcasting Textbooks I: Industry and Effects," *Educational Broadcasting Review,* v (April 1971).

History. A rich and fascinating social history of American broadcasting is the comprehensive three-volume work by Erik Barnouw: *A Tower in Babel: A History of Broadcasting in the United States to 1933; The Golden Web: A History of Broadcasting in the United States, 1933–1953;* and *The Image Empire: A History of Broadcasting from 1953* (New York: Oxford University Press, 1966, 1968, and 1970, respectively). Each volume contains a chronology, the text of major laws relating to broadcasting, and an extensive bibliography.

Other useful books on various aspects of the history of broadcasting include Llewellyn White's *The American Radio: A Report on the Broadcasting Industry in the United States from the Commission on Freedom of the Press* (Chicago: University of Chicago

Press, 1947; reissued by Arno Press, 1971); Sydney W. Head's *Broadcasting in America, supra;* and Robert S. McMahon, *The Regulation of Broadcasting: Half a Century of Government Regulation of Broadcasting and the Need for Further Legislation,* a detailed account of Congressional consideration of laws on broadcast regulation written for the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 85th Congress, 2nd Session, 1958. "A Selected Bibliography on the History of Broadcasting" prepared by Barry G. Cole and Al Paul Klose, appears in the Summer 1963 issue of the *Journal of Broadcasting* (VII:3).

The FCC's *Annual Reports* constitute excellent background material from the Commission's perspective; reports for the years 1935 through 1955 have been reissued by Arno Press in 1971. A collection of landmark legal documents affecting broadcasting (with helpful introductory notes) is contained in Frank Kahn, ed., *Documents of American Broadcasting* (New York: Appleton-Century-Crofts, rev. ed., 1972). Laws dealing with the communications media have been compiled in Gilman G. Udell, comp., *Radio Laws of the United States* (Washington: U.S. Government Printing Office, 1968).

Primary Sources. The following publications of the U.S. Government Printing Office in Washington, D.C. contain copies of the basic laws, rules, and decisions pertaining to broadcast regulation: the *United States Code,* all Federal laws (the Communications Act of 1934 appears in Title 47); the *Federal Register,* weekly materials on rule-making proceedings by governmental agencies; the *Code of Federal Regulations,* an annual compilation of rules and regulations adopted by such agencies; and the *Federal Communications Reports,* decisions, notices, and reports of the FCC. The standard comprehensive reference work in the field of broadcast regulation is *Pike & Fischer Radio Regulation,* a commercial publication which includes the text of broadcast laws; legislative histories of such laws; rules proposed and adopted by the FCC; decisions, reports and other rulings of the Commission; and decisions of courts and other governmental agencies directly affecting radio and television.

Bibliographies. An excellent annotated bibliography of major published works dealing with the background, structure, function, content, and effects of the communications media is Eleanor Blum, *Basic Books in the Mass Media: An Annotated, Selected Booklist*

Covering General Communications, Book Publishing, Broadcasting, Film, Magazines, Newspapers, Advertising, Indexes, and Scholarly and Professional Periodicals. (Urbana: University of Illinois Press, 1972). The subtitle accurately describes the bibliography's contents. *Broadcasting Bibliophile's Booknotes: Mass Media Publications Service,* edited by Professor Christopher H. Sterling, Temple University, is a monthly review of recent books on broadcasting and other media.

Several journals (*Journal of Broadcasting, Federal Communications Bar Journal, Journal of Law and Economics* and *Educational Broadcasting Review*) regularly publish articles on various aspects of broadcast regulation. The Summer 1970 issue (Vol. XIV:3) of the *Journal of Broadcasting* contains "A Selected Bibliography of Works on the Federal Communications Commission" by Robert Sperry, which is a highly selective list of articles, books, pamphlets, dissertations and Congressional documents. The Winter 1969–1970 issue (Vol. XIV:1; Part II) of the *Journal of Broadcasting* includes "A Bibliography of Articles about Broadcasting in Law Periodicals, 1956–1968," prepared by Kenneth Gompertz, which is an index—by title, subject, and author—of 497 articles on administrative law and the regulation of broadcasting culled from American law journals. This issue also features an analysis of 526 articles published during the preceding 35 years entitled "An Annotated Bibliography of Articles on Broadcasting Law and Regulation in Law Periodicals, 1920–1955." In addition, the *Journal of Broadcasting* periodically publishes compilations of graduate theses and dissertations.

The Four Case Studies. Surprisingly little useful research has been published concerning the four case studies in Chapters 5, 6, 7, and 8. What literature exists tends either to be highly impressionistic and one-sided, or simply journalistic reports scattered through issues of various periodicals such as *Broadcasting.* The footnotes in Chapters 5 through 8 provide citations to the pertinent FCC, judicial, and Congressional documents. Detailed contemporaneous accounts of FCC actions in the four cases (as well as other aspects of broadcast regulation) are reported in *Broadcasting,* a weekly magazine. Although *Broadcasting* is the best known of the trade journals for the broadcasting industry, *Television Digest* and *Variety* offer informative accounts of FCC actions each week, frequently from a less industry-oriented perspective. (Both *Broadcasting* and *Television Digest* publish annual indexes.)

The FM Shift. No single concise account exists of the FM shift decision, with the exception of an earlier version of Chapter 5 by Lawrence D. Longley, "The FM Shift in 1945," *Journal of Broadcasting,* XII (Fall 1968). Useful material on FM broadcasting may be found in W. Rupert Maclaurin, *Invention and Innovation in the Radio Industry* (New York: Macmillan, 1949, reissued by Arno Press, New York: 1971). A lively account of FM's early history, full of detail but undocumented, is the book recently reprinted in paperback by Lawrence Lessing, *Man of High Fidelity: Edwin Howard Armstrong* (New York: Bantam, 1969). Probably no better introduction exists to the development of FM broadcasting—or to the life of a truly towering figure—yet the reader must keep in mind Lessing's obviously deep admiration of the man and his profound distrust of Armstrong's opponents. An alternate and briefer introduction to much of the same material (and with similar biases) can be found in the anonymous article, "Armstrong of Radio," *Fortune,* XXXVII (February 1948).

A useful study of the economic characteristics of the radio spectrum and of the roles played by various participants in the allocation of spectrum is Harvey J. Levin's *The Invisible Resource: Use and Regulation of the Radio Spectrum* (Baltimore: Johns Hopkins Press, 1971).

The FM shift is also covered, although rather briefly, in the appendix of Elmer E. Smead's book, *Freedom of Speech by Radio and Television* (Washington, D.C.: Public Affairs Press, 1959), in Murray Edelman's *The Licensing of Radio Services in the United States, supra,* and in the unpublished doctoral dissertations of Avard Wellington Brinton, "The Regulation of Broadcasting by the FCC: A Case Study in Regulation by Independent Commission" (Harvard, 1962), and Christopher H. Sterling, "Second Service: A History of Commercial FM Broadcasting to 1969" (University of Wisconsin, 1969). (Copies of the dissertations noted here may be obtained from University Microfilms, Ann Arbor, Michigan.) The bright new future which the development of FM might bring is glowingly predicted in a book written in the 1940's by Charles A. Siepmann, *Radio's Second Chance* (Boston: Little, Brown, 1946). Finally, two recently published articles by Christopher H. Sterling, "Second Service: Some Keys to the Development of FM Broadcasting," *Journal of Broadcasting,* XV:2 (Spring 1971), and "Decade of Development: FM Radio in the 1960's," *Journalism Quarterly,* XXXXVIII:3 (Summer 1971), establish a most

useful context for understanding the events of the late 1940's and their impact on the subsequent development of FM broadcasting.

The All-Channel Receiver Bill. A comprehensive account of the deintermixture policies of the FCC during the 1950's and the events leading up to the All-Channel Television Bill in 1962 is an article written by the student editors of the *Harvard Law Review*, "Notes: The Darkened Channels: UHF Television and the FCC," *Harvard Law Review*, LXXV (June 1962). Although limited because of its heavy reliance on formal statements and legal briefs, this is an excellent overview. Two dissertations cover the Commission's early deintermixture efforts: John Michael Kittross, "Television Frequency Allocation Policy in the United States," (University of Illinois, 1960), includes a sound discussion (in Chapter VI) of UHF television and deintermixture in the 1950's; and Avard Wellington Brinton, "The Regulation of Broadcasting by the FCC: A Case Study of Regulation by Independent Commission," (Harvard, 1962) which reviews some of the events surrounding the deintermixture controversies in the course of trying to show the limitations of independent regulatory commissions.

Some of the specific events surrounding the passage of the 1962 All-Channel Receiver Law are discussed in Chapter VI, "All-Channel Television," of Newton N. Minow's *Equal Time: The Private Broadcaster and the Public Interest* (New York: Atheneum, 1964). Douglas W. Webbink analyzes this legislation in a recently published critique, "The Impact of UHF Promotion: The All-Channel Receiver Law," *Law and Contemporary Problems*, XXXIV:3 (Summer 1969). In fact, the relatively brief discussion by Minow and the criticism by Webbink constitute the entirety of significant published materials specifically on the 1962 legislation—with the exception of an earlier version of this chapter by Lawrence D. Longley, "The FCC and the All-Channel Receiver Bill of 1962," *Journal of Broadcasting*, XIII:3 (Summer 1969).

The Commercial Time Proposal. The only published material which systematically examines events surrounding the commercial time fiasco is an early version of Chapter 7, written by Lawrence D. Longley, "The FCC's Attempt to Regulate Commercial Time," *Journal of Broadcasting*, XI:1 (Winter 1966–1967). A criticism of the Commission's 1963 initiative on legal and constitutional grounds was published at that time by Douglas A. Anello and Robert V.

Cahill, attorneys with the National Association of Broadcasters, "Legal Authority of the FCC to Place Limits on Broadcast Advertising Time," *Journal of Broadcasting,* VII:4 (Fall 1963). One interested in the genesis of the Commission's concerns should also examine the famous 1946 FCC "Blue Book," *Public Service Responsibility of Broadcast Licensees* (Washington, D.C.: Government Printing Office, 1946), as well as two articles discussing this landmark document, Richard J. Meyer, "The Blue Book," *Journal of Broadcasting,* VI:3 (Summer 1962), and his "Reactions to the 'Blue Book'," *Journal of Broadcasting,* VI:4 (Fall 1962). A discussion of the FCC's policies on commercials following the abortive attempt in 1963 is contained in an article by Carl Ramey, "The Federal Communications Commission and Broadcast Advertising: An Analytical Review," *Federal Communications Bar Journal,* XX:2 (1963).

Competing Applications at Renewal Time. The literature on the FCC's landmark decision in the *WHDH* case and the "Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants" has been limited primarily to articles focusing on legal issues: Walter B. Emery, "Nervous Tremors in the Broadcasting Industry," *Educational Broadcasting Review,* III:3 (June, 1969); Louis Jaffe, "WHDH: The FCC and Broadcasting License Renewals," *Harvard Law Review,* LXXXII (1969); Hyman Goldin, "'Spare the Golden Goose'—The Aftermath of WHDH in FCC License Renewal Policy," *Harvard Law Review,* LXXXII (1969); "Comment, The Federal Communications Commission and Comparative Broadcast Hearings: WHDH as a Case Study in Changing Standards," *Boston College Industry and Commerce Law Review,* X (1969); and William H. Wentz, "The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?" *University of Pennsylvania Law Review,* CXVIII (1970).

A study entitled *Licensing of Major Broadcasting Facilities by the Federal Communications Commission,* which was prepared by Professor William K. Jones for the Administrative Conference of the United States, is an excellent volume for general background reading on the FCC's processing of renewal applications and its standards in comparative hearings. The study was reprinted in U.S. House of Representatives, Subcommittee No. 6, Select Committee on Small Business, 89th Congress, 2nd Session, *Activities of Regulatory and Enforcement Agencies Relating to Small Business,* Part 1, A103–A112, A165–A174.

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