INTERPRETING FCC BROADCAST RULES & REGULATIONS: Volume 2

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INTERPRETING FCC BROADCAST RULES & REGULATIONS

VOLUME 2

By the Editors of BM/E Magazine

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PREFACE

The first volume of this work, published in the Fall of 1966, achieved wide-spread acceptance and acclaim. Originally published as a series of articles in BM/E Magazine, more than 20 important topics governed by FCC policies, rules and regulations are included in the previous work.

Since that time, however, the FCC has taken many actions, including changes in its policies and views which affect day-to-day broadcast operations. Subjects range from the amount of commercial time considered acceptable to specific formats for sponsor and station identifications — from in-depth views on Section 315 to cases involving the "Personal Attack" rules — from cigarette commercials vs. the Fairness Doctrine to non-communications act violations — from revised program format forms to TV-CATV cross-ownership — from rules governing CATV to rules governing translators, pre-sunrise operation, the Emergency Broadcast System, monitoring stereo and SCA operations, and many more.

Because of their importance to broadcasters,

these subjects, among others, were chosen for in-depth coverage in BM/E Magazine during the past two years, and are reprinted herein as a single documentary source. The topics were carefully researched, and the content thoroughly checked for authenticity and accuracy by some of the capitol's foremost communications lawyers. The original articles have been rearranged to follow a logical sequence. For example, three different articles relating to various ID Rules appear as successive sections in this book, thereby providing the reader with all the research information published on the subject to date. In closing, we again remind readers that this is a second Volume, not a new edition of the first volume. This book, therefore, does not replace the first one; rather, it supplants the original volume.

The Editors

October, 1968

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Comparative Criteria for Choosing Applicants

DURING THE past few years, we have witnessed a tremendous upsurge in the volume of standard, FM, and TV applications for construction permits. In many instances, there were two or more applicants for the same facilities, thereby necessitating a Commission hearing to determine the best qualified applicant. In 1965, the Commission issued a policy statement as a future guide to be followed in the comparison of applicants in a hearing.

This discussion does not deal with the issues of basic legal, financial, and technical qualifications to become a licensee; it is more particularly directed toward the areas explored and criteria employed by the Commission, as set forth in the policy statement, in comparing each applicant. These are commonly referred to as the *Comparative Issues.*

The Commission has set forth two primary objectives toward which the comparative portion of a hearing should be directed. They are (1) the best practicable service to the public, and (2) a maximum diversity of control of mass communications media.

The first objective is so obvious that it requires little further comment. The *raison d'etre* of the Commission is to insure that the broadcaster *will* serve the public interest. Desirability of the second objective has been discussed pre-

viously. To wit: (1) "The Commission believes that the better method of creating a diversity of viewpoints in an area, through the broadcast medium, is to grant broadcast authorizations to as many separate owners as possible." (2) "The Commission was guided by the Congressional policy against monopoly in the communications field (e.g., as expressed in Section 313 of the Communications Act), and the concept (recognized by the courts) that the broadcasting business is, and should be, one of free competition."

The Commission has decided that the two primary goals stated above are quite compatible. Service by a broadcaster to an area implies the ability and flexibility to meet the changing local tastes, needs, and interests. Since independence and individuality of approach are elements of rendering good program service, *the primary goals of good service and diversification of control complement each other.*

Diversification of Control

Diversification *is a factor of primary significance since,* as set forth above, *it constitutes a primary objective in the licensing scheme.* As in the past, the Commission will consider both common control and less than controlling interest in other broadcast stations and other media of mass communications. Control of large interests elsewhere in the same state or region may well be more significant than control of a small medium of expression in the same community. The number of other mass communication outlets of the same type, in the community proposed to be served, will also affect, to some extent, the importance of this factor in the general comparative scale.

It is not possible, of course, to spell out in advance the relationships between any significant number of the various factual situations which may be presented in actual hearings. It is possible, however, to set forth the elements

which the Commission believes significant. It will consider interests in existing media of mass communications to be more significant in the degree that they: (1) are larger (i.e., go towards complete ownership and control); (2) are in (or close to) the community being applied for; (3) are significant in terms of numbers and size (i.e., the area covered, circulation, size of audience, etc.); (4) are significant in terms of regional or national coverage; and (5) are significant with respect to other media in their respective localities.

Full-Time Participation

The integration of ownership and management is, frequently, of *decisional importance.* It is inherently desirable that those with the legal responsibility oversee day-to-day operation of the station. In addition, with such integration, there is a likelihood of greater sensitivity to (1) an area's changing needs and (2) programming designed to serve these needs. This factor is of vital importance in securing the best service. It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership.

The Commission is *primarily interested in full-time participation* by owners in management. To the extent that the time spent is less than full time, the comparative credit given will drop sharply, and no credit will be given to the participation of any person who will not devote substantial amounts of time to the station on a *daily* basis. In assessing proposals, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management, the Commission also looks to the positions which the participating owners propose to occupy. Also, it accords particular weight to staff positions held by the owners, such as general manager, station manager, program director, business manager, director of

news, sports or public service broadcasting, and sales manager. Thus, although positions of less responsibility are considered, especially if there will be full-time integration by those holding those positions, they cannot be given the decisional significance attributed to the integration of stockholders exercising policy functions. *Purely consulting positions will be given no weight.*

Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. While, for the reasons given above, integration of ownership and management is important *per se*, its value is increased if the participating owners are local residents and if they have experience in the field. Participation in station affairs by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs. The importance of this is demonstrated by the Commission's great emphasis on program surveys in renewal and other applications.

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

Previous broadcast experience, while not so significant as local residence, also has rapidly diminishing value when put to use through integration of ownership and management. Also, previous broadcasting experience includes activ-

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

The discussion above has assumed full-time, or almost full-time, participation in station operation by those with ownership interests. The Commission recognizes that station ownership by those who have broadcasting experience may still be of some value even where there is not the substantial participation to which it will accord weight under this heading. Therefore, a slight credit will be given for the local residence of those persons with ownership interests who will devote *some time* to station affairs. Similarly, a very slight credit will be given for experience not accompanied by full-time participation. *Both of these factors, it should be emphasized, are of minor significance. No credit will be given either the local residence or experience of any person who will not put his knowledge of the community or experience to any use in the operation of the station.*

Proposed Program Service

The United States Court of Appeals for the District of Columbia Circuit has stated that ". . . in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service." (*Johnson Broadcasting Co.* v. *FCC*, 85 U.S. App. D.C. 40, 48, 175 F. 2d 351, 359.) The importance of program service is obvious. The feasibility of making a comparative evaluation is not so obvious. Hearings take considerable time. and precisely for-

mulated program plans may have to be changed not only in details but in substance—to take account of new conditions existing at the time a successful applicant commences operation. Thus, minor differences among applicants are apt to be of no significance.

The basic elements of an adequate service have been set forth in the Commission's July 27, 1960 "Report and Statement of Policy Re: Commission en banc Programming Inquiry." The applicant has the responsibility for a reasonable knowledge of the community and area, based on surveys or background, which will show that the program proposals are designed to meet the needs and interests of the public in that area. Contacts with local civic and other groups and individuals are also an important means of formulating proposals to meet an area's needs and interests. *Failure to make them will be considered a serious deficiency, whether or not the applicant is familiar with the area.*

Decisional significance will be accorded only to material and substantial differences between applicants' proposed program plans. Minor differences in the proportions of time allocated to different types of programs will not be considered. Substantial differences will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service. For example, an unusual attention to local community matters for which there is a demonstrated need, may still be urged.

In light of the considerations set forth above, and experience with the similarity of the program plans of competing applicants, taken with the desirability of keeping records free of immaterial clutter, no comparative issue will ordinarily be designated on program plans and policies, or on staffing plans or other program planning elements, and evidence on these matters will *not* be taken under the standard issues. The Commission will designate an issue where

examination of the applications and other information before it makes such action appropriate, and applicants who believe they can demonstrate significant differences, upon which the reception of evidence will be useful, may petition to amend the issues.

Past Broadcast Record

This factor includes past ownership interest and significant participation in a broadcast station by one with an ownership interest in the applicant. *It is rarely a factor of substantial importance.* A past record within the bounds of average performance will be disregarded, since average future performance is expected. Therefore, the Commission is not interested in the fact of past ownership *per se*, and will not give a preference because one applicant has owned stations in the past and another has not.

The Commission is interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future. Thus, it will consider past records to determine whether the record shows (1) unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs, or (2) either a failure to meet the public's needs and interests or a significant failure to carry out representations made to the Commission.

Character

The Communications Act makes character a relevant consideration in the issuance of a license. Significant character deficiencies may warrant disqualification, and an issue will be designated where appropriate. Since substantial demerits may be appropriate in some cases where disqualification is not warranted, petitions to add an issue on conduct relating to character will be entertained. In the absence of a desig-

nated issue, character evidence will not be taken. The intention here is not only to avoid unduly prolonging the hearing process, but also to avoid those situations where an applicant converts the hearing into a search for his opponent's minor blemishes, no matter how remote in the past or how insignificant.

Other Factors

As the Commission has stated, its interest in the consistency and clarity of decision and in expedition of the hearing process is not intended to preclude the full examination of any relevant and substantial factor. Thus, it will favorably consider petitions to add issues when, but only when, they demonstrate that significant evidence will be presented.

Past experience has shown that hearings have run for long periods of time because of the number of areas of comparison. The Commission's new guidelines of July 28, 1965, "Policy Statement On Comparative Broadcast Hearings," is an attempt to (1) formulate a higher degree of consistency of decision and (2) prevent undue delay in the disposition of comparative hearings. As is evident from the foregoing discussion, the various factors cannot be assigned absolute values; some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are nearly countless. Nevertheless, it behooves all parties who are interested in applying for new broadcast facilities to keep these comparative criteria in mind. Additionally, consultation with an attorney well versed in the practice of communications law is essential to obtain a realistic appraisal of one's chances in a given case.

The Financial Showing

ALL LICENSEES are familiar with the financial portion (Section III) of an application for construction permit (Form 301). Few, however, are cognizant of the tremendous number of cases and thousands of man-hours that have been expended in litigation relating to the showing necessary to meet the Commission's financial requirements. These requirements affect those who may be applying for: (1) a major change in facilities; (2) transfer of control or assignment of license; (3) renewal; (4) any application that estimates $5000 or more in expenditures; and, of course, (5) new stations.

Since the earliest days of broadcasting, the Commission has required an applicant to show that he is financially qualified to construct and operate a broadcast facility. Section 308 (b) of the Communications Act provides, in part, as follows:

> "All applications for station licenses . . . shall set forth such facts as . . . to citizenship, character, and *financial* . . . and other qualifications of the applicant to operate the station. . . ."

Analysis of the Commission's financial requirements should prove helpful to existing licensees and applicants.

Analysis of Section III (Financial)

Paragraph 1 (*a*) requests information relating

to costs of: (1) equipment; (2) antenna system; (3) land for antenna and/or studio site; and (4) other expenses such as legal and engineering fees. All of these items can be supported by estimates from reliable sources. Usually, a simple letter from a recognized supplier is utilized. The two most nebulous and challenging portions of this paragraph relate to: (1) estimated cost of operation for the first year; and (2) estimated revenues for the first year.

Estimating the first year's estimated *costs of operation* by an applicant—in a manner that will withstand cross-examination—may not be as simple as first impression may indicate. When the applicant computes this figure, he should consider his programming and staffing proposals carefully. For example, if the applicant proposes extensive *local* programming, his staff proposal must be greater than that of otherwise comparable stations. Since the Commission tends to equate "public service" with the extent of proposed *local* programming, those involved in comparative hearings with other applicants are well-advised to propose a staff larger than average. Obviously, this increases proposed operating costs and, hence, the overall financial requirements.

The first year's *estimated revenues* create a problem only if the applicant intends to rely thereon for *any* portion of his financial commitment. The problem is one of *proving* (to the Commission's satisfaction) that the analysis of estimated revenues is correct. When an applicant reflects a "thin" financial picture and relies on projected revenues, the latter assumes monumental importance.

Paragraph 1(b) requests justification of the figures employed in response to 1 (a) (above). Antenna and equipment costs can be justified by obtaining a letter from a reliable supplier setting forth these various figures. The purchase or leasing of land, office space, and remodeling or construction of buildings may be justified by various means such as: (1) options to lease or purchase;

(2) contracts of sale; and (3) estimates from bona fide contractors as to costs of remodeling or construction. Estimates of the first year's cost of operation and revenues may be based upon: (1) experience as a broadcaster in the same geographical area; (2) general broadcast experience elsewhere: (3) survey of similar stations in the same market; (4) survey of commercial establishments in the market to ascertain interest in advertising; (5) survey of population to ascertain interest in proposed programming as a gauge to approximate audience that would attract advertisers; and (6) numerous other methods.

Paragraph 1 (c), 2, 3, and 4 are basically designed to elicit the details of an applicant's ability to meet his financial commitments as outlined in Paragraphs 1(a) and (b).

Comparative Hearing Problems

An applicant who does not anticipate having his application consolidated in hearing with competing applications may generally employ the overworked characterization of "reasonableness" in estimating his expenses and revenues. Additionally, if the financial showing relating to the applicant's ability to meet expenses is not adequate or clear, a simple amendment setting forth additional details will usually satisfy the Commission. However, when a hearing with competing applicants is anticipated, a markedly different situation arises.

In comparative hearing, one's application will *not* be considered with the "comparative criteria" (*BM/E*, Nov. 1966) unless the basic financial qualifications have been met. In other words, the financial showing is of a "threshold" nature. a condition precedent to the comparative phases of the hearing. The Commission has stated:

> "Where one applicant in a competitive proceeding has not been found by the Commission to be financially qualified, an affirmative showing will be required that such applicant is so qualified

before it is entitled to comparative consideration with the other applicants in a proceeding. . . ." See *Brush-Moore Newspapers, Inc.*, 9 RR 922 (1953).

Basic qualification issues affect an applicant's ability to meet the minimum standards required of all applicants by the Commission. If an applicant cannot make an adequate showing, proof that he can meet his financial commitments, his application fails. With respect to this issue, *the main question relates to the applicant and his financial proposal.* It makes no difference that one applicant has more funds than another; *the major point is whether each applicant can justify his own financing scheme.* "The fact that one applicant has demonstrated greater financial strength will not be given weight in deciding whether to make a grant of it or to a competing applicant whose financial situation is adequate for carrying out its proposal if it is awarded a construction permit." See *Northeastern Indiana Broadcasting Co., Inc.*, 9 RR 261 (1953). However, if greater financial strength is pledged to more local programming, better equipment, and hence more public service, a comparative advantage may be achieved.

During the 30's and 40's, the Commission adhered to the basic premise that, in order to be financially qualified, every applicant must be able to meet: (1) *costs of construction, and (2) expenses for operation of the station over a reasonably extended period of time.* See *Radio Enterprises, Inc.*, 7 FCC 169 (1939). During the initial planning for a-m facilities, many applicants found it extremely difficult to prove that there would be adequate advertiser support. Those applicants relying, at least in part, upon projected revenues, were required to make an evidentiary showing that businesses in the community would support the station. Where an applicant for a new station had secured advertising commitments of $2,741.85 per month, thus indicating adequate commercial support, this overcame the claim of an existing

station that the community could not support another station. See *Capitol Broadcasting Co.*, 6 FCC 72 (1938).

During the 1950's, with the meteoric growth of TV and fm facilities, it became evident that the portion of the Commission's financial criteria (relating to the availability of financing to meet operating expenses for a *reasonable period of time)* required more explicit definition. Too much time and effort had been spent in haggling over the interpretation of "reasonable period of time." Therefore, *the Commission established a more definite criteria.* Applicants must demonstrate adequate financing to meet costs of construction plus *the first three months' operating costs.* The Commission said:

> "The Commission in considering an applicant's financial qualification is not concerned with the question of whether, *in the long run, a station can maintain* itself economically . . . An applicant who has sufficient funds available *to build and operate his station for at least three months is* financially qualified . . ." (Emphasis supplied.) See *Sanford A. Schafitz,* 24 FCC 363; 14 RR 582 (1958).

The new criteria established a practical pegboard upon which the Commission and all applicants could base their analyses. However, the early 1960's witnessed a veritable deluge of new applications for fm facilities; additionally, with the advent of the all-channel receiver law, applications for new uhf television stations increased appreciably. Many of the new applications were in markets where there were numerous facilities in the same broadcast service. Naturally, the major networks were affiliated with the vhf stations. Since these stations covered larger areas (thereby delivering larger audiences), the ability of a new uhf station to attract network affiliation was practically nil. Since, from the outset, the economic viability of uhf was poor, many individuals decided to obtain a uhf construction permit and

"sit on it" until the economic climate changed. The Commission was so anxious to encourage uhf activity that they were most lenient in applying the financial requirements. As a result, many financially weak applications were granted, and construction permits were held for years without any construction. The Commission finally realized that it must augment financial requirements to avoid further useless grants of uhf CPs. Finally, the Commission's concern was evidenced by the promulgation of new financial qualifications criteria. On June 30, 1965, the Commission adopted these new guidelines in the pivotal *Ultravision* case (*Ultravision Broadcasting Co.*, 5 RR 2d 343 (1965)):

> "Applicants for commercial uhf television stations in markets where there are three commercial vhf television stations will be required to submit evidentiary proof relating to estimated construction costs and estimated operating expenses during the first year of operation. The applicants should not encounter any particular difficulty in submitting evidentiary proof concerning amounts allocated for staffing, programming, fixed charges and other expenses during the first year of operation, and in establishing that the funds allocated for programming are reasonably likely to suffice for effectuation of program proposals."
>
> "*Applicants* for commercial uhf television stations in three-vhf-station markets *should be permitted to demonstrate their ability to meet all fixed charges and operating expenses during the first year of operation* either by proof that adequate funds are available and committed for the purpose without income, or by a convincing evidentiary showing that the available and committed funds will be supplemented by sufficient advertising or other revenue to enable the applicants to discharge their financial obligations during the first year. *Where viability of the proposed facility during the first year is dependent on income, the accuracy of the estimate becomes a critical factor in determining whether a continuing operation is likely.* In such cases, it is essential that applicants demonstrate the soundness of figures submitted. Where applicants are able to demonstrate financial ability to meet costs and expenses for the first year without income only because the first

monthly or quarterly installment payments for equipment or other fixed charges have been deferred beyond that period, the Commission will scrutinize with care the applicants' itemizations of expenses." (Emphasis supplied.)

Shortly thereafter, on July 7, 1965, the Commission issued a public notice (FCC 65-595), *Clarification of Applicability of New Financial Qualifications Standard Concerning Broadcast Applications,* whereby the new standards discussed in the *Ultravision* case would be applied to *all other broadcast applications.*

". . . we shall hereafter require all applicants for commercial broadcast facilities, whether a-m, fm, vhf-TV or uhf-TV, to demonstrate their financial ability to operate for a period of one year after construction of the station. In those instances where operation during the first year is dependent upon estimated advertising revenues, the applications will be required to establish the validity of the estimate."

How does the new standard affect applicants from a practical standpoint? First, each applicant must present a showing that there are adequate finances to construct and operate his facility the first year without any income. Therefore, he will be able to obtain grant of his application without any delay caused by searching questions from the Commission. Additionally, if the application should be designated for hearing with other applications, no financial issue will be designated against his application.

Second, if the applicant must rely on projected revenues, he should be sure to heed the Commission's admonishments relating to "the accuracy of the estimate" and the ability to demonstrate the "soundness of figures submitted."

A new slant to the financial requirements was developed by the Commission's Review Board in the *Chicagoland* case, 7 RR 2d 221, by holding that since the burden of proof with respect to

the *Ultravision* issues was the applicant, it could rely on the testimony of one of its principals to establish that there was a reasonable possibility that the station would be constructed and continue to operate; however, it took the risk that the proof might not be adequate without further evidence. Upon review (Chicagoland TV Co., 7 RR 2d 612), the Commission ruled that proffered letters from potential advertisers could be considered in order to reach a determination as to the reasonableness of the applicant's projected revenues. Accordingly, applicants in hearing must *prove* that their estimated costs are reasonable and, if they seek to rely on revenues during the first year of operation to defray any of those costs, their estimated revenues are reliable. The applicant will not be advised by the Examiner if its proof is adequate. The applicant will learn its fate in the Examiner's Decision.

Clearly, the Commission has augmented its financial requirements appreciably since the 1930's and 1940's—from funds sufficient to operate "a reasonable period of time," to "three months without any income," to one year. While estimated revenues may be relied upon, they are difficult, if not impossible, to prove. In any event, they constitute a very "risky" financial basis. Perhaps the essence of the changes in financial requirements may be summed up by the word "proof." The applicant, more than ever before, must prove all statements relating to his financing.

Fines and Forfeitures — Up 600% Since '64

All licensees should be aware of the pertinent portions of the Rules concerning their liability for fines and forfeitures. As adopted on February 2, 1961, Section 10.503(b) (1) (E) reads as follows:

". . . shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violations occur shall constitute a separate offense. Such forfeitures shall be in addition to any other penalty provided by this act."

". . . (3) No forfeiture liability under paragraph (1) of this subsection (b) shall attach for any violation *occurring more than one year prior to the date of issuance of the notice of apparent liability* and in no event shall the forfeiture imposed for the acts or ommissions set forth in any notice of apparent liability exceed $10,000." (Emphasis supplied.)

In other words, the Commission is impowered to impose a *maximum fine of $1,000 per day for each violation!* However, *the total amount of fines assessed,* no matter how numerous, *cannot exceed $10,000.* (Of course, the Commission's power does not end here; it still retains its long-standing authority to designate a license for hearing.)

The Preview Issue (Dec. 1964) contained an article entitled, "FCC Fines Are Beginning to Pinch." Set forth therein was the prediction: "It

is clear that the use of forfeitures and fines, as the Commission's primary lever against violators, will become more prevalent and painful in the years to come. Many broadcasters have already felt the poignant sting of this four-year-old Commission tool, but many more remain vulnerable targets by ignoring or overlooking the Commission's policing."

Increase Of Forfeiture Proceedings

An analysis of the number of forfeiture proceedings instituted during the fiscal years 1964, 1965, and 1966, as reported in the Commission's Annual Reports, discloses that there has been an upsurge in the incidents of fines levied on licensees. In 1964, notices of apparent liability were issued to 13 stations. Examples of the most salient consisted of: (1) $2,500 for unauthorized assignments and transfers; (2) $500 for violation of operating log requirements; (3) $250 for failure to make sponsorship identification of paid-for advertising; (4) $1,000 for failure to file time broker contract; and (5) $250 for failure to give sponsorship identification of teaser announcements. During the same year, *forfeitures* were ordered for 15 stations which had responded to previous notices of apparent liability, including: (1) $1,000 for failure to identify sponsorship; (2) $1,000 for equipment and other rule violations; (3) $3,500 for violation of operator requirement rule; (4) $500 for violation of logging requirements rules; and (5) $500 for violation of operating hours.

During fiscal year 1965, Notices of Apparent Liability were issued to 38 stations (compared to 13 such notices in fiscal 1964). The great majority involved AM stations. Of the 1965 total, 19 paid the amounts set forth in the notice, five responded and were permitted to pay lesser amounts, and one was later relieved of liability.

The amount of the forfeitures varied with

the number and seriousness of the violations. The largest order during 1965 was $8,000 for lack of control over program content. Other fines assessed over $1,000 included: (1) $5,000 for violation of logging and sponsorship identification rules; (2) $1,000 for violation of first-class operator rule; (3) $4,000 for failure to originate the majority of its programs from its main studio; and (4) $1,500 for failure to reduce power at night as required by its license and operation without a licensed operator on duty.

Other violations leading to forfeitures included numerous instances of failure to employ first-class operators to the extent required by the rules ($500—$1,000) and other violations of the operator rule; several unauthorized assignments of license or transfers of control ($500—$1,000); operating nondirectionally at night and by remote control without authority ($1,000); operating changes of facilities without prior program test authority ($100); failure to keep maintenance logs ($500); broadcasting advertisements involving a lottery ($350); rebroadcast without the originating station's consent ($100); failure to maintain modulation within tolerance ($250 or $500); failure to make required filing of time-brokerage contracts ($500); and failure to make a required sponsorship announcement in connection with a political broadcast ($1,000). A total of $34,150 in forfeitures was paid by stations during this fiscal year.

1966—A Banner Year For Fines

Fiscal year 1966 was marked by considerably greater use of the forfeiture penalty than at any previous time since the Congress gave the Commission this authority in 1960. A total of 78 notices of apparent liability—up from 38 in 1965 and 13 in 1964—were issued during the fiscal period, representing apparent *fines of $83,125.*

Thirty-one final forfeiture orders were issued for amounts totaling $39,050. Twenty licensees elected to pay forfeitures totaling $8,875 without waiting for issuance of a final order. (As the reader may know, all forfeitures are payable to the U.S. Treasury, not to the FCC.)

Among the most common violations leading to issuance of liability notices were operation without a properly licensed operator, violation of logging requirements, failure to broadcast identification of the sponsors of sponsored programs or announcements, failure to file ownership or financial reports, broadcast of lottery information, excessive deviation from assigned frequency, failure to give proper station identification, unauthorized transfer of control, failure to maintain tower lights, broadcast with excessive power, and rebroadcast of programs of another station without obtaining authority of the originating station.

The 1960 Fine Amendment Reviewed

The 1960 Amendment to the Communications Act (P.L. 86-752, approved 9-13-60) permits the Commission to assess fines upon licensees for "willful and repeated" violations of the Commissions' Rules or of the Act. *Nearly all violations are assummed to be "willful."* Why? All licensees, and their staff and agents, are expected to know the rules; ignorance is no excuse. *"Repeated" has been held to be any violation occurring more than once.* Thus, the statutory mandate that fines be "willful and repeated" offers little or no solace for licensees.

Factors Determining the Size of the Fine

How does the Commission determine the size of the fine? Three of the most important criteria are: (1) the importance of the station in its market; (2) the financial condition of the station; and (3) the past broadcast record

of the licensee, including the number of prior offenses.

Forfeitures Levied on Late Filed Renewals

On December, 2, 1965, the Commission announced that, beginning with the license renewal applications due to be filed by March 1, 1966, the Broadcast Bureau would bring to its attention all instances in which broadcast licensees fail to make *timely filing of their license renewal applications* in accordance with the Commission's Rules.

Except in cases where delay is found to be justified, the Commission levies forfeitures for late filing.

Thereafter, the Commission developed a more comprehensive and precise policy with respect to late renewal applications. On March 15, 1966, a Commission Release notified all licensees as follows:

> "Licensees are put on notice that it is the experience of the Commission that receipt by the Commission of renewal applications at sometime less than 90 days prior to expiration of the station license *does not provide adequate time* for a complete review of such applications and frequently results in *deferral of action* and the consequent delay in issuance of a renewal until sometime *after expiration of the current license.* Additionally, Section 309 (b) of the Communications Act provides that the Commission *may not grant any* renewal application until at least 30 days have elapsed after issuance of a public notice by the Commission that such application has been accepted for filing." (Emphasis supplied.)

Subsequently, on June 24, 1966, *the Commission issued a forfeiture schedule for those licensees filing late renewal application,* as follows:

(1) $25 for the first through the 15th day,
(2) $100 from the 16th through the 60th day, and
(3) $200 from the 61st through the 90th day.

Commission Delegates Authority to Issue Fines

In 1966, the Commission effected an amendment (x) to Section 0.281 of the Commission's Rules. *This subparagraph delegated authority to the Chief of the Broadcast Bureau as follows*:

"to issue Notices of Apparent Liability in amounts not in excess of $250 under Section 503 (b) of the Communications Act, . . . "

Thus, fines not exceeding $250 may be issued by the Commission staff without Commission approval.

Prior to this delegation of authority, each fine was reviewed by the Commissioners. They considered the merits and amount of the fine. The Commission was proceeding cautiously in this area. When the 1960 Fine Amendment was adopted, there was a dormant anxiety that the authority to fine, if placed in the hands of the Commission's staff, might be abused. This concern was rekindled in 1966, when the Commission gave the Broadcast Bureau authority to levy fines of $250 or less without seeking approval of the Commissioners.

Despite the problems inherent in the delegated authority to fine, the Commission has found its workload too great to accord individual attention by the Commissioners to each fine. The number of violations and violators make such treatment implausible. In actual practice, the decision has worked out reasonably well.

To Avoid Fines By Delegated Authority and Delay Payment

It must be noted, however, that the licensee has not lost access to decision by the Commissioners. For example, if a licensee receives a notice of apparent liability of $100 for a certain violation, he can delay his response for a few weeks and file a letter barely within the 30-day limit, explaining the surrounding circumstances and requesting that the liability either be waived or reduced substantially. When such a response is received by the staff, they *forward it for consideration by the Commissioners.* Because the Commission is understaffed, and therefore literally deluged with work, it will take a few weeks before they reply.

At that point, approximately 45 days has lapsed since the issue of the forfeiture notice. Assuming the Commission's action upon your letter-request is unfavorable (either a denial or inadequate reduction in the amount of the fine), you may file *a request for reconsideration.* You have an additional 30 days (from receipt of the Commission's action on your initial request) to do this. By utilizing this second 30-day period, you have legally postponed payment approximately 75 days.

By the time the Commission acts upon your *request for reconsideration,* approximately 90 days will have elapsed. At that point, you have an additional 30 days to make payment. Therefore, when you finally make payment, approximately 120 days will have elapsed.

While the advantages of (1) obtaining a ruling by the Commissioners (as opposed to the staff), and (2) delaying payment for four or more months appear obvious, *there are disadvantages. First,* it is time-consuming, troublesome, and if your lawyer assists, costly. *Second,* it focuses staff attention upon you and your violation; as a "contested" fine, more records will be made and kept on the case; and adverse

publicity, in the trade press, may result. *Third*, in the vast majority of cases, you will not induce the Commission to overrule the staff's recommendation. Your initial request and your subsequent plea for reconsideration, in most cases, merely postpones the inevitable.

Courts Reverse FCC Forfeiture Rulings

On the other hand, if your have the funds and proclivity to "wage war" with the Commission over a fine, you may take the case to court. You are entitled to a trial *de novo* (based on the original merits of the case) in the Federal District Court where your station is located.

In two recent cases, decided in January and April 1966, (*United States* v. *Hubbard Broadcasting, Inc.*, 6 RR 2nd 2069 and *United States* v. *WHAS, Inc.*, 7 RR 2d 2055) the licensees were victorious. The fines were set aside because the Court did not agree that the violations were "willful and repeated." Encouraging as the precedents are, few licensees are willing to incur the legal and other expenses necessary to take a fine case that far.

In most cases, the *disadvantages* of requesting a reduction or cancellation of a fine outweigh the advantages. However, there are cases wherein the licensee's reasons may well result in favorable action on such a request.

Arnold Toynbee once observed, "You can't adjust life to law; you must adjust law to life." While his wisdom may serve to admonish federal lawmakers (and rulemakers) to proceed with caution, it is of small solace to the broadcast licensee. In fact, quite the contrary appears applicable; in this instance, the licensee is well advised to adjust his life to the law and the ever-changing Commission Rules.

"Overcommercialization" Reviewed

SOME MOST PREGNANT QUESTIONS HAVE ARISEN: (1) Does the Commission maintain commercial standards? If so, in what form? (2) *What are these standards?* (3) *Is the Commission, by virtue of its recent "Commercial Inquiry," changing these standards?*

These probative, curious and Delphic questions flow from the Commission's October 24, 1966, Public Notice (FCC 66-923). In this cryptic and unimposing Notice (above and hereinafter referred to as the "Commercial Inquiry"), the Commission required *all* broadcast licensees, without exception, to file "updated" information concerning their proposed commercial practices. This request was made, purportedly, to bring all licensees within the boundaries of the program forms adopted for radio (*BM/E* Feb. & Mar. 1966 issues) and TV (*BM/E* Dec. 1966 issue) and to afford each licensee an opportunity to state its commercial content in *minutes* rather than in terms of the number and length of commercial announcements. Its effects, and the trends reflected thereby, warrant the reader's avid attention. This unassuming Commercial Inquiry has caused considerable, warranted concern. The questions set forth in the above paragraph will be discussed in the order posed.

Does the Commission Maintain Commercial Standards? If so, in What Form?

Yes! And, no! The ambiguous answer is necessitated by the Commissions' ambiguous and volatile commercial "policy." This nebulous and oracular standard can be better understood by a cursory review of its inconsistent and surprise-filled background.

Over the years, the FCC has considered overcommercialization in a host of cases, too numerous to list, and has consistently taken the position that this was "an important element in judging the overall program performance of an applicant or a licensee." However, *in none of these cases did the Commission* (or its predecessor Agency) *establish definite standards or even broad guidelines as to the formula used to distinguish "overcommercialization" from acceptable commercialization.*

While the Commission has maintained a continuing interest in this problem, there have been few cases wherein the FCC actually concluded that there was overcommercialization. In those infrequent cases, the findings of so-called overcommercialization have resulted in nothing more than "short-term" renewals. In most cases, the licensee has seen the error of his ways before, or at least in the middle of, a hearing, adjusted downward his commercial proposal, and received a renewal. In most of the hearing cases, the amount of overcommercialization was so extreme as to be obvious. (See 1962 case, 24 RR 315, wherein the a-m licensee proposed 6 to 8 minutes commercial in every 14½ minute period —an average of 50% or more commercial.)

Throughout over 40 years of broadcasting and federal regulation thereof, a definite commercial standard or guideline (in written form) is conspicuously absent. These unwritten policies have not appeared in case digests, memoranda, opinions, and orders, or even in letters to licensees. Why, the reader may ask, has the Federal Governmnet judiciously avoided reducing these transitory, fugitive and ever-changing policies to writing? There are a wealth of *legal* reasons

militating against rigid guidelines. A brief review thereof follows.

The First Amendment to the United States Constitution provides, in pertinent part, as follows:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section 326 of the Communications Act of 1934, as amended, states:

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications . . . 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 communications."

In an inexhaustible list of precedents, *the courts, the federal agencies, and the Commission have repeatedly disavowed any authority to "censor"* the right of free speech. In the case of the FCC, "censorship" would involve any rule which dictates what the licensee must offer (or not offer) in the way of program content. (Notable exceptions to this dearth of written specifics may be found in those cases wherein the Commission has properly forbade the broadcast of obscenities, criminal acts, libel, lotteries, and the like. Few, if any, would quarrel with the prohibition of amoral or *criminal* program content.) In a more general sense, "censorship" of program content — the amount of music, agricultural, religious, sports, news, and even *commercials* — remains a somewhat unsettled issue!

In numerous *FCC* cases, *the courts have ruled that the choice of programs rests with the licensee* and that the Commission is forbidden to censor. (See, for example, *McIntire v. Wm. Penn Broadcasting*, 151 F. (2d) 597, C.C.A. 3d, 1945.) Also, see U.S. Supreme Court decision in *Farmers Educational and Cooperative Union*, 360 U.S. 525 (1959).)

Despite all of the above, the Commission, from

time to time, has asserted (and seemed to assume) that it has authority to regulate the amount of commercial content broadcast.

In one of its more recent "Magna Carta's," entitled *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 RR 1902 (1960), the Commission, in justifying its authority to control commercialization, stated:

> "Notwithstanding the foregoing authorities, the right to the use of the airwaves is conditioned upon the issuance of a license. . . ."

Thus, after thoughtful review of the clearly anti-regulatory legal premises, the Commission pointed out that it does not have to issue or renew a license to one—as contrasted with its (Commission's) view of proper programming. It implies that its basic obligation — to make broadcasters program in consonance with the public interest — may supersede the explicit and repeated "censorship" prohibitions.

In January 1964, the Commission adopted a *Report and Order* (FCC 64-22, 1 RR 2d 1606) regarding "Commercial Advertising Standards." In that proceeding, *the Commission had proposed to adopt fixed rules to restrict the amount of advertising broadcast* by its licensees. While the Commission continued to maintain that it has authority to promulgate commercial standards, it concluded:

> ". . . We will continue to take whatever steps are necessary and appropriate to prevent its occurrence [overcommercialization] . . . however, [*the*] *adoption of definite standards in the form of rules limiting commercial content, would not be appropriate at this time. . . .*" (Emphasis supplied).

> ". . . we will give closer attention to the subject of commercial activity . . . *on a case-by-case basis.* . . . Attention will be given to situations where performance varies substantially from standards [promises] previously set forth. . . ." (Emphasis supplied.)

To the chagrin of then Chairman Henry and Commissioner Cox, in July 1964, the Commission granted a series of renewal applications that embodied apparent overcommercialization. The dissenters offered an impassioned plea for *definite commercial standards*, because the licensees, guilty of commercial excesses, as pointed out by the staff, were granted renewals anyway. In some of these cases, the excesses of commercial content far exceeded (1) NAB Code limits and (2) the "promises" set forth in the last renewal. It is interesting to note that most of the punishment (short-term renewals or fines) administered for "overcommercialization" to date has been predicated upon the licensee's failure to program as proposed (promise vs. performance test) — *not* upon excessive commercialization *per se*.

The next significant action is the current (October 1966) Commercial Inquiry seeking commercial content in *minutes* — as distinguished from the number and length of commercial announcements — from *all* licensees.

Thus, in response to the question, "Does the Commission maintain commercial standards? *BM/E* must respond both "Yes, and no." *In summary, for 40 years, the Federal Government has espoused an acute interest in the amount of commercial "chatter"; but, the intensity of this interest has undergone a marked change every five years or so; moreover, the law is such that it is difficult for the Commission to establish firm and fixed advertising standards; additionally, no two broadcasting markets are alike; for these reasons and others, the Commission has never set in print, in any form, its "commercial standards"; however, by indirection (the refusal to issue a license or grant a renewal), the Commission controls commercial content!*

Today, the major problem is to ascertain or define these *unwritten, amorphous commercial ceilings! But, what are the Commercial Standards?*

As the Commission might say, "These standards must be predicated upon the needs of the public and can be determined only by the licensee." *There is no lucid answer!* There is only inference, supposition and speculation. The ever-present, unwritten implication was and is that the *commercial proposal must comply with current Commission standards.* This nebulous, and still undefined policy, has a long history of vacillation.

During the past 20 years, the Commission has repeatedly altered its commercial standards. For example, during much of the 1940's and early 1950's, the Commission would accept a statement to the effect that "The licensee proposes to adhere to the NAB Code limits." In the middle and late 1950's, it became necessary to be more specific; a recitation of Code compliance was unsatisfactory; the licensee was expected to assert that it would ". . . . not *generally* broadcast any commercial in excess of one minute in length and no more than three such commercials, aggregating no more than three minutes, in any given 14½ minute period." In the 1960's, this technique became unpalatable to the FCC. With the advent of the KORD case in 1961, the Commission augmented its use of the "*promise vs. performance*" test. In this era, high commercial ceilings were not nearly so dangerous as composite week statistics that demonstrated that the licensee was programming substantially more commercials than proposed.

However, by artful wording and the liberal use of such evasive terms as "generally," many licensees were able to justify their "performance" with their *inexact* "proposal." Several Commissioners became most disturbed. With the exception of a few, ancient and distinguishable cases, the Commission had no legal precedent or procedures upon which to base definite advertising standards. This situation resulted in the *proposal to adopt definite standards by amending the Rules.* Under pressure from Con-

gress, as indicated previously, *this proposal was defeated*, by a 4-3 vote, in January 1964 — with Commissioners Henry, Cox and Lee dissenting. The latter two remain on the Commission today, and Commissioner Nicholas Johnson (Henry's replacement) may be logically expected to follow in the same general tradition of his predecessor.

As NAB Code requirements stiffened, its standards, once again, became more attractive guidelines. Within very recent years, the Commission has encouraged licensees to propose to adhere to the Code standards. With the adoption of the long-anticipated new program forms (Section IV's) and program logging requirements for a-m and fm (in 1965) and TV (in 1966), the Commission, at long last, had renewal, assignment, transfer, and new license forms (Section IV's programming proposals), with "teeth." Now, the licensee must set forth his commercial proposals in terms to which the Commission may bind him. Hence, the "promise vs. performance" test is more effective, and, more saliently, the Commission is better able to ascertain *exactly* what the licensee is proposing.

During much of the 1960's, the a-m/fm licensee could obtain renewal by proposing "20 minutes commercial during the average broadcast hour" with limited exceptions wherein the ceiling was raised to "22 minutes." By adhering to this *unwritten* rule, the licensee could obviate letter-inquiries and deferral of renewal. Those exceeding these limits were required to make out a strong case in support. Generally, the licensee yielded to the Commission's will, when questioned, and brought his commercial proposal in line with the "20- and 22-minute ceilings." That was the unwritten, commercial policy in effect prior to the issuance of the 1966 Commercial Inquiry.

Has the Commission, Via Its Recent Inquiry, Changed the Commercial Standards?

Much to the surprise of many — in view of the current composition of the Commission — the Commissioners, by virtue of strong staff influence, were prompted to issue the *October 1966 Commercial Inquiry*. In so doing, the Commission concluded its Notice with the following statement:

> "By this action *the Commission does not imply or seek to impose any particular requirement or limitation on the commercial practices of licensees*, but does seek full, specific and responsive statement as to licensee's commercial practices." (Emphasis supplied.)

Once again, by artfully avoiding a classic opportunity to spell out its convictions in the matter, the Commission has left the broadcaster puzzled. However, *the general import of the message* was received "loud and clear" by the industry. That is, *the licensee had best propose to comply with the NAB Code commercial standards.*

The instant responses to the Inquiry were due to be filed prior to January 1, 1967. Many licensees filed well in advance of that date. One FCC staff member reports that *". . . in excess of 95% of those replying indicated that they would comply with the NAB Code."*

Interestingly, assuming the accuracy of the *Commission's 1963 staff-analysis (Report and Order*, re Commercial Advertising Standards, 1 RR 2d 1609, footnote 4), *"40% of the licensees analyzed proposed to exceed NAB Code commercial limits."*

Thus, the October 1966 Commercial Inquiry form appears to have resulted in a substantial decrease, in commercial proposal, by an estimated 35% of the broadcast industry! That is, where "40%" of the industry exceeded NAB limits in 1963, only 5% exceed it today. Such a marked departure is somewhat astounding when one considers that *the Commission has not set forth, to this day, either broad or specific com-*

mercial standards in written form. Such pronouncements have been, and continue to be, judiciously avoided.

The Commission has appeared to have accomplished its long-sought goal by innuendo, indirection, or quasi-intimidation. The licensees, as a group, appear to believe that, the Commission's assertions to the contrary notwithstanding, a failure to meet and comply with NAB Code standards, may result in letter-inquiries, deferred renewal, possibly a hearing, and/or a loss or denial of license. Accordingly, they conclude that a few extra commercials are not worth the risk. Is it really necessary to yield so quickly? Have the prior, more liberal commercial standards really changed that much? Will the Commission really enforce its ephemeral commercial standards?

Reports in the industry press have indicated (1) the "rules" have not really changed, (2) the thrust of the Commercial Inquiry is to elicit exact and precise commercial proposals and not to reduce commercial content, and (3) exceptions, well stated and justified, will be permitted.

For several weeks, the Commission has chosen to postpone action upon a series of renewals which the staff has recommended for deferral. Within the last two weeks, the Commission has ruled that several of these stations should receive letters. The *feeling*—and "feeling" is what has determined acceptable and unacceptable commercial policies for 40 years—*is that most requests to exceed the NAB Code limits will meet with stern opposition—BUT probably not result in a hearing or loss of license!*

In the case of a-m and fm stations, some staff members speculate that the Commission will approve many requests wherein the licensee proposes to exceed Code limits from 10% to 15% of the time. In the case of TV stations, excesses of the Code commercial limitations, supposedly, will be confined to 5% to 10%. At

least, this is the current thinking. As a practical matter, *percentages* of permissible commercial excesses (e.g., ". . . licensee will adhere to the NAB commercial limits 90% of the time. . . .") are apt to prove disappointing. To wit, *depending entirely upon the reasons advanced*, a request to exceed NAB Code limits 15% might be granted in one a-m case, and a 5% excess denied in another. At present, there are no meaningful guidelines or "rules of thumb"—except for the NAB code standards.

What reasons will the Commission accept as sound justification for commercial excesses? This is a question that can be answered *only* by the licensee and the specific and unique facts of his case. The chances are that most requests for exception will be denied *indirectly*. That is, after letter-inquiry and deferred renewal, most licensees will voluntarily reduce their commercial proposals.

Conclusion

BM/E is compelled to observe that *it is not necessarily prudent or appropriate to agree to or adhere to the NAB Code standards so quickly*—unless you feel it desirable from a public interest and financial standpoint! Why? *First*, the Commission is overloaded with hearing cases and can ill afford renewal hearings on borderline commercial-policy issues. *Second*, the Commission's *legal* footing to "censor" or indirectly dictate commercial content is shaky at best. The only court cases on point do not indicate a disposition to ignore the First Amendment of the Constitution or Section 326 of the Communication's Act. Congress might rally to your defense. In brief, the Commission might lose and would prefer undoubtedly to avoid taking the risk of losing its present *indirect* leverage. *Third*, if you have (in your opinion) legitimate, good faith reasons to propose commercial standards greater than those permitted under the NAB Code, you should

present them; if you receive a letter-inquiry, you could reduce your commercial proposals; in fact, you could "stick to your guns" up to the unlikely day your case was designated for hearing; further, you could proceed through the issuance of an Initial Decision by the Hearing Examiner, and, if unsuccessful, adjust your commercial proposal at that time.

In any event, there are *many* opportunities, along the way, to reduce your commercial proposals to NAB levels and receive favorable action upon your application. *It seems tragic that the average licensee's first reaction is to yield rather than to defend his democratic rights.* Of course, it may cost money to resist, but, then, the matter can be settled in a day by agreeing; moreover, the loss of substantial advertising dollars, over a period of years, may well result in large cash loss. In brief, any licensee, who really needs to exceed the "new commercial standards" (the standards of the NAB Commercial Code), should be daring enough to make a tacit attempt at least. While bureaucracy is upon us, we should not lose our willingness to defend our freedoms. In our sacrificial zeal to avert controversy, let us not lose sight of the Supreme Court's 1959 admonition (in *Farmers Educational Cooperative Union*) as follows:

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

While the Commission is vested with the authority and obligation of requiring broadcasters to meet the needs of the public, *the licensee*, as the Commission has consistently held, *is the final judge*. Even a greater commercial content may be needed by (1) the public in some cases or (2) the broadcaster to provide funds for other forms of needed programming.

There are two basic methods of resolving the

problems encountered by the new and more stringent — although unwritten — commercial standards. *First*, the licensee can follow the advice of Demosthenes (renowned Greek orator and statesman), "The readiest and surest way to get rid of censure is to correct ourselves." Or, in the vein of Epicurus (a Greek slave immortalized by his philosophy), the licensee may assume the attitude that, "The greater the difficulty the more the satisfaction in surmounting it." To date, "95%" of the licensees have chosen the former and brought their commercial proposals in line with the NAB Code limits. Curious, but apparently true.

BM/E propounds neither view and concludes simply that the licensee's commercial proposals, today as in the past, should set forth standards which (*in the licensee's opinion*) are consonant with good taste, public need and the economic viability of his operation. *If* the resultant proposal exceeds NAB Code ceilings, the proposal should be *very specific* as to the following:

(1) when such excesses would occur,
(2) how frequently such excesses would occur,
(3) the commercial ceilings that would then apply,
(4) the percentage of total broadcast time in which NAB Code limits would be exceeded, and
(5) *detailed and convincing reasons to* justify these excesses.

If necessary, you can revise and reduce your commercial proposal subsequently. If questioned, you need not "run scared;" defend your *honest* judgment (and freedoms). On the other hand, if the NAB Code limits satisfy the needs of your audience and station, it would be most prudent to propose accordingly.

Sponsorship ID Rules Revised to Accommodate "Want Ad" Programs

SINCE THE EARLIEST DAYS of broadcasting, the Commission has consistently adhered to the basic tenets of Section 317, as reflected in the "Sponsorship Identification Rules" (Sections 73.119, 73.289 and 73.654). In brief, they provide that all matter broadcast by any station for valuable consideration must be (a) *announced as sponsored, paid for, or furnished, and (b) by whom.* In the *BM/E* issue of September 1965, the article entitled, "Section 317—The Advertising Section," stressed the fact that the Commission has *consistently* applied the strictures imposed by 317 and the sponsorship id rules.

In the past few years, in accordance with the provisions of Section 317(d)[1] the Commission has granted a number of requests substantially similar in nature for waiver of the sponsorship

1. "317(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement."

identification requirements of Section 317(a)[2]. *These requests involved the broadcast of "want ad" or classified advertisement programs,* wherein individuals sponsor brief advertisements. Since the waivers constitute a departure from established precedent, a brief review of the sponsorship id rules and the recent waiver proposal is appropriate.

The Rigidity of the Basic Rule

One of the best examples of the Commission's attempts to stem violations of the sponsorship id rules is best evidenced by a warning contained in a Public Notice released October 10, 1950. In pertinent part the release maintains that:

> "Although the statute does not specify the exact language of the required announcement, *its plain intent is to prevent a fraud being perpetrtated on the listening public* by letting the public know the people with whom they are dealing. *Therefore, reference must be made to the sponsor of his* product in such manner as to indicate clearly not only that the program is paid for, but also the identity of the sponsor.
>
> "It is apparent that under the Act and the Commission's Rules . . . the sponsor or his product must be identified by a distinctive name

2. "317(a)1 All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: **Provided,** That service or other valuable consideration shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

"317a (2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talents, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program."

and not by one merely descriptive of the type of business or product. Thus, Henry Smith offers you, or Smith Stove Company offers you, or Ajax Pens brings you . . ." would be sufficient as would reference to a registered brand name (Renzo, Lucky Strike, Duz). However, "Write to the Comb Man." Send your money to Nylons, Box 000. This program is sponsored by the Sink Man or words of similar import which are merely descriptive of the product sold and which do not constitute the name of the manufacturer or seller of goods, or the trade or brand of the goods sold, would not comply with S 317 . . . This is true even where such descriptive terms have been adopted by the selling agency as a convenient method for direct radio merchandising of the products of any company. In all cases the public is entitled to know the name of the company it is being asked to deal with, or at least, the recognized brand name of his product.

"It is also pertinent to point out that the mandate of S 317 of the Act applies with equal force to political broadcast." (Emphasis supplied.)

The Commission has emphasized that (1) with regard to ordinary broadcast matter, reasonable diligence must be exercised by a licensee to ascertain and identify the true sponsor and source of all the material presented over his station, and (2) with regard to discussions of public controversial issues or political discussions, *the highest degree of diligence* must be exercised by a licensee to ascertain the actual source responsible for furnishing the material.

In summary, the present sponsorship id rules, like those in the past, require:

(1) Any broadcast matter—for which money, service, or other valuable consideration is directly or indirectly paid or promised to any station—must be announced as sponsored, paid for, or furnished either in whole or in part, and by whom or for on whose behalf such consideration was supplied.

(2) "Service or other valuable consideration" does not include any service or property furnished without charge, unless it is furnished in consideration for an identification beyond that rea-

sonably related to the use of such service or property on the broadcast.

(3) Licensees must use "reasonable diligence" to obtain information from its employees and agents of any data which might require sponsorship identification.

(4) In political or controversial issue programs, if records, tapes, scripts, services, etc., are provided, an announcement stating such things were given and identifying the true supplier, must be made at the beginning and end of the program.

(5) Sponsor announcements must fully, fairly, and clearly identify the *true* identity of the person(s) by whom or on whose behalf the payment is made or promised.

(6) In the case of advertising commercial products or services, an announcement of the sponsor's corporate or trade name of his product is sufficient, provided, however, that the mention of the name clearly identifies the sponsor without confusing, misleading, or teasing the audience.

New Rules Proposed

On March 3, 1967, the Commission adopted a Notice of Proposed Rule Making looking towards amendment of Part 73 of the Commission's Sponsorship Identification Rules (Docket Number 17252), to accommodate "want ads" or classified advertisements by individuals sponsoring brief advertisements. The proposed rule would afford such "want-ad" advertisers the same kind of anonymity which is available to users of classified want-ads in the newspapers. This would prevent abuse of advertisers such as harassment of women advertisers by crank telephone calls.

To date, licensees seeking waiver made substantially similar representations regarding safeguards and precautionary measures to be established if the Commission granted the request for waiver, namely it would attach to the program log for each day's classified want ads a list showing

the name, the address, and, where available, the telephone number of each person purchasing such ads. Of course, this information would be made available to any member of the public having a legitimate interest therein.

In view of the numerous similarly worded requests for waiver, the Commission proposed an additional subsection to the sponsorship id rules (73.119, 73.289, and 73.654) to read as follows:

> "The announcements required by Section 317(A) of the Communications Act of 1934, as amended, are waived with respect to the broadcast of want ads or classified advertisements sponsored by individuals. The waiver granted in this paragraph shall not extend to classified advertisements or want ads sponsored by any form of business enterprise, corporate or otherwise. Whenever sponsorship announcements are omitted pursuant to this paragraph the following conditions shall be observed:
>
> "(1) *The licensee shall maintain a list* showing the name, address, and (where available) the telephone number of each advertiser and shall attach this list to the program log for each day's operation; and
>
> "(2) *Shall make this list available to members of the public* who have a legitimate interest in obtaining the information contained in a list.
>
> "Commission interpretations in connection with the provisions of this Section may be found in the Commission's Public Notice entitled *Applicability of Sponsorship Identification Rules* (FCC 63-409; 28 FR 4732, May 10, 1963) and such supplements thereto as are issued from time to time" (Emphasis supplied.)

Conclusion

In effect, the proposed amendments provide a blanket waiver of the announcements required by Section 317(a) for classified advertising sponsored by private individuals, *but not for advertisements sponsored by any business enterprise, corporate or otherwise.*

The proposed rule requires each licensee who

wishes to take advantage of the waiver to comply with certain minimum safeguards as set forth in the proposed rule. These safeguards are merely a modification of the safeguards required by the Commission as a condition to its grant of waiver in the past years under similar circumstances. There seems to be little doubt that the proposed rule will be adopted in the very near future. It will (1) assist the Commission, (2) relieve licensees of the burden of filing applications for waiver, and (3) provide additional protection for the public.

The proposed rules do not herald a radical departure from the Commission's past strict enforcement of the sponsorship identification rules. Basically, they recognize a valid waiver requirement in a specialized area; consequently, all licensees can expect continued rigid enforcement of the sponsorship id rules.

Recent Changes in ID Rules

The requirements of the id rules are found in Sections 73.117(AM), 73.287(FM) and 73.652(TV).

ID Rules In General

The rules require the licensee to identify the station by announcing the call letters and location (city of license). For a-m and fm stations, these id's must be given at the beginning and ending of each time period of operation and as follows: (1) within two minutes of the hour *and either* the half hour *or* quarter and three-quarter hours; (2) in the case of a single consecutive speech, play, religious service, symphony concert, or operatic production, at the first interruption of the entertainment continuity and at the conclusion of the program; or (3) in the case of variety shows, athletic contests, and similar programs of longer duration than 30 minutes, within five minutes of the time given above.

For TV, the id's must be given *both visually and orally* at the beginning and ending of each time period of operation, *and either visually or orally* (1) during the operation on the hour or (2) in the case of a single consecutive speech, play, religious service, symphony, concert, or operatic production, at the first interruption of

the entertainment continuity and at the conclusion of the program.

The importance of these rules cannot be overemphasized. They were promulgated at the very beginning of the broadcast regulation, first by the Department of Commerce and later by the Commission. *The underlying reason for the requirements of the rules has been to assist the regulatory agency in its monitoring.*

New Rules Concerning IDs for Translator Stations

On December 1, 1966, the Commission released a Memorandum Opinion and Order (RM-440, FCC 66-1074, 91767) amending Sections 74.750 (c) (7) and 74.783 (a) of the rules governing television broadcast translator stations. The Commission recognized that station identification for TV translators is useful and often necessary; however, it found that it could dispense with the identification requirement for translators with power of 1 watt or less. In other words, the order eliminated the need for television translator stations of powers of 1 watt or less to identify themselves; nevertheless, it retained this requirement for those translators with powers exceeding 1 watt.

The licensees that filed comments in the proceeding suggested that the Commission could further relax the id rules for translator stations in order to include powers higher than 1 watt. However, the Commission indicated that its principal concern was with potential interference to other radio stations. It is believed that the problem of identifying the source of signals by the Commission is compounded in the absence of a call sign or some other quickly recognizable method of relating the signals observed to a particular transmitter in a specific location. In the case of the very low-powered vhf translators the Commission was able to eliminate the requirements for station identification because the range of such signals is very limited,

thereby permitting the use of simple radio-location methods. In the case of high-powered translators, their signals extend over a much larger area, and simple radio location methods are not feasible.

As is evident, the Commission has recognized the practical necessity of allowing a relaxation of its id rules insofar as translator stations are concerned; however, it is also evident that the Commission is still concerned primarily with the original reasons for the establishment of the id rules—to be able to monitor and establish the identity of a station over the air.

New Rules for TV Auxiliary Broadcast Stations

On October 15, 1965, the Commission issued a Notice of Proposed Rulemaking (FCC 65-930) which looked towards modification of Section 74.682 of the Rules. This section sets forth station identification requirements, television auxiliary broadcast stations (TV pickup stations, television studio-transmitter link stations, and television intercity relay stations). On December 1, 1966, the Commission issued a Report and Order (Docket No. 16,240, FCC 66-1101) modifying Section 74.682 of the Rules.

The present rules require each television auxiliary station to identify itself by transmitting its call signals at the beginning and end of each period of operation. During operation, the rules required that the call sign of the station or the associated television station must be transmitted *on the hour*; however, such identification transmissions *need not interrupt program continuity.* When the stations were operated in an integrated relay system, the station at the point of origination could transmit the call signs of all the stations in the system. The transmissions of the call sign would normally employ the type of emission for which the station is authorized, either visual or aural. When the transmitter was used for visual transmission

only, the call sign could be transmitted in International Morse Code by keying the carrier or a modulating signal impressed on the carrier.

The modified rules, for TV auxiliary stations, as adopted on December 1, 1966, read as follows:

74.682 Station identification.

(a) Each television broadcast auxiliary station shall transmit station identification at the beginning and end of each period of operation and at intervals of no more than one hour during operation, by one of the following means:

(1) Transmission of its own call sign by visual or aural means or by automatic transmission in International Morse telegraphy.

(2) Visual or aural transmission of the call sign of the TV broadcast station with which it is licensed as an auxiliary.

(3) Visual or aural transmission of the call sign of the TV broadcast station for whose signal it is relaying to its own associated TV station.

(b) Identifiation transmissions during operation need not be made when to make such transmission would interrupt a single consecutive speech, play, religious service, symphony concert, or any type of production. In such cases, the identification transmission shall be made at the first interruption of the entertainment continuity and at the conclusion thereof.

(c) During occasions when a television pickup station is being used to deliver program material for network distribution it may transmit the network identification in lieu of its own or associated TV station call sign during the actual program pickup. However, if it is providing the network feed through its own associated TV broadcast station it shall perform the station identification required by paragraph (a) of this section at the beginning and end of each period of operation.

(d) A period of operation is defined as a single uninterrupted transmission or a series of in-

termittent transmissions from a single location or continuous or intermittent transmission from a television pickup station covering a single event from various locations, within a single broadcast day.

(e) Regardless of the method used for station identification it shall be performed in a manner conducive to prompt association of the signal source with the responsible licensee. In exercising the discretion provided by this rule, licensees are expected to act in a responsible manner to assure that result.

The basic purpose of call signs is to provide identification. For years, stations have used their call signs, both at required id times and at other times, for promotional purposes to keep the public aware of their identity. In this connection, identification of auxiliary installations is of little or no concern; however, this is not the only purpose of station identification. The transmission of station identification by call sign and location is also intended to assist enforcement agencies in this country and abroad in rapid identification of signal sources and to indicate that the signals originate at a legally licensed station. The transmission of station identification may be compared to the display of license plates on a motor vehicle. Since it is usually impractical for a radio station to *display* its call sign at all times, the Commission's Rules and international agreements require the transmission of station id's at reasonably frequent intervals. If this were not required, it would be next to impossible for monitoring stations to recognize licensed stations and to quickly identify stations guilty of infractions of the Rules. Additionally, the proper use of call signs also protects stations against wrongful accusations which could arise as a result of similarities in their transmission with those of the real wrong-doer. When signals are observed and no station identification is transmitted, there is a

strong suspicion that the signals originate from an unlicensed transmitter.

It was not the purpose of this recent modification to eliminate the requirement for station identification. Its purpose was to modify the requirements so as to meet practical operating problems without the sacrifice of information necessary for the proper identification of stations.

TV Auxiliary Station ID Problem Analyzed

In promulgating the modified rule, the Commission realized that it had to establish a middle ground between adherence to its basic philosophy of availability from the basic purposes of station id's and the practical operating problems inherent in the establishment of too strict a rule. The television auxiliary services involve transmissions under a variety of circumstances. Some equipment carries both visual and aural transmissions and other equipment carries only visual information. Some transmitters are attended and others operate unattended. Therefore, *it becomes difficult if not impossible to prescribe specific methods of station identification that will embrace all possible situations. The Commission's principal concern is to assure rapid identification of observed signals and to prohibit the transmission of unidentified signals.*

For example, the transmission of station identification is most difficult at unattended stations. In the TV auxiliary services, these are either TV intercity relay stations or intermediate stations in a multihop television STL circuit. The Rules do not permit unattended operation of TV pickup stations or the originating station in a television STL circuit. The Commission pointed out that devices for the automatic transmission of call signs at unattended TV auxiliary stations are available; however, these devices rely upon a timing mechanism which ac-

tuates the call sign transmission at regular predetermined intervals. Unless the break in program continuity for station identification occurs at prescisely these intervals interruption to the program itself may occur. Furthermore, unless some means are provided to disconnect the intercity relay or STL circuit from the transmitter of the TV station, using the system during such automatic transmissions, the call signs of the TV auxiliary stations may be broadcast by the TV station. This is certainly undesirable.

In order to meet the Commission's enforcement requirements, *transmission of the call letters and location of the parent TV station over the TV auxiliary station would provide the necessary information.* This may be done as a part of the regular station identification transmission of the parent station, thereby solving the timing problem and avoiding transmission of auxiliary station call signs by the broadcast station. *However, this is not practical in the case of an intercity relay system which delivers programs obtained from another TV station,* or from network lines to the parent TV station. Since broadcast stations must obtain permission from the originating station before rebroadcasting their programs, an indirect form of station identification is possible if the intercity relay system carries the call sign of the originating station or an appropriate network identification. Although this may complicate rapid station identification, the Commission believes it to be an acceptable method of station identification in those special cases.

The transmission of station identification by *attended* TV auxiliary stations poses no timing problem. However, there is the problem of retransmission of the TV auxiliary call sign by the parent TV station. The present rule requires transmission of the TV auxiliary call sign at the beginning and end of each period of operation, and it permits use of the TV station call sign

during the remainder of the period of operation, which is easily accomplished at television STL stations and at TV pickup stations when used in conjunction with the parent TV station. On those occasions when TV pickup stations are used in conjunction with other TV stations or for a network feed, other methods of station identification as outlined above are permitted.

The question as to the type of emission to be used for station identification is fairly simple. For monitoring purposes, transmission by aural means or in International Morse telegraphy is best, although aural or visual identification is allowable and may be preferable. Use of visual or aural identification is comparatively simple over STL circuits and TV pickups when actively engaged in covering a remote broadcast. However, TV pickup equipment may be dispatched to the scene of a remote broadcast in advance of an actual broadcast for the purpose of establishing the circuit while cameras and sound equipment are not sent out until the time of the actual broadcast. In such cases, present rules permit the use of International Morse telegraphy transmitted automatically. *The use of telegraphy is permissive, not mandatory,* and licensees may elect to provide for aural, or visual identification on these occasions.

New Rules Revise Station ID Requirements

THE SO-CALLED "ID RULES" are found in Section 73.117 (a-m), 73.287 (fm), and 73.652 (TV). Briefly, they require the licensee to "identify" the station by announcing the call letters and location (city of license). For a-m and fm stations, these id's must be given at the beginning and ending of each time period of operation and (1) within two minutes of the hour, and either the half hour or the quarter and three-quarter hours; (2) in the case of a single consecutive speech, play, religious service, symphony concert, or operatic production, at the first interruption of the entertainment continuity and at the conclusion of the program; or (3) in the case of variety shows, athletic contests, and similar programs of longer duration than 30 minutes, within five minutes of the times given above. For TV, the id's must be given both visually and aurally at the beginning and ending of each time period of operation and (1) during the operation on the hour or (2) in the case of a single consecutive speech, play, religious service, symphony, concert, or operatic production, at the first interruption of the entertainment continuity and at the conclusion of the program.

The id rules were promulgated at the very beginning of broadcast regulation, first by the Department of Commerce and later by the Commission. In the past, the underlying reason for

the requirement was to *assist the regulatory agency in its monitoring.*

On January 25, 1967, the Commission adopted a Notice of Proposed Rule Making (FCC 67-114) to prohibit broadcast licensees in station identification announcements, promotional announcements or any other broadcast matter from leading or attempting to lead members of the listening or viewing public to believe that their stations have been assigned to cities other than those specified in their licenses. (In the matter of amendment to Part 73 of the Commission's Rules and Regulations relating to station identification requirements, Docket No. 17145, Report and Order, released 8/30/67.)

Efforts of certain licensees to mislead the public as to the licensed location of their stations have long been a matter of concern to the Commission. *Gulf Television Co.,* 12 RR 447; *Tulsa Broadcasting Co.,* 12 RR 1256. More recently, *McLendon Pacific Corp.,* 8 RR 2d 1187 (the licensee of station KABL), the Commission found such practices by a licensee undesirable (but under the particular circumstances of that case not in violation of existing rules) because the call letters and city in which the station was licensed were announced at the time specified for station identification.

This case is most interesting and informative because it was instrumental in galvanizing the Commission to review the entire station "id" problem, institute a rule making, and adopt the Report and Order mentioned above.

KABL's alleged violation of the station identification rule was based upon its conduct in making announcements required by the rule at specified intervals and in its "local color" announcements at other than the specified intervals. In making the required station identification, KABL coupled the announcement of its call letters and location with language concerning its coverage of San Francisco.

The Commission's Order involving KABL arose

as the result of complaints by city officials of Oakland, to which KABL is licensed, that the station consistently identified itself with San Francisco rather than with Oakland. Following receipt of the complaint, Commission monitoring disclosed the following announcement at station identification times:

"This is Cable—K-A-B-L, Oakland 960 on your dial, in the air everywhere in San Francisco." (Clang-clang of cable-car bell) At other times, other than the times specified for mandatory id's announcements or "promos" such as the following were broadcast:

> This is Cable—K-A-B-L music on aisle 96 from San Francisco. Serenade in the morning from aisle 96 on your San Francisco dial. . . . . This is KABL, in the air everywhere over the great Bay area, constantly in fashion with beautiful San Francisco. . . . . This is KABL, 960 on your San Francisco dial, with enchanting melody for San Francisco, the world's most enchanting city. . . . . This is KABL music, the voice of San Francisco from aisle 96 on your radio dial. . . . . A symphony of sound on KABL designed for San Fancisco.

The Commission ordered a hearing (Docket 16214) to determine whether an Order of forfeiture in the amount of $10,000 or some lesser amount should be issued. In an order released December 13, 1966, the Commission found that by announcing the station's call letters and the city of license, KABL *complied with the literal provisions of the rules and nothing more was required!*

Consequently, the Commission concluded, after review of information coming to light regarding misleading station identification announcements, that it was necessary to amend the rules. It further believed that nothing short of a general prohibition of the broadcast of misleading matter on this subject would cover all situations and prevent the defeat of the intent and purpose of the station identification rules. Accordingly, it

adopted a notice of a proposal to amend Part 73 of the rules to provide that:

> A licensee shall not in station identification announcements, promotional announcements or any other broadcast matter either lead or attempt to lead the station's listeners to believe that the station has been assigned to a city other than that specified in its license. (The amendment to the rules relating to television stations substitutes the word "audience" for "listeners.")

The Rules Analyzed

The majority of the parties submitting comments supported the proposed rule or its purpose, and one urged the Commission to go further and specify that even in nonbroadcast forms of advertising and promotion stations may not identify themselves with communities other than those in which they are licensed. However, most of the parties favoring the rule asked clarification (1) to specify that stations licensed to more than one city or authorized to use multiple-city identification may in all program matter identify themselves accordingly, and (2) to specify that stations licensed to one city but providing substantial service to other cities or nearby areas may so describe the scope of their coverage — provided no attempt is made to mislead the audience as to their licensed location. One of the parties in this group asked the Commission to state that licensees shall be entitled to declaratory rulings under Section 1.2 of the Rules. *The Commission emphasized that it was not its intent in proposing the rule making to infringe on any authorization for multiple-city identification or to inhibit the broadcast of truthful statements about a station's coverage area.*

A minority of the comments opposed the rule. Many of these comments were based on misconceptions of its effect in the areas described above; i.e., the use, where authorized, of multiple-city identification and the right to broadcast accurate statements regarding a station's coverage area.

However, several submitting opposition comments professed fear that the rule would impose many other prohibitions upon the programming of stations whose licensed locations are suburban communities. Among the consequences conjured up by this group were prohibitions against (a) the broadcast of any public service announcements or programs on behalf of organizations located in the principal city; (b) the broadcast of programs designed to serve the needs and interests of the entire coverage area of the station; and (c) the broadcast of advertising sponsored by businesses located in the principal city. A few of those submitting comments even professed fear that a suburban station would be required to delete or severely restrict the amount of news broadcast about events occurring in the adjacent principal city — lest the Commission hold that the broadcast of such news would mislead the station's listeners as to its location.

The Commission set forth that all such fears in the terms stated above were groundless. It repeatedly stated that a station has an obligation to serve its entire coverage area, and the broadcast of public service announcements and other programming, including news, which pertains to or is of interest to persons in its entire coverage area is not inhibited by the proposed rule. However, as set forth in Section 73.30(a) of the Rules, *the primary responsibility of a licensee is to "serve a particular city, town, political subdivision or community which [is] specified in its station license." The further obligation to serve its entire service area may not be used as justification to ignore the licensee's primary responsibility or to mislead a station's audience as to its licensed location.*

In his statement concurring with the Rule Making, Commissioner Johnson raised numerous questions going to the Commission's basic allocation policies, and invited comments thereon. In response, some filing comments urged that the Commission abandon the principle of licensing stations to individual communities and permit

them to identify themselves with entire metropolitan areas. In support of this view, it was urged that (1) the concept of community service is anachronistic; (2) stations in metropolitan regions now actually serve homogeneous areas rather than political entities, and (3) the people in such metropolitan areas have the same interests. Although such arguments merit consideration, the commission did not propose in this proceeding to consider the revision of its historic concept of station allocation. The proceeding was instituted to determine whether a rule should be adopted to prohibit misleading announcements regarding station location as presently assigned. As Commissioner Johnson recognized in his concurring statement, the Commission has in some areas permitted a substantial increase of interference in order to grant applications for first local transmission services. If the Commission were now to relieve such licensees of their local service obligations, it might well reconsider the need for so many facilities in some metropolitan areas.

Until such time as it may consider revising its basic policy in allocating facilities, the Commission shall continue to license stations primarily to serve their own communities and secondarily to service their entire coverage areas: Although the contention has been made that all metropolitan areas are now homogeneous and have the same programming needs, the Commission found no evidence was presented to support such a proposition. In fact, the Commission mentioned that the tremendous growth of suburban newspapers in recent years would lead to the conclusion that although many suburbanites work in the principal city, they retain their interest in the political, civic, cultural, social and educational affairs of their home communities.

In releasing its Notice of Proposed Rule Making the Commission recognized that if such a rule were finally adopted, it would be desirable to issue a supplementary list of examples of its application for the guidance of licensees. It did not

release a list of examples at that time because it believed that comments of interested parties in the proceeding would be of assistance in preparing the examples. After considering all suggestions and questions of interpretation submitted in the comments, the Commission incorporated, by reference in the rule, examples of ways in which it intends to apply the rule to specific practices. It previously followed this practice with respect to rules on sponsorship identification and fraudulent billing practices, and it apparently has proved helpful. The list of examples will be enlarged as experience dictates, and they should answer most of the specific questions posed in the comments. Most importantly, they will serve to negate the criticism advanced in some comments to the effect that the rule is vague and lacks clearly defined standards.

Following are examples set forth by the Commission illustrating the application of the rule to certain kinds of broadcast statements — whether or not broadcast at the time at which station identification is required.

1. Station xxxx's licensed location is Central City. It broadcasts an announcement: "This is Station xxxx, Central City," or otherwise refers to its location as in Central City.

Ruling: Such statements comply with the rules.

2. Station xxxx has been granted authority by the Commission to use dual-city identification. It broadcasts an announcement: "This is Station xxxx, Central City and Nearby City."

Ruling: The announcement complies with rules, assuming that the named cities are those specified in the dual-city authorization.

3. Station xxxx is licensed to a suburban community, Suburbia, but also provides primary coverage to substantially all of the adjacent metropolitan area. It broadcasts an announcement: "This is xxxx, Suburbia, serving the greater Principal City area."

Ruling: The announcement complies with the rules. Similarly valid announcements,

provided the station's coverage data support the claims, might be:

"Station xxxx, Millville, serving the Green River Valley."

"Station xxxx, Millville, serving Millville, Rushville and Oakville."

"Station xxxx, Millville, serving the Tri-City area."

4. Station xxxx is licensed to Central City only. It broadcasts an announcement: "Station xxxx, serving Central City—Nearby City."

Ruling: The announcement violates the rule because it appears designed to lead listeners to believe that xxxx has been authorized to identify with Nearby City as well as Central City.

5. Station xxxx is licensed to Suburbia. It broadcasts an announcement either at the time for station identification or at any other time: "This is xxxx, covering the greater Principal City area."

Ruling: The announcement violates the rule, since it appears designed to lead listeners to believe that xxxx is licensed to Principal City rather than Suburbia.

6. Station xxxx correctly identifies itself as located in Suburbia at the times specified in the Rules for mandatory station identification, but at other times refers to its locations as "Here in Principal City" or it makes other references which would be inconsistent with the station's assignment to Suburbia.

Ruling: Such statements and references violate the rules, since they attempt to lead listeners to believe that xxxx has been assigned to a city other than that specified in its license.

7. Station xxxx is licensed to Suburbia. It broadcasts public service announcements not only for organizations located in Suburbia but for those located in Principal City as well.

Ruling: The mere broadcasting of public service announcements or other program

matter relating to Principal City or any other city is not a violation of the station identification rule. However, the primary responsibility of xxxx is to serve Suburbia.

8. Station xxxx is licensed to Suburbia. At the times specified in the rules for mandatory station identification, it gives its call letters and licensed location, but at other times it broadcasts such statements and references as the following:

"In the air, everywhere, over Principal City."

"This is xxxx, a symphony of sound designed for Principal City."

"This is xxxx with enchanting music for Principal City, the world's most enchanting city."

"xxxx, the tiger of Principal City radio."

"Principal City's best music station."

"From the good guys of Principal City Radio."

Ruling: Since such announcements "either lead or attempt to lead the station's listeners to believe that the station has been assigned to a city other than that specified in its license," they violate the rule.

9. Station xxxx, licensed to Suburbia, broadcasts announcements: "Station xxxx, Suburbia, in the air everywhere over Principal City."

Ruling: Although the station's license location is given, the announcements appear designed to create the impression that xxxx is licensed to both cities or, indeed, to Principal City alone, and therefore violate the rule. Such announcements are to be distinguished from those recited in Example 3, since the areas there described as being served included the city specified in the station's license.

10. Station xxxx, licensed to Suburbia, broadcasts many "vignettes" referring to places or historical events associated with Principal City. The wording of the "vignettes" makes it evident that they are designed to create the impression that xxxx is assigned to or located in Principal City.

Ruling: This is a violation of the rule.

Of course, no all-encompassing pronouncement with innumerable examples relating to station "id's" and promos will be able to answer all of the specific problems that arise. In those instances, consultation with communications counsel is recommended.

Section 315 (Political Broadcast) Revisited

SECTION 315 of the Communications Act, as amended, and the pertinent Commission Rules [Section 3.119 and 3.120 (a-m), 3.289 and 3.290 (fm), and 3.654 and 3.657 (TV), which are, with negligible variances, identical] have stimulated as much controversy and confusion as any matter in the broad field of communications law. To attempt an exhaustive treatment of this subject matter in the space limitations of this article would be impossible. Therefore, this article is designed to refresh your recollection as to the fundamental obligations of the broadcaster under Section 315 and discuss major changes in case precedent and FCC policy during recent years.

In brief, Section 315 provides that any broadcaster who allows the "use" of his facilities by any legally qualified candidate must provide "equal opportunities," without censorship, to all other such candidates with comparable times, rates, and treatment. The problem, as usual, is one of semantics. To understand the Act and the rules, the broadcaster must be able to define the pertinent terms. The following definitions emanate from FCC memos, letters, public notices, numerous cases, and comments by the Commission's staff.

(1) A *legally qualified candidate* is one for whom the electorate can vote. See *Socialist Labor Party of America,* FCC Report No. 1934. This may or may not include those unlisted on the ballot. If

under your state or local law "write-ins" are permissible, then any *bona fide* candidate may qualify. *"Bona fide* candidate," a term often bandied about by the Commission although never really defined thereby, refers to one who has made, or is making, a conscientious effort to obtain election; this may be evidenced by his promotional material, speaking engagements, and other proof or effort. (Naturally, any party nominee is a qualified candidate.) In the last analysis, the definition of a "legally qualified" or "bona fide" candidate is *determined by State law.* [See Section 3.120(f), 3.290(f), and 3.657(f) of the Rules.] However, the FCC may interpret State law.

(2) *"Any public office"* would include federal, state, municipal, and other elections in which the local citizenry may vote.

(3) *"Use"* of the broadcasters' facilities by a candidate has been broadly defined as *any and all appearances by a candidate* other than for a bona fide newscast, news interview, news documentary, or on-the-spot coverage of a news event. [See *WMCA, Inc.,* 7 RR 1132 (1952); *KNGS,* 7 RR 1130 (1952); and *Use of Broadcast Facilities by Candidates for Public Office,* FCC 62-1019, 31 Fed. Reg. 6660 (1966).]

(4) *"Equal Opportunities"* means *comparable time, rates, and treatment.* Comparable *time* does not necessarily mean the exact day, hour, and show, but rather approximately the same amount of time in a time segment of equal commercial value. Comparable *rates* would indicate that any rate discounts given one candidate must be afforded to all. (Of course, no candidate may be charged more than the rate charged regular commercial advertisers.) Comparable *treatment* implies that the broadcaster will not discriminate against any candidate in its practices, regulations, facilities, or services rendered. (See FCC 62-1019 as cited above.)

(5) The provision that the broadcaster shall have *"no power of censorship"* has been repeatedly held to *preclude all censorship* except as to deletion of

obscene language or materials concerning lotteries. In the absence of a state law that exempts broadcasters from liability for libel by a political candidate using its facilities, the only sure protection rests in libel and slander insurance. [The Commission has vehemently asserted that broadcasters are protected from libel suits in such cases. See *Port Huron Broadcasting Company (WHLS)*, 4 RR 1 (1948), and *WDSU Broadcasting Company*, 7 RR 769 (1951).] However, several state courts have disagreed, and prior to 1959 the United States Supreme Court had not ruled on point. See *Daniell v. Radio Voice of New Hampshire, Inc.*, 10 RR 2045 (1954). The controversy of a broadcaster's libel liability has been resolved, at least temporarily by the Supreme Court's decision in *Farmer's Educational and Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 252 (1959). That case follows the earlier FCC rulings that Congress could not have intended to compel stations and/or broadcast stations to carry political speeches without censorship and, at the same time, subject the broadcaster to the risk of a libel suit. See Branscomb's "Should Political Broadcasting Be Fair or Equal? A Reappraisal of Section 315," 30 Geo. Wash. L. Rev., 63, 65 (1961).

Observations Concerning Section 315

With the above definitions in mind, the simple statements in Section 315 and the pertinent Commission rules should be more meaningful. Perhaps the most important thing to remember is that *a station need not carry any political broadcast*, but if it permits the use of its facilities by one candidate, it must afford equal opportunities to all candidates for *that* office during *that* campaign.

While the broadcaster cannot censor candidates, he can and should censor noncandidates. See *Felix v. Westinghouse Radio Corporation*, 6 RR 2086 (1950). It is vitally important that licensees understand that the Section 315 prohibition of censorship applies *only* to candidates. In all other

instances, the licensee has complete authority over and responsibility for the content of its programs.

In accordance with the Commission's rules, *the licensee must maintain and permit public inspection of a complete record of all requests for broadcast time* made by or on behalf of candidates for public office and information concerning the licensee's disposition of such requests *for at least two years.*

Section 3.120(e) of the Rules provides that "A request for equal opportunities must be submitted to the licensee within one week of the day on which the prior use occurred." On April 23, 1964, the Commission addressed a letter to Senator Yarborough, concerning the alleged failure of various stations owned by one licensee to honor Yarborough's *untimely* request for "equal time at no charge," which broadened "the seven-day rule." The owner-licensee of the various stations, also a candidate for the democratic nomination for U.S. Senator, utilized time on his stations without charge. By letter, the owner-licensee offered Senator Yarborough comparable time without charge, and the latter replied that he would utilize this opportunity but failed to state precisely when. Subsequently, when the latter requested specific time periods, the owner-licensee refused and advanced the so-called "seven-day rule" in defense. The Commission held that ". . . *where the licensee, or a principal of the licensee, is also the candidate, there is a special obligation upon the licensee to insure fair dealing* in such circumstances. The licensee is therefore estopped from relying upon the seven-day rule . . ." (Emphasis supplied.)

Fairness Doctrine and Section 315 Compared

There is an unavoidable overlap of the "Fairness Doctrine" and Section 315 of the Act. Previously distinguished, the latter pertains *only* to political candidates while the former concerns broadcast licensees' broad obligation to afford reasonable opportunity for the discussion of conflicting views

on matters of public importance. Obviously, any hotly contested campaign for public office might well constitute a "matter of public importance" and thus appear to fall within the domain of the "Fairness Doctrine" and obligate a "fair" coverage of all sides of the controversial matter. Conversely, cannot the "equal opportunities" provision of Section 315 be attached to matters of public importance? Exactly where is the line to be drawn?

Section 315 is readily distinguishable from the Fairness Doctrine in that it applies *only* to political candidates, and, therefore, no provision of Section 315 is applicable to the broader issues, controversies, and matters encompassed by the Fairness Doctrine. While Section 315 does not encroach upon the Fairness concept, the basic element of fairness would seem to include Section 315. A simple formula, to aid the broadcaster in making the distinction, follows: *"Political candidates require application of Section 315 of the Act; and political issues and broad matters of public interest and importance require application of the Fairness Doctrine."*

Unhappily, while the above may serve as some small assistance, the question arises, "In view of the fact that the Commission has repeatedly asserted that *non*candidates are not subject to the provision of Section 315, are their utterances not then subject to the Fairness dicta?" Or, "Are station editorials attacking a particular candidate subject to the Fairness Doctrine?

The prevalent attitude seems to be that where noncandidates (including spokesmen, station announcers, and program participants) comment upon candidates for public office, the Fairness Doctrine applied. Therefore, if the licensee should editorialize on behalf of a political candidate, it should furnish the opposing candidate with a copy of the editorial and permit a *spokesman* for the other candidate, *but not the candidate himself,* to answer the editorial in a comparable time period. Similarly, if one of the station's staff members, or a participant on a show, should support or attack

any candidate, the licensee should offer a *spokesman* of the agreed candidate approximately the same quality and quantity of broadcast time. If you allow a candidate, rather than his spokesman to reply to the comments of a noncandidate, Section 315 will apply immediately. A chain reaction of "equal opportunities" requirements might result and throw your program schedule into a "cocked hat." (Next month's article, analyzing the Fairness Doctrine, will delve more thoroughly into the problems inherent in personal attacks and political editorializing.)

Remember, *the requirements of the Fairness Doctrine are greater as to political candidates* than they are as to controversial issues. On the plus side is the fact that while the broadcaster may not censor candidates under Section 315, *he may censor noncandidates* under the Fairness Doctrine. In short, the licensee may require the noncandidate to confine his remarks to the subject matter which gave rise to his appearance. The licensee should endeavor to maintain tapes of programs dealing with, or touching upon, political elections. Thus, in the event a brief comment is made by a noncandidate over the licensee's station, the station's obligation under the Fairness Doctrine would be negligible. However, if the station had no record of the nature and length and comments made, a dispute might arise concerning the amount of "free" time required and result in complaints to the Commission. If the station's policy to give away as little time as possible, the licensee must be able to *prove* that controversial matters aired have been provided approximately equal coverage.

Summary

In light of the above, the broadcast licensee's obligation under Section 315 of the Communications Act, as amended, might be summarized as follows:

(1) A station need not carry any political broadcast, but if it permits the "use" of its facilities by

one "legally qualified candidate" it must afford "equal opportunity" to all candidates for that office during that campaign. (Of course, licensees are expected to devote some time to broadcasting matters of a political and controversial nature and thus do their part to keep the public informed.)

(2) *Section 315* of the Act applies *only* to political candidates and its provisions should be reviewed whenever dealing with the candidates themselves.

(3) The requirements of Section 315 apply, *regardless of the nature of the broadcast,* whenever a legally qualified candidate is permitted to "use" the facilities.

(4) *The Fairness Doctrine applies to noncandidates,* this includes all spokesmen for candidates, comments made by all noncandidates participating in the licensees' programs, and broadcast editorials. The overlap of Fairness and Section 315 is evidenced by the fact that the requirements of the Fairness Doctrine are greater as to political candidates then they are as to controversial issues. (The Fairness Doctrine now appears in Section 315(a) (4) of the Act.)

(5) Each contest for each office is separate, and a primary campaign is distinct from a general election campaign. The licensee may choose only one, or none, of the several campaigns for "use" by candidates.

(6) The "equal opportunities" requirement of Section 315 applies as soon as a station permits the "use" of its facilities by a "legally qualified candidate," even though such use be only as a guest on another program. There is no "use" when the station allows a candidate to participate in a *bona fide* news event, news documentary, news interview, or "on-the-spot" news coverage broadcast.

(7) The "equal opportunities" requirement necessitates an offer of comparable time, rates, and treatment.

(8) Equal opportunities need be afforded only to candidates themselves, and not to supporters of candidates or to political parties.

(9) Section 315 precludes censorship of candidates' slanderous comments and all other matters, except for permissible deletion of obscene language or matter pertaining to lotteries. The Supreme Court decision in *Farmer's Educational, supra,* notwithstanding, slander and libel insurance is advisable. Section 315 does *not* preclude full censorship and direction of all matter aired by *non*-candidates. The licensee can and should censor and direct comments by *non*candidates.

(10) Exactly the same *rates* must be charged and discounts allowed candidates as are charged and allowed commercial advertisers. Rate discounts and policies made available to one candidate must be made available to all others. (This does not preclude the station from offering candidate A a lower rate, per spot, for package buying, than it offers candidate B for the purchase of less spots. It does, however, require that the station offer the "package plan" to all candidates.)

(11) The licensee should not permit a candidate to reply to a comment made by a noncandidate *or* a noncandidate to reply to a candidate. If this is done, both Section 315 *and* the Fairness Doctrine will apply, thus compounding the licensee's responsibilities.

(12) The licensee can *require* all candidates to submit advance scripts of their talks, *provided* that the licensee requires this of all candidates and makes no attempt to censor the material. The licensee may and should impose the same requirement upon noncandidates.

In summary, the licensee is urged to require appropriate members of its staff to review Section 315 of the Act, and Sections 3.119, 3.120, 3.289, 3.290, 3.654, and 3.657 of the Commission's Rules and Regulations. The latter two rules pertain to a-m, but identical rules apply to fm and TV. A thorough knowledge and familiarity with the pertinent rules and Section 315, coupled with the distinctions and overlap illustrated above, should enable the broadcaster successfully to comprehend his responsibilities as to "fairness" and the "equal

opportunities" requirement of Section 315. Since the licensee's responsibilities under each are different, it is essential that the broadcaster know which set of standards applies to a given situation.

Of course, this article (and next month's article on Fairness), cannot possibly constitute complete coverage of these broad and complex subjects. However, when read *together*, they should enable you to reduce the problems to an acceptable size.

Recommendations

It is most desirable that those responsible for policy decisions adopt, well in advance of each election, a comprehensive policy for use of the stations for political broadcasts, including spot announcements.

The policy should spell out precisely what campaigns will be covered and in what manner. For example: (1) Candidates for the Presidency, United States Senate, and United States House of Representatives, and their authorized spokesmen, will be required to purchase time and spots; (2) candidates for all State offices, and their spokesmen, will be required to purchase time and spots; (3) each candidate for a major city office, but not his spokesman, will be given two five-minute periods in evening hours in the two weeks before the election, and will be required to purchase any additional time and spots; (4) candidates for minor offices, such as dog catcher, garbage collector, etc., will not be afforded the opportunity to use the station. The policy should be fair, taking into consideration anticipated network orders, and the design should avoid the possibility that the station will be unable to carry out its statutory responsibilities by heavy purchases of time and spots on the last two or three days before the elections. The policies should also include the manner of handling programs and spots concerning bond issues, referendums, and the other local and state issues on the ballot.

By virtue of establishing clearly defined policies, in advance of the campaigns, the licensee will be

able to anticipate responsibilities under Section 315 and the Fairness Doctrine and facilitate the appropriate adjustments in programming.

In any event, the licensee should continue to make conservative decisions, proceed with caution and vigilance, and consult with communications attorneys whenever any questions arise.

The "Personal Attack" Rules

THE SO-CALLED "PERSONAL ATTACK" rules require specific procedures still foreign to many broadcasters. Since violations are increasingly prevalent subject to fines and censures, they warrant careful review.

Adoption of 'Personal Attack' Rules

On April 6, 1966 the Commission adopted a Notice of Proposed Rule Making (FCC 66-291, Docket No. 16574) to provide procedures in the event of certain personal attacks. This Notice was published in the Federal Register of April 13, 1966 (31 Fed. Reg. 5710). On July 5, 1967, the Commission released a Memorandum Opinion and Order revising its Rules by adding Section 73.300, 73.598 and 73.679, all to read identically as follows:

Personal attacks; political editorials.[1]

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notifi-

1. Note: In a specific factual situation, the Fairness Doctrine may be applicable in this general area of political broadcasts. (See Section 315(a) of the Act (47 U.S.C. 315(a)); Public Notice: **Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.** 29 Fed. Reg. 10415.)

cation of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesman, or those associated with them in the campaign, or other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* that where such editorials are broadcast within 72 hours prior to the day of election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a reponse and to present it in a timely fashion.

The purpose of embodying the procedural aspects of the Commission's long-adhered-to personal attack principle and political editorial policy in its Rules is twofold. First, it will clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks and editorials regarding political candidates. Second, in the event of failure to comply with these rules, the Commission will be in a position to impose appropriate forfeitures (§503 (b) of the Act) in cases of clear violations by licensees or designate for hearing. Of course, pursuant to §503 (b) of the Act, only the willful or repeated violation of these rules can result in forfeiture. The Commission stressed that the *personal attack principle is applicable only in the context of the*

discussion of a controversial issue of public importance.

These rules serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine. As set forth in the 1949 *Report of the Commission in the Matter of Editorialization by Broadcast Licensees, 13 FCC 1246 at 1249 (1949),* "the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day" is the keystone of the Fairness Doctrine. "It is this right of the public to be informed, rather than the right on the part of the government, any broadcast licensee, or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting."

The Fairness Doctrine was given specific Congressional approval in the 1959 amendment of Section 315 (a) of the Communications Act (73 Stat. 557, 47 U.S.C. 315(a)). *The personal attack principle is simply a particular aspect of the Fairness Doctrine.* The principle stems from the Commission's language in the 1949 *Report* that "elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station . . ." (13 FCC 1252). *The standard of fairness similarly dictates that where a licensee editorializes for or against a candidate the appropriate spokesman for the conflicting point of view is the opposed candidate's representative, or, if the licensee so chooses, the candidate himself.* "These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses, but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public." (1949 *Report, supra,* 13 FCC 1250).

It is the contention of some broadcasters that the Fairness Doctrine and the personal attack principle are unconstitutional infringements of

broadcasters' rights of free speech and free press under the First Amendment. Naturally, the Commission believes these contentions are without merit. It discussed the constitutionality of the Fairness Doctrine generally in the *Report* on Editorialization (13 FCC 1246-1270). "We adhere fully to the discussion, and particularly the considerations set out in paragraph 19 and 20 of the Report." *Letter to John H. Norris (WBCB),* 1 FCC 2d 1587, 1588 (1965). The court in reviewing the constitutionality of the personal attack principle of the Fairness Doctrine in *Red Lion,*[1] concluded "that there is no abrogation of the petitioners' (licensee's) free speech right . . . I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by use of modern technology the 'free and general discussion of public matters (which) seems absolutely essential for an intelligent exercise of their rights as citizens,' *Grosjean v. American Public Press, supra at 249." Red Lion, supra,* at 41.

The Commission has emphasized again that the "personal attack" rules do not proscribe in any way the presentation by a licensee of personal attacks or editorials on political candidates. They simply provide that where he chooses to make such presentations, he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint within a reasonable amount of time after such a presentation occurs.

The addition of Section 73.123(a), (b) (and also 73.300-FM; 73.598—Educational fm; 73.679-TV of identical language) to the Rules serves to codify what has long been the Commission's interpretation of the personal attack aspect of the Fairness Doctrine. *Report on Editorialization by Broadcast Licensees,* 13 FCC 1246, 1258 (1949); *Clayton W. Mapoles,* 23 Pike &

1 Affirmed sub. nom. Red Lion Broadcasting Co., Inc. v. FCC, Case No. 19,938, D.C.Cir. (June 13, 1967).

Fischer, R.R. 586 (1962); *Billings Broadcasting Co.*, 23 Pike & Fischer, R.R. 951 (1962). "Thus, the Commission has repeatedly stated that when a licensee, in connection with its coverage of a controversial issue, broadcasts a personal attack on an individual or organization, it must *'transmit the text of the broadcast to the person or group attacked . . . either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response.'* Public Notice of July 26, 1963; Controversial Issue Programming, FCC 63-734" *Springfield Television Broadcasting Corp.* 4 Pike & Fischer, R.R. 2d 681, 685 (1965). This duty devolves upon the licensee, because other than in the case of a broadcast by political candidates, the licensee is responsible for all material disseminated over his broadcast facilities.

As the Notice pointed out, the Commission has set forth the obligation of a licensee when a personal attack occurs during the discussion of a controversial issue of public importance, i.e., the licensee must notify the individual or group attacked of the facts, forward a tape, transcript or accurate summary of the personal attack, and extend to the individual or group attacked an offer of time for the broadcast of an adequate response. The Commission notified all licensees of their responsibility in this respect by transmitting to them the July 26, 1963 Public Notice (FCC 63-734) and the 1964 Fairness Primer. *Despite such notification and the Commission's rulings, the procedures specified have not always been followed—even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that it codified the procedures* into the "personal attack" rules. These rules will in no way lessen the force and effect of the Fairness Doctrine as it obliges licensees to "withhold from expression over his facilities relevant news or facts concerning a controversy or . . . slant or

distort the presentation of such news." (See *Report on Editorialization, supra.)*

The obligation for compliance with these rules is on each individual licensee at it is for compliance with the Fairness Doctrine generally. *Where a personal attack or editorial as to a candidate on a network program is carried by the licensee, the licensee may not avoid compliance with the rules merely because the attack or editorial occurred on a network program.* Of course, if the network provides appropriate notice and opportunity for response and the licensee carries such response, its obligation under the rules would be satisfied.

Confusing Semantics of the Rules

A major purpose of the rules is to clarify and make more precise the procedures which licensees are required to follow in personal attack situations. *The long-applied standard of what constitutes a personal attack remains unaffected by this codification:*

> (T)he personal attack principle is applicable where there are statements, *in connection with a controversial issue of public importance,* attacking an individual's or group's integrity, character, or honesty or like personal qualities, and not when an individual or group is simply named or referred to. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* Public Notice of July 1, 1964, footnote 6.

As stated in the Notice of Proposed Rule Making, the Commission recognized that in some circumstances there may be uncertainty or legitimate dispute concerning (1) whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance, or (2) whether the group or person attacked is "identified" sufficiently in the context to come within the rule. *The rules are not designed to answer such questions.* When they arise, *licensees will have to continue making good faith judgments*

based on all of the relevant facts and the applicable Commission interpretations. As stated in the Notice of Proposed Rule Making, the rule will not be used as a basis for sanctions against those licensees who *in good faith* seek to comply with the personal attack principle. The rules are thus directed to situations where the licensees do not comply with the requirements of the personal attack principle as to notification and offer of time to respond—even though there can be no reasonable doubt under the facts that a personal attack has taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist).

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

Timely Compliance with Personal Attack Rules

Paragraph (a) of the rule places specific procedural responsibilities on the licensee over whose facilities a personal attack has been broadcast. A licensee is required to send the attacked person or group, within a reasonable time and in no event later than *one week after the attack*, a notice of the attack which states when the attack occurred and contains an offer of a reasonable opportunity to respond. *Along with the notice, he is required to send a tape, transcript, or accurate summary of the attack to the attacked person or group.* This time limit should be suffi-

cient to allow a licensee to confer with counsel or with the Commission if there is doubt as to its obligation. In any event, in a doubtful situation, if the person who possibly has been attacked is notified promptly within the time limit and the licensee seeks clarification of his obligations from his counsel or the Commission, no sanctions would be imposed—even if the matter is not finally resolved within the one week period. This one week outer time limit does not mean that such a copy should not be sent earlier or indeed, before the attack occurs—*particularly where time is of the essence.*

Personal attacks (1) on foreign groups or foreign public figures and (2) made by political candidates, their authorized spokesmen, or those associated with them in the campaign against other candidates, spokesmen, or persons associated with them in the campaign, are excluded from the rule. *Attacks by candidates against other candidates are covered by the "equal opportunities" provision of Section 315—not the personal attack principle.*

Finally, subsection (c) of the rule clarifies licensee's obligations *in regard to station editorials* endorsing or opposing political candidates. The appropriate candidate (or candidates) must be informed of a station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and must be offered a reasonable opportunity to respond through a spokesman of his choice including, if the licensee so agrees, himself.

The phrase *"reasonable opportunity" to respond* is used because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a "reasonable opportunity" may require more than a few seconds if there is to be a meaningful response. *Notification shall be within 24 hours of the editorial,* since time is of the essence in this

area, and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial. In many cases, licensees will be able to give notice prior to the editorial. *Indeed, such prior notice is required in instances of editorials broadcast close to the election date, i.e. less than 72 hours before the day of the election.* While such last-minute editorials are not prohibited, the Commission emphasized as strongly as possible that such editorials would be patently contrary to the public interest and the personal attack principle—unless the licensee insures that the appropriate candidate (or candidates) is informed of the proposed broadcast and its contents sufficiently far in advance to have a reasonable opportunity to prepare a response and to have it presented in a timely fashion.

As in the case of the personal attack subsection, the licensee may impose reasonable limitations on the reply, such as requiring the appearance of a spokesman for the candidate to avoid any Section 315 "equal opportunities" cycle. (Barring extraordinary circumstances, the choice of the spokesman is, of course, a matter for the candidate involved.) The matter of scheduling responses is left to reasonable judgment and negotiation. Subsection (c) is directed only to station editorials endorsing, or opposing, political candidates. Situations containing aspects of both personal attacks and political editorials may arise, and, in such cases, rulings on the particular factual settings may be necessary.

In summary, the long-standing and seldom-heeded "personal attack" policies have been codified into rules which confusingly overlap with the licensee's obligations under the Fairness Doctrine, editorializing policies, and the statutory political broadcast provisions (Section 315 of the Act). Careful review of the rules, first-quoted-above, and the balance of this article should be of assistance. Individual cases require consultation with your attorney.

Cigarette Ad Ruling and Its Effect on the Fairness Doctrine

ON SEPTEMBER 8, 1967, THE COMMISSION adopted a Memorandum Opinion and Order (RM-1170, FCC 67-1029) applying the Fairness Doctrine to cigarette advertising. Initially, the Commission had issued its ruling on June 2, 1967, in a letter to WCBS-TV in New York City. It followed a complaint from Mr. John Banzhaf, III, stating that the station had not afforded him or some other responsible spokesman an opportunity to present "contrasting views" on the subject of cigarette smoking after having presented numerous cigarette commercials.

In turning down numerous requests by various parties for reconsideration, the Commission stated that the Fairness Doctrine may be appropriately applied to cigarette advertising; the ruling implements the policy of Congress as embodied in the Cigarette Labeling Act; other products are not affected by the ruling; it will not have an adverse effect on the broadcasting industry; *the ruling does not curtail cigarette advertising;* and it is the obligation of the licensee, operating in the public interest, to provide information pointing out the hazards of cigarette smoking if the station carries cigarette advertising.

WCBS-TV replied that it had presented programs providing contrasting views on smoking but maintained that the Fairness Doctrine did not apply to commercial advertising.

Arguments Against the Cigarette Ruling

The principal contentions against the merits of the ruling are: (a) that the Fairness Doctrine is itself violative of the First and Fifth Amendments to the United States Constitution and hence cannot properly serve as a basis for delineating licensee responsibilities under the Communications Act; (b) that the Fairness Doctrine, even if constitutional, applies only to programming in the nature of news, commentary on public issues or editorial opinion, and does not extend to advertising; (c) that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement *per se* presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose; (d) that the requirement that a significant amount of time be allocated each week to cover the viewpoint of the health hazard posed by smoking and the suggestion that a licensee might, *inter alia,* present a number of public service announcements of the American Cancer Society or the Department of Health, Education and Welfare, will cause a debasement of the Fairness Doctrine generally and substitute Commission fiat for licensee judgment; (e) that the ruling cannot logically be limited to cigarette advertising alone; (f) that the ruling will have an adverse financial effect upon broadcast licensees by causing the cigarette industry to turn to other advertising media and will also have an adverse effect on the sale of cigarettes; and (g) that the ruling is in any event procedurally invalid for failure to accord interested persons an opportunity to be heard prior to the issuance of a novel and unprecedented policy determination.

Those parties claiming that the Fairness Doctrine is violative of the First and Fifth Amendments to the Constitution were answered by the Commission in Docket No. 16574, *In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack of Where a Station Editorializes as to Political Candidates.* (See Nov. 1967 *BM/E* article "The Personal Attack Rules.") By a Memorandum Opinion and Order released on July 10, 1967, in that docket (FCC 67-795), the Commission rejected the contention as to the First Amendment. For the reasons and authorities there set forth, the Commission adhered to that determination in this proceeding. The Fifth Amendment challenge was also rejected in *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* Case No. 19,938, (C.A.D.C., decided June 13, 1967).

In contending that the Fairness Doctrine does not apply to advertising, the parties argue that the doctrine had its genesis in the 1949 *Report of the Commission in the Matter of Editorializing by Broadcast Licensees* (13 FCC 1246) which was meant to apply *only to dissemination of news, commentary on public issues, and editorial opinion because it contains no reference to advertising.* It was further urged that no mention of advertising was made in the 1964 Fairness Primer (29 F.R. 10415) and that the Commission has never interpreted the doctrine as applying to advertising. In addition, it was asserted that Congress, in giving specific approval to the Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting in the 1959 amendment of Section 315(a) of the Communication Act (73 Stat. 557, 47 U.S.C. 315(a)), limited the scope of the doctrine to programming of that nature since it did not amend Section 317 of the Act to incorporate a similar provision. It follows, the parties stated, that the present ruling is an unprecedented extension of the Fairness Doctrine which is beyond the Commission's discretion or statutory authority.

The Commission found otherwise. The Commission stated that the circumstance that Congress specifically incorporated the Fairness Doctrine into the 1959 amendment to Section 315 to make it "crystal clear" that the programming exemptions from the equal time requirement of that section did not exempt licensees "from objective presentation thereof in the public interest" does "not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and matters of public controversy." (S. Rept. No. 562, 86th Cong., 1st Sess., p. 13; 105 Cong. Rec. 14439.) Most important, the amendment refers to the obligation imposed upon broadcast licensees" . . . *under this Act* to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." (Emphasis supplied.)

The Commission further argued that it has always directed itself particularly to programming and advertising which bears upon public health and safety. The Federal Radio Commission denied a renewal of license to a station which broadcast a "medical question box" devoted to diagnosing and prescribing treatment of illnesses from symptoms given in letters from listeners—and from which the station received a rebate on each prescription sold. *KFKB Broadcasting Association* v. *Federal Radio Commission* (47 F. 2d 670, 671 (C.A.D.C.)). The Commission has similarly condemned advertising of alleged medical prescriptions and quack remedies which were deemed inimical to health, and granted renewal only upon assurances that such broadcasting would be discontinued. *Farmers and Bankers Life*

Insurance Co. (2 FCC 455, 457-459). The Commission stated that "(a) broadcast station carrying such programs should be held to a high degree of responsibility, affecting as they may the health and welfare of the listeners, and careful investigation of such products, and of the claims made therefor, should be made before they are advertised over a broadcast station." (2 FCC at 458) See also *WSBC, Inc.*, 2 FCC 293, 294-296, and *Oak Leaves Broadcasting Station, Inc.*, 2 FCC 298 (both involving advertising of quack medicines by one not licensed to practice medicine).

In short, the Commission held that the licensee's statutory obligation to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints on the controversial issue of public importance posed by cigarette advertising (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and, as found by the Congress and Governmental reports, may in normal use be hazardous to health, and that the licensee's compliance with this duty may be examined at license renewal time. (See 1960 Programming Policy Statement, 20 Pike and Fischer, Radio Regulation 1901, 1912-1913.) While the agency's position as to what the obligation to operate in the public interest required for cigarette advertising may have fluctuated over the years since 1929, the exercise of such authority in the present circumstances is plainly reasonable. Considering the 1964 Report of the Surgeon General's Advisory Committee, the establishment of the National Interagency Council on Smoking and Health and the enactment of Cigarette labeling and Advertising Act (Public Law 89-92, 15 U.S.C. 1331 *et seq.*) in 1965, and the recent Reports to Congress by the Federal Trade Commission and the Department of Health, Education and Welfare pursuant to that Act, it is not an

abuse of discretion for the Commission to decide now that a licensee who presents programming and advertising which encourages the public to form this habit potentially hazardous to health has, at the very least, an obligation adequately to inform the public as to the possible hazard.

Summary

The Commission has ruled that (1) *the Fairness Doctrine applies to cigarette advertisements,* (2) *the ruling applies only to cigarette advertising,* and (3) *stations,* while not obligated to provide equal time for response, *must provide a "significant amount of time"* on a regular basis. The Commission stressed that implementation of its ruling would be consistent with the policy of the Cigarette Labeling Act, and that, as in other areas, the manner of compliance is left to the *good faith, reasonable judgment of the licensee.*

Violations Will Be Considered at Renewal Time

In denying the petitions for reconsideration, the Commission emphasized, " . . . we believe that the licensee's statutory obligations to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints . . . posed by cigarette advertising (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and may in normal use be hazardous to health and that *the licensee's compliance with this duty may be examined at license renewal time* . . . It is our belief that the public interest standard and Fairness Doctrine have been embodied in this principle from their inception." (Emphasis supplied.)

Discussing the effect of the ruling on the advertising of other products, the Commission emphasizes that cigarette advertising presents a unique situation. "As to whether there are other comparable products whose normal use has been found by Congressional and other Government

action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine, we can only state that we do not find such circumstances present in petitioners' contentions about the advertised products upon which they rely." The ruling, the Commission stressed, *imposes no Fairness Doctrine obligation with respect to other product advertising.*

Additionally, the Order stated that the Commission does not consider itself to be "the proper arbiter of the scientific and medical issue here involved . . . has not sought to resolve that issue." It makes the point that there is an issue of substantial public importance involved and it must be presented fairly to the American people.

The remaining (and still unanswered) question in the minds of many broadcasters relates to the Commission's intentions in this area. Will it gradually extend the "Fairness Doctrine" to other advertisements? The FCC says, "No" but history would indicate to the contrary.

In any event, broadcasters (that carry cigarette advertisements) would be well advised to provide some public service announcements daily to set forth the hazards of smoking. The quantity of same should be determined with the assistance of your legal counsel.

Non-Communications Act Violations

During the past 35 years, broadcasters, as well as all other segments of the business community, have been subjected to increasingly stringent governmental regulation. Today, an alert broadcaster must have a good working knowledge of numerous legal fields including labor laws, Internal Revenue laws, antitrust laws, false advertising, etc.

We have witnessed a great many hearings at the Commission whereby applications for (1) construction permits, (2) transfers and/or assignments, and (3) renewals have been designated for hearing on the grounds that the applicants and/or licensees had been found by a federal court to have violated laws relating to monopoly, restraint of trade, unfair competition, etc.

The Commission has not promulgated exact rules in this area; consequently, what can a licensee expect from the Commission when he (1) intentionally or (2) unintentionally violates local, state, and/or federal laws? What criteria does the Commission employ? Should there be a difference in procedure or result in any of these situations:

(a) Whether the finding of the violation is in a civil or criminal case;

(b) Whether the finding of violation is by the United States Supreme Court or some lower court;

(c) Where, after the finding of violation, a decree is entered by an appropriate court which

results in the elimination of the practice which was a violation of state or federal law;

(d) Where there has been no finding of violation or no filing of suit, but the Commission is in possession of information which shows that there has been a violation of state or federal law.

In approaching these issues, the Commission is concerned with two basic considerations: (1) Under the Communications Act of 1934, as amended, licensees are required by law to operate radio stations in the public interest; (2) the Commission, in its licensing functions, is obligated to see that this legislative mandate is carried out in order to encourage the larger and more effective use of radio in the public interest. It is in the light of these requirements that the problems presented must be considered.

Section 307(a) and 310(b) of the Communications Act provide that the Commission *may* grant applications only if the public interest, convenience or necessity will be served. No intelligent appraisal of applicants in terms of this standard can be made without an examination of the basic character qualifications of these applicants, and Congress, in §308(b) of the Act, specifically gave the Commission authority and imposed upon it the duty to make such examination in evaluating applicants for broadcast facilities.

An important aspect of this examination is the conduct of the applicant. *(KFKB Broadcasting Association, Inc.* v. *Federal Radio Commission,* 44 F. 2d 670.) Obviously this does not include every phase of an applicant's behavior, but only that part which has some reasonable relationship to ability to operate a broadcast station in the public interest. As pointed out in *Mansfield Journal Co.* v. *Federal Communications Commission,* 180 F. 2d 28, 33, ". . . in determining whether a particular applicant should be permitted to operate so important and restricted a facility as a radio station . . . it is appropriate that the Commission examine pertinent aspects of the past history of the applicant."

The Commission believes a pertinent part of this history would clearly include any violation of State or Federal law. In the past, it has considered various types of unlawful conduct including violations of Internal Revenue laws, conspiracy to violate antitrust laws, false advertising and other deceptive practices, in passing upon qualifications of applicants. In this respect, the Commission has been sustained by the Courts. In *Mester, et al* v. *United States, et al,* 70 F. Supp. 118, affirmed per curian 332 U.S. 820, the U.S. District Court for the Eastern District of New York stated that the Commission might consider as one element of evaluation the applicant's flagrant disregard and violation of various U.S. government regulations designed for public protection. In *National Broadcasting Company* v. *United States,* 319 U.S. 190, 222, the Supreme Court stated that the Commission is permitted to exercise its judgment as to whether violation of the antitrust laws disqualify an applicant from operating a station in the public interest; and "might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee." It must be concluded, therefore, that the Commission's authority to consider violation of Federal laws, other than the Communications Act of 1934, in evaluating applicants for radio facilities is well established and that a postive duty is imposed upon it to exercise authority.

As the Courts have held, by exercising such authority the Commission is not encroaching upon the administrative and enforcement jurisdictions of other governmental agencies or the courts. Thus, in the above-mentioned National Broadcasting Company case the Commission pointed out to the Court that in adopting the network regulations it was not attempting to apply the antitrust laws as such, but was concerned only with practices violative of the antitrust laws to the extent that they "had a bearing upon the matters

which were entrusted to the Commission." The Supreme Court expressed its approval of this interpretation. In the Mester case, *supra,* the Commission was not attempting to impose penalties for violations of laws administered by the Federal Trade Commission. However, it considered such violations along with other conduct pertinent to a determination whether the applicant had the qualifications to operate a broadcast station as required by the Communications Act.

A very recent Commission decision (March 27, 1968) concerned the application for assignment of license of station WFMT, Chicago, Illinois, from Gale Broadcasting Co., Inc., to WGN Continental FM Company (BALH-1039), a wholly owned subsidiary of a series of subsidiaries of a larger newspaper, The Tribune Company and owner of an a-m and TV station in the same market. Although this case is known in the industry because it instigated the proposed new rules limiting future a-m, fm and TV ownership in the same market to a single licensee (this subject to be discussed in a future article), the grant of the applicant is contingent upon the following language:

> The Commission noted there is pending civil action against the Chicago Tribune-New York News Syndicate, Incorporated (wholly-owned by the Tribune Company) which furnishes comic strips, columns, and specialty and variety features to 1700 daily newspapers in the United States. Grant of the WEMT (fm) assignment application was made without prejudice to such further action as the Commission may deem appropriate as a result of the pending civil antitrust suit, *United States of America v. Chicago Tribune-New York News Syndicate, Incorporated,* Civil No. 4596, U.S. District Court for the Southern District of New York, filed Nov. 21, 1967.

The contention has been made by many parties that no blanket policy should be adopted by the FCC which would absolutely disqualify applicants for radio facilities where they are found

to have violated a federal law or which would attempt to specify the exact weight or significance to be given by the Commission to such violations. Such evaluations should be made only on a case-to-case basis in the light of the specific facts involved in and related to the violation, and the Commission has agreed with this argument. As mentioned above, the Commission must be satisfied that an applicant has the requisite qualifications to assure that public interest will be served by a grant of his applicant. This determination cannot be made on the basis of isolated facts but should include a careful, critical analysis of all pertinent conduct of the applicant. It believes that if an applicant is or has been involved in unlawful practices, an analysis of the substance of these practices must be made to determine their relevance and weight as regards the ability of the applicant to use the requested authorization in the public interest. It does not believe that the outcome of this determination should be prejudged by the adoption of any general rule forbidding anv grant in all cases where unlawful conduct of any kind or degree can be shown. Nor does it believe that any rule could adequately prescribe what type of conduct may be considered of such a nature that in all cases it would be contrary to the public interest to grant a license.

While the Commission has determined that no blanket policy should be enunciated, in view of the apparent confusion which has existed with respect to the subject, and the concern expressed by those interests have been or may be affected in the future, the Commission has set forth what it believes is the correct approach for properly determining on a case-to-case basis the weight to be given violations of State or Federal law other than the Communications Act. By so doing, the Commission has not instituted a "trick substitute" for the exercise of administrative discretion. There is no easy formula or slide rule which can be used to give the answer to every such case that comes before it. However, as discussed in

the following paragraphs, the FCC has stated a general policy or philosophy that it employs.

Commission Criteria Analyzed

Many have argued that the violation of a U.S. or State law raises no presumption adverse to an applicant. With this point of view, the Commission disagrees. Violations of Federal laws, whether deliberate or inadvertent, raise sufficient question regarding character to merit further examination. While this question as to character may be overcome by countervailing circumstances, nevertheless, in every case, the Commission must view with concern the unlawful conduct of any applicant who is seeking authority to operate broadcast facilities as a trustee for the public. This is not to say that a single violation of a State or Federal law or even a number of them necessarily makes the offender ineligible for a grant. There may be facts which are in extenuation of the violation of law; or, there may be other favorable facts and considerations that outweigh the record of unlawful conduct and qualify the applicant to operate a station in the public interest. *In all such cases, a matter of prime concern is whether the violation was committed inadvertently or willfully. Innocent violations are not as serious as deliberate ones.*

Another matter of importance is whether the infraction of law is an isolated instance or whether there have been recurring offenses which establish a definite pattern of misbehavior. A single transgression of law, particularly if inadvertently committed, might raise little question with respect to qualifications; however, a continuing and callous disregard for laws may justify the conclusion that the applicant cannot be expected in the future to demonstrate a responsible attitude toward his obligations as a broadcast licensee. In this connection, the matter of time is important. There necessarily must be more concern with recent violations than with those which occurred in the remote past and have been followed by a

long period of consistent adherence to law and exemplary conduct on the part of the applicant. Cases which must be viewed with most critical scrutiny are those where the applicant has been involved in violations over a long period of time or is presently engaged in illegal practices. In all such cases a strong presumption of ineligibility is raised and a heavy burden of proof is imposed on the applicant to show he is qualified to operate a broadcast station in the public interest.

It is irrelevant to a determination of qualifications whether the finding of violation is in a civil or criminal case. In either case it is the conduct of the applicant and not the type of suit brought that is important. As pointed out by the Department of Justice in a Memorandum, "while the bringing of a criminal case may sometime indicate a more flagrant and willful disregard of the antitrust laws than does the filing of a civil complaint, so many factors enter into determination of the type of action to be brought that whether the suit was civil or criminal has little relationship to the question whether the defendant's acts were in deliberate disregard of the antitrust laws or whether his violation was flagrant or persistent."

Futhermore, *it is not the particular tribunal which makes the finding, but the finality of the decree which is significant.* There is no logical basis for giving greater evidentiary weight in character determination to a final decree of the higher court than to that of a lower court from which no appeal was taken.

The question is presented as to *what significance should be given to the fact that a suit alleging a violation of law has been filed against an applicant or where the Commission is in possession of facts showing that the applicant has violated the law but where there has been no final adjudication by an appropriate authority.* The fact that suit has been instituted is not the important consideration. The question raised and facts involved, however, may be of concern to the

Commission. As hereinafter pointed out, the Commission has the authority to examine pertinent aspects of the past history of an applicant and this history, of course, includes any violation of State or Federal law. Even though no suit alleging illegal conduct has been filed, or if one has been filed but has not been heard or finally adjudicated, the Commission may consider and evaluate the conduct of an applicant in so far as it may relate to matters entrusted to the FCC.

Violations of antitrust laws have been the principal basis for the FCC's concern in this area. Therefore, such violations are discussed below.

Congressional concern with free competition in the broadcasting field is evident in the very explicit and specific provisions of §§313 and 314 making the antitrust laws applicable to broadcasting. This concern is amplified in the legislative history of these provisions. As the Supreme Court pointed out in *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 137, Congress in setting up the Communications Act of 1934 "moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." As the Supreme Court further pointed out in *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470, 478 (1940) "the Act recognizes that the field of broadcasting is one of free competition." In that case the Court held that the Act "expressly negatives" the idea of monopoly in the broadcasting field. It is clear from the legislative history of the Act and from various provisions therein that Congress conceived as one of the Commission's major functions the preservation of competition in the broadcasting field and the protection of the public as against the private interest.

It has been argued that there is no need or basis for the Commission to disqualify applicants because they have been involved in violations of the antitrust laws since the Commission has the

means of preventing the growth of monopolistic practices. Thus, it is contended that if the Commission effectively enforces the duopoly and multiple ownership rules there can be no real danger of a monopoly developing in the broadcasting field. This argument misses the point. While it is true that enforcement of the Commission's multiple ownership rules can prevent any applicant from acquiring an excessive number of stations, there are many other monopolistic practices against which there are no rules. And, while in the course of time and where such practices are discovered, the Commission can adopt rules which might prevent recurrence of these monopolistic practices, the fact remains that such practices might exist for a long period of time before they are discovered or corrected. During this period, the existence of these restrictive practices can prevent the maximum development of broadcasting not only for that period but also for the future. It is well known that once certain practices develop, it is exceedingly difficult in applying corrective measures to restore the situation to the same healthy conditions that would have prevailed had not the restrictive conditions been permitted to arise. Thus, it is important that only those persons should be licensed who can be relied upon to operate in the public interest. When passing upon applications of persons who have engaged in monopolistic practices in other industries, the Commission must be concerned as to whether such person would also engage in monopolistic practices in broadcasting. Their conduct in other fields is obviously a matter which the Commission must consider in determining whether they possess the requisite qualifications of a licensee.

While the preceding discussion has emphasized the antitrust aspects of the Commission's concern in this area, broadcasters should not minimize the reflections that would be cast upon their qualifications if other areas of State or Federal laws were violated. For example, the tremendous

growth of federal and state regulation in the field of labor law should be carefully watched. Reported convictions by State employment agencies or the NLRB as to unfair and/or discriminatory hiring and employment practices would be a serious matter in the eyes of the Commission. The same pitfalls are found in many other areas.

How does a licensee avoid Commission sanction in this area. Obviously, he should not violate the law. However, there are many instances where the law is inadvertently violated. How does a broadcaster protect himself in this instance? Prepare a complete memorandum about the violation. Retain all written correspondence, and set down all oral conservations pertaining thereto in writing to be inserted in the file. Also, all legal papers concerning a hearing or case in court should be retained. Consequently, if questions from the Commission should arise immediately or years later, you will have a complete file to extract the necessary information so that the Commission can be satisfied as to *the licensee's intentions as well as the nature of the violation.*

Monitors for Stereo or SCA Operation

ON APRIL 2, 1964, the Commission issued a Notice of Proposed Rule Making (FCC 64-298) requesting comments looking toward Amendment Of Part 73 of the rules "To Require FM Broadcast Stations Engaging In Multiplex Stereophonic Programming Or SCA Operation To Install Type Approved Frequency And Modulation Monitors Capable Of Monitoring Subcarrier Operation." Numerous comments were filed in response thereto by a number of fm licensees, equipment manufacturers, organizations, and individuals having a general interest in the broadcast industry. Appropriate rules (Sections 73.253, 73.283, 73.295, 73.297, 73.332, 73.553, 73.583, and 73.595) were adopted on *May 25, 1966.*

The Notice set forth the Commission's belief that fm stations engaged in stereo broadcasting and in the transmission of additional programming under a subsidiary communications authorization (SCA) should adhere to more exacting standards for type approved *frequency and modulation monitors.* This would assist the FCC in establishing the technical adequacy of such operation.

Most of the comments filed with respect to multiplex frequency monitors questioned their need. As set forth by the Commission, the general consensus was that it is unnecessary for a crystal oscillator to check continuously the frequency of a similiar crystal oscillator. Most of

the parties suggested occasional checks of frequency to insure proper frequency stability.

Upon re-examination of this problem, the Commission decided that the parties' contentions were correct. Nevertheless, the Commission also decided that each licensee must have available a means of determining that the pilot subcarrier and SCA subcarrier frequencies are maintained within proper limits. The Commission drew upon its experience in the field of TV broadcasting and concluded that, if the licensee checks the operating frequency on a daily basis, using a simple procedure which will indicate that the operating frequency is within authorized limits, a separate frequency monitor is unnecessary.

As reflected in new Sections 73.295(i) and 73.297(b), the Commission reached a similiar conclusion. However, the Commission found it necessary to specify a permissible tolerance for variation in the resting (or authorized) frequency of the SCA subcarrier particularly because there is no reference point in the present rules. The Commission chose 500 Hz as reasonable and well within the confines of good engineering practices. Accordingly, on May 25, 1966, Sections 73.283, 73.295, 73.583, and 73.595 were amended to provide for daily the logging of the necessary readings.

Modulation Monitors

Sections 73.253 (a), 73.332 (b) and 73.553 (a) were amended on May 25, 1966, to recognize the existence of three different types of *modulation monitors:* (a) those for nonmultiplex operations, (b) monitors for stereophonic operation, and (c) monitors for SCA operations. These are to be referred to as nonmultiplex, stereophonic, and SCA monitors as reflected in Note 1 to Sections 73.253 and 73.553.

Consequently, because (1) equipment modifications would be necessary and (2) the passage of time required for submission of the monitor

for type approval with the necessary passage of time for a station to obtain the type approved model, the Commission adopted an *effective date of June 1, 1967*, as reflected in Note 2 to Sections 73.253(a) and 73.553(a). Additionally, since (1) the Commission's actions in this proceeding were delayed, (2) the manufacturers had produced stereophonic and SCA modulation monitors in reliance upon the Commission's ultimate adoption of specifications for type approval, and (3) numerous licensees had purchased and installed these monitors while awaiting the Commission's decision, *the Commission decided to extend the time for compliance — for those licensees who had purchased and installed such monitors prior to July 5, 1966 — to January 1, 1972.* This latter action was taken with the understanding that the installation and use of the non-type approved monitors did not in any way relieve the licensee of the responsibility for maintaining stereophonic or SCA operation in compliance with the appropriate technical rules (Section 73.322 and 73.319).

Specifications Of Modulation Monitors Analysis of Section 73.332

Section 73.332(d) (1) now requires that the type approved modulation monitor indicate the modulation percentage of the carrier produced by the main channel (L+R) signal with an accuracy of ±5 percent for all frequencies from 50 to 15,000 Hz. In order to insure the accuracy of this indication, the Commission found it necessary to expand the proposed rule to provide that (1) the frequency characteristic be such that the attenuation at the pilot subcarrier frequency (19 kHz) is at least 26 dB and (2) the attenuation in the frequency range of 23 kHz and above, (where a-m subcarrier sideband information is present) is at least 46 dB. Similiarly, in 73.332(d) (2), the Commission expanded the proposed rules to require measurement of modulation percentage of the carrier produced by the

supressed subcarrier and its sideband. It requires the frequency characteristic to be such that (1) the attenuation at 19 kHz and 57 kHz be at least 26 dB and (2) the attenuation at 15,000 Hz and below and 59 Hz and above shall be at least 46 dB. With these specifications, the Commission believes that the accuracy of the indication will be accomplished. Similiarly, subparagraph (3) (73.332(d) (3) specifies the requirement that the modulation monitor indicate the modulation of the carrier by the pilot subcarrier.

With respect to Paragraph 73.332(d) (9), the Commission established greater specificity as to the accuracy of the visual peak preset indicating device (more commonly the "peak flasher"). Since the peak flasher is normally more accurate in indicating modulation peaks under program conditions, and, because it is a peak indicating device — whereas the modulation meter is a semipeak indicator — the Commission decided this action appropriate. [The existing Rules — Section 73.332(b)], for nonmultiplex modulation monitors, require the use of the peak indicating device; however, they are not specific in defining its accuracy. The Commission intends to do so at some future date. Meanwhile, since it is establishing new classes of modulation monitors, the new monitors produced will be examined for type approval under the more specific accuracy requirements. When there is disagreement between the peak preset indicator and the semipeak modulation meter indications, *the peak flasher will be considered the prime indicator.*

When an fm station is transmitting an SCA program in addition to a stereophonic broadcast, an undesirable characteristic which may occur in an improperly adjusted system is cross-talk (from the SCA and main channels into the stereophonic subchannel and from the stereophonic subchannel into the main channel). Therefore, *paragraph 73.332(d) (6) is intended to provide the licensee*

with a means of measuring cross-talk to insure compliance with the rules.

With respect to type approval specifications for SCA modulation monitors, Paragraph 73.-332(f) (1) was added because of the Commission's belief, as demonstrated by most SCA monitors being produced, that the licensee engaging in SCA operation desires a single monitor exhibiting main channel modulation as well as SCA modulation. To insure the accuracy of this main channel indication, the Commission specified that the frequency characteristics be such that the attenuation in the SCA range, from 20 to 75 kHz, be at least 46 dB.

Additional Matter

Sections 73.553, 73.583, 73.595, and 73.596 (relating to *non*commercial education fm's) were amended in similiar fashion to that described — with the exception that Note 2 to Section 73.553 does not permit continued use until January 1, 1972, of those non-type-approved monitors which were purchased and installed prior to July 5, 1966. This decision was prompted because of the limited number of noncommercial educational fm stations engaging in stereophonic and SCA operations. However, the Commission will grant waivers for these stations upon request.

The Commission called attention to the fact that, while it was amending Section 73.297 and 73.596 relating to stereophonic broadcasting, *it deleted the requirment that stations so operating shall notify the Commission of the hours of stereophonic* broadcasting and any change therein. At the time of adoption of the original rule, the Commission felt it desirable to be informed as to the extent of stereophonic broadcasting; however, since the Commission believes that such operation has progressed in satisfactory fashion, it sees no further need to be informed of the hours of stereophonic broadcasting.

As set forth in a recent article concerning

Fines and Forfeitures (Fines And Forfeitures — Up 600 percent Since 1964, January 1967), the Commission has increasingly utilized its authority to fine numerous licensees for various violations. We can only assume that the Commission will be on the alert to be sure that the new monitoring rules are not violated, and it behooves all licensees affected to be sure that they are in compliance.

If you are not absolutely confident about the application of the rules or any portion thereof, you should consult with a competent radio engineer and/or a communications attorney without delay.

New Rules On Experimental FM Operation

ON DECEMBER 13, 1967, the Commission adopted a Report and Order (Docket No. 17660, RM-1140, FCC 67-1337), amending Section 73.262 of the Rules concerning the period for experimental operation of fm broadcast stations.

The *previous rule in this regard, Section 73.262, limited the experimental period for fm stations to the period between 1:00 A.M. and 6:00 A.M., local standard time,* and unlike the TV rule (Section 63.666) did not make provision for other experimental periods.

Reasons for Change in Rules Re Testing And Maintenance Of Facilities

In support of its request for increased hours of experimentation for testing and maintenance of facilities, the commenting parties had urged that (1) fm facilities are allocated upon the same fundamental philosophy as television facilities (which are not limited as to time during which non-program material may be transmitted); (2) the propagation characteristics of fm signals are similar to television signals, (3) the nature of fm and television signals do not require restrictive time periods for experimentation as is required in the case of standard broadcast signals, and (4) the mileage separation plan affords the necessary protection to other stations. Because of the similarities of fm and television signals, the NAB re-

quested that the fm experimental period for testing and maintenance of facilities be lengthened one hour so as to permit testing from midnight to 6:00 A.M., local standard time, instead of from 1:00 A.M. to 6:00 A.M., local standard time. Furthermore, because many fm stations operate on limited schedules and with limited personnel, the previous rule works, in many cases, an unnecessary hardship on personnel; and return to the station for the testing period by the personnel thereby resulted in added expense to the licensee. The NAB claimed that the one hour increase will result in no degradation of the Commission's technical standards, and no "perceptible" increase in interference would occur to other fm stations. What did FCC do about it?

Reasons For Changes In Rules Re Improvement Of Facilities

With respect to its request for permission for fm stations to conduct experimental tests looking toward improvement of its facilities, the proponents stated that, with the increased complexity in the transmission of fm signals brought about by SCA and stereophonic broadcasting, it is necessary to conduct tests other than during the designated experimental period. This argument was advanced because SCA and stereophonic broadcasting, in many cases, requires precise adjustment of both the receiver and the antenna system. Since the receiver adjustments are made by the listener and service personnel during daylight and early evening hours, the parties requested that the Commission provide, upon proper conditions, that experimentation may be made in periods other than the designated experimental period. The conditions requested for experimentation looking toward improvement of an fm station were (1) that informal application must be made to the Commission; (2) that the fm station complies with Section 73.261 of the Rules which deals with minimum hours of transmission; and (3) that no interference is caused to other fm stations.

All the comments filed in the proceeding supported the requested relaxation in the rules. No oppositions to the proposal were filed. Some of the parties, however, proposed two changes: (1) that routine test and maintenance activities be permitted at any hour of the day without informal application for authority, and (2) that the time reference in the rule be made to local *clock* time rather than local *standard* time.

Conclusions

As to routine testing at any time, the Commission found that it can relax the requirement for prior informal authority without adversely affecting the public interest; at the same time, *this would relieve the Commission and the licensees of the burden of seeking and receiving permission each time such tests are deemed necessary.* However, the Commission's new rules require *notification of the commencement of such tests and adjustments to (1) the engineer in charge* of the district in which the station is located *and (2) the Commission in Washington.* The rule adopted reflected this change. It is important to note that while the NAB proposal referred to "technical experimentation," the only references in the petitions to experimentation were to routine testing of equipment, adjustments of equipment for SCA and stereo operation, and the like. *There was no intention to include actual experimentation with signals and standards other than those authorized in the Rules, as is the case with the TV rule.* The Commission decided it would be useful to include such experimental operation by fm stations, and the rule adopted does so. However, since this type of operation may have an impact on the listening public and the development of the fm broadcast service, *the Commission retained the requirement for prior Commission approval of such operations.*

With respect to changing the rule *to specify local clock time rather than local standard time,* the Commission found that people's living habits

are geared to locally adopted clock time, and that the purpose of the new rules will be defeated if local standard time is retained in the rule. For example, during the summer months, when daylight saving time is in effect, the station could not begin testing until 1:00 A.M. daylight saving time or 12 midnight, standard time. If the station during this same summer period wished to begin programming at 6:00 A.M. daylight saving time, it would have to cut short its testing period—having only 5 hours instead of the intended 6 hours. Following adoption of the Uniform Time Act of 1966, sometimes known as "daylight saving time" or "advanced time," has become all but universal in the conterminous 48 states from late April until late October. Accordingly, it changed the time reference to read *prevailing local time.*

Accordingly, the Commission amended Section 73.262 to read as follows:

'Section 73.262 Experimental Operation'

(a) The period between 12 midnight and 6:00 A.M., prevailing local time, may be used for experimental purposes in testing and maintaining apparatus by the licensee of any fm broadcast station on its assigned frequency and not in excess of its authorized power, without specific authorization from the Commission.

(b) Fm broadcast stations may (with prior notification to the Commission and the Engineer in Charge of the radio district in which the station is located) test, maintain, and adjust the apparatus at the station during other time periods; and may (upon informal application) conduct technical experimentation directed to the improvement of technical phases of operation during other time periods, and for such purposes may utilize a signal other than the standard fm signal, subject to the following conditions:

(1) That the licensee complies with the provisions of §73.261 with regard to the minimum number of hours of operation.

(2) That emissions outside the authorized bandwidth shall comply with §73.317(a) and that no interference is caused to the transmissions of other fm broadcast stations.

(3) No charges either direct or indirect shall be made by the licensee of an fm broadcast station for the production or transmission of programs when conducting technical experimentation.

Specific problems concerning the above, should be directed to your attorney.

Revised Program Forms for TV Stations

ON AUGUST 13, 1965, the Commission released a Report and Order (FCC 65-686) in Docket 13961 adopting a revised program form (Section IV-A) for AM and FM applicants. On October 10, 1966, an additional Report and Order (FCC 66-903) was released in the same Docket revising the TV program forms (IV-B). The February 1966 issue of BM/E magazine carried an article reviewing the changes in the AM and FM program forms. Some of the information and suggestions contained therein apply with equal force and validity to the revised TV forms.

The New TV Program Form (Section IV-B) In General

The new Section IV-B applies solely to TV stations and will replace the old Section IV. Thus, Section IV-A (AM-FM) and Section IV-B (TV) will appear in applications for new stations and changes in facilities (Form 301), renewals (Form 303), assignment of license (Form 314), and transfer of control (Form 315). The new Section IV-B, like its counterpart IV-A, employs different methods of inquiry, expands greatly upon the factual detail required to support the answers to the basic

questions, and should better enable the Commission to determine if the applicant has (1) ascertained the needs of its audience, 2) attempted to meet those needs, and (3) performed in substantial compliance with its last proposal.

Section IV-B includes the following major subdivisions:

Part I—Ascertainment of program needs
Part II—Past programming
Part III—Proposed programming
Part IV—Past commercial practices
Part V—Proposed commercial practices
Part VI—General station policies and practices
Part VII—Other matters and certification

The Importance of Part I

As stated previously, "Part I may eventually become the most important part of your renewal application." The Commission has consistently reiterated that the local broadcaster knows his own community much more intimately than any official at the Commission; consequently, throughout its existence, the Commission has been loathe to interfere with the programming decisions of broadcasters. Additionally, the Commission has and does not desire to become involved in any action that may be construed as censorship, in violation of First Amendment's protection of freedom of speech. However, because the Commission is charged with the statutory responsibility of granting licenses "in the public interest," and since its basic philosophy is to foster greater expression by local interests, the Commission has emphasized that it would be abrogating its responsibility by not establishing certain broadly-stated criteria whereby licensees would be judged to be operating *in the public interest where the station is located.* Part I provides the Commission with a method

FCC Requests Statements of Proposed Commercial Practices

As part of the Commission's overall review of renewal applications of commercial radio and television stations, it has heretofore been considering representations as to commercial practices made in response to the inquiries contained in Section IV of Form 303. The Commission has recently amended this Section so that the representations and data now sought are stated in terms of minutes of commercial matter rather than the number and length of commercial announcements. The Commission believes it would be more fair and efficient to base its review of a licensee's performance on the factors and data included in the new program forms as quickly as possible, without waiting for all licensees to file renewal applications on the new forms in the normal course of business.

Accordingly, the Commission has requested all commercial television and radio stations, without exception, to file a statement of their proposed commercial practices prior to January 1, 1967, in accordance with the requirements of the recently adopted program forms. These statements will be considered as amendments to each licensee's most recent application for license or license renewal. Any evaluation of commercial practices will be made on the basis of the representations made therein.

of ascertaining whether a licensee has (1) made meaningful efforts to determine the tastes, needs, and desires of those within its service area, and (2) provided and proposed programs in response to those needs.

The Commission recognizes that there is wide disagreement over the details that should be required of an applicant in reporting on ascertainment of community needs and interests. An awareness of and a response to such needs is essential. Realistically, a question seeking

The form requires, in addition to a statement as to proposed commercial practices, a statement, where appropriate, as to the basis on which a licensee has concluded that a maximum amount of commercial matter in excess of 18 minutes per hour for radio (AM or FM) or 16 minutes per hour for television (rounded to the nearest minute), as a normal practice, would be consonant with the needs and interests of the community which licensee serves. These limits are in general accord with those generally accepted by the industry as appropriate, as expressed in NAB Codes. The Commission has given great weight to such industry judgment, without denying the right of each broadcaster to make his own different judgment on any reasonable basis in terms of his particular situation.

Licensees are cautioned that responses in the interim form should not be in terms of vague generalities or references to industry codes, but should be as precise as possible. If a licensee proposes to exceed his normal commercial time limits other than in special situations, a question may arise as to whether the proposal is in fact an established norm. By this action the Commission does not imply or seek to impose any particular requirement or limitation on the commercial practices of licensees, but does seek a full, specific and responsive statement as to licensee's commercial practices.

such information can be phrased only in somewhat general terms. The Commission believes that the question in the form (Question #1), reasonably interpreted, can be readily answered—provided good faith efforts have been made to ascertain needs. While the ultimate program decisions must be made by the licensee, the Commission expects broadcast permitees and licensees to make a positive, diligent, continuing effort to provide a program schedule designed to serve the needs and

Effective Dates of Section IV-B

The effective dates of the new TV forms (Section IV-B) should be noted. (See Report and Order in Docket 13961, FCC 66-903, released October 10, 1966). They are as follows:

Effective Date	Application
December 1, 1966	Form 301—application for new TV facilities or major changes thereof.
December 1, 1966	Forms 314 & 315—applications for assignment and transfer filed by assignees and transferees.
December 1, 1967	Forms 314 & 315—applications for assignment and transfer filed by assignors and transferors.
November 1, 1967	Form 303—application for renewal. However, applications due to be filed on or after January 1, 1967, but prior to November 1, 1967, shall use Parts I, III, V, VI, and VII of the revised form (IV-B) and Questions 1(a), 2(a), 3(a), 4(a), 5(a), 5(b), and 10 of the present form.

interests of the public before making decisions. The "survey" efforts must include consultation with (1) the general listening public, (2) leaders in the community, and (3) professional and eleemosynary organizations. The Commission's experience with the radio form has shown that some applicants are not providing full answers to the questions on ascertainment of community needs (Question #1). It has cautioned applicants to study this question and to supply a complete and responsive answer to each part. As set forth by the Commission, the question is designed to elicit full information as to:

(a) The steps that an applicant has taken to become informed of the real needs and interests of the area served and to provide programming which constitutes a diligent effort to provide for such needs and interests;

(b) Any suggestions that may have been made as to how the station could help meet the needs and interesst of the community from the viewpoint of those consulted;

(c) The applicant's evaluation of the relative importance of all such suggestions and the consideration given them in formulating the station's over-all program structure;

(d) The programming that applicant proposes, either generally or specifically, to meet the needs and interests of the community as he has evaluated them.

Program Survey Methods

(1) Have members of your staff, especially those who belong to various civic groups (e.g., service clubs, philanthropic organizations, PTA, citizens' associations, religious groups, and the like) conduct oral surveys and submit periodic memoranda to you as to the results and/or have brief questionnaires completed and tabulated for your use. Actually, the distribution and tabulation of questionnaires on 3 x 5 cards would be less time-consuming than posing the questions orally and preparing a memo on the results.

(2) Keep a record of community (program) contacts by your staff.

(3) Send out form letters, seeking opinions on programming.

(4) You might retain an independent survey firm.

(5) Periodically, broadcast a request for such information from your audience. You might offer a small prize for the best recommendations.

Regardless of the methods you employ to ob-

tain documented indications of the interests of your audience, you should:

(1) Immediately set up procedures, policies, and plans to obtain such evidence;

(2) Examine the survey results carefully;

(3) Prepare a brief resume of each survey to be included in your renewal application;

(4) Make some effort to adopt the meritorious suggestions received.

Again, we must emphasize that a disregard of the Commission's strong interest in this area is at best unwise, and it could conceivably result in designation of an application for hearing.

Replies which relate to proposed future programming and commercial operation constitute representations upon which the Commission relies. Such representations are not, of course, exact detailed statements of proposed day-to-day operations, and literal adherence to them in that respect would neither be possible nor necessarily desirable. Because the proposals as to programming and commercial matter are representations relied upon by the Commission in determining whether grant of an application is in the public interest, licensees are given the responsibility for advising the Commission whenever substantial changes occur. It is not possible to define what would constitute a substantial change so that it may be applied in every case. This is a judgment to be made by the licensee in the exercise of sound discretion. It does not require that every departure from programming and commercial proposals is to be reported to the Commission. The type of changes in commercial practices which should be reported are:

(1) a station deciding as a matter of policy to increase the maximum percentage of commercial matter which it proposes to allow;

(2) when the station determines that it is exceeding these proposed maximums approximately 10% of the time.

Silence on the part of the Commission is not an indication that the Commission has passed on the matter. The station's performance in the public interest will be evaluated in any event at the time of next renewal.

To avoid any confusion resulting from the adoption of one form for all television applicants, it should be understood that applicants for major changes need file Section IV-B unless a substantial change in programming is proposed. Assignors and transferors need not answer any portion of the form if the information required of such applicants has been filed with the Commission within 18 months prior to the filing of the application and it is referenced and identified.

Conclusion

Many have criticized the Commission for developing another method of harrassment of the licensee. However, if the Commission is to carry out Congress' mandate, it must have adequate information upon which to base a valid and informed judgement. While the form was under consideration, there were numerous proposals such as (1) to create one TV form for Renewals and a separate form for all other applications, and (2) proposals requiring programming and commercial information for three weeks rather than one.

The Commission took the licensees' problems into consideration and decided that the above proposals would impose too cumbersome a task; consequently, it decided to (1) use one form (IV-B) for all TV applications, (2) employ one composite week, and (3) discard the necessity of "spot" counting of commercials.

The Commission has forwarded copies of the new form to all licensees. It behooves them to read and analyze it as soon as possible.

TV Multiple Ownership Rules Reviewed

THE PURPOSES of the Commission's multiple ownership rules are to promote (1) the maximum competition among broadcasters and (2) the greatest possible diversity of programming sources and viewpoints. The rules appear in §§73.35, 73.240, and 73.636. These sections govern multiple ownership of stations in the standard, fm, and television broadcast services, respectively. Each section is divided into two main parts: (1) the so-called "duopoly" or "overlap" portion which provides limitations on the common ownership or control of broadcast stations in the same broadcast service which serve substantially the same area, and (2) the "concentration of control" portion which proscribes the grant of a license for an a-m, fm, or TV station to any party —if the grant "would result in concentration of control" in the particular broadcast service "in a manner inconsistent with public interest, convenience or necessity."

The concentration of control portion sets forth a number of specific factors that will be considered by the Commission in determining whether a particular grant would result in a concentration of control contrary to the public interest. In this regard, the a-m and fm rules state:

> In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to

such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question.

The TV rule uses the identical language except for the absence of the words "classes of stations involved."

The concentration of control portions go on to state that although the aforementioned factors will be considered in determining whether the grant of a license would result in undue concentration of control; in any event such a concentration will be deemed to exist if the grant would result in more than a specified maximum number of stations in each service. That maximum is seven a-m stations, seven fm stations, and seven TV stations, no more than five of which may be vhf. The *concentration of control of mass media is not precluded by a specific rule but is rather impeded by Commission policy.*

These provisions are designed to further maximum competition among broadcasters and, more significantly, *the greatest possible diversity of programming sources and viewpoints.* The Commission has dedicated itself to the prevention of undue concentration of control of mass media and to the development of the greatest diversity and variety in the presentation of information, opinion, and broadcast material. Its actions in this area have been guided by the Congressional policy against monopoly in the Communications Act, and the concept, as recognized by the courts, that the communications business is and should be one of free competition. (See FCC 64-1171, December 18, 1964.)

The Duopoly Rules

As adopted initially Sections 3.35(a), 3.-240(a), and 3.636(a) of the Commission's Rules provided limitations on the common ownership or control or multiple a-m, fm, and TV stations which served substantially the same area. These provisions of the Rules, commonly referred to as

the "duopoly" or "overlap" rules, were intended to preserve and augment the opportunities for effective competition in the broadcast industry and to implement the Commission's policy of maximizing diversification of program and service viewpoints. The latter policy has assumed a very special importance in a democratic society. As stated in the following case, it is well established that ". . . the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ." (*Associated Press v. United States,* 326 U.S. 1,20; *Scripps-Howard Radio, Inc. v. F.C.C.,* 89 U.S. App. D.C. 13, 19, 189 F. 2d 677 cert. den., 342 U.S. 830).

Concentration of Control Problems

The question of diversification of mass communications media has double aspects—diversification in the locality involved, and diversification of the total mass communications ownership without restriction to the community in question. Where one applicant was licensee of a 250-watt a-m station in the city, with the smallest service contours of the four stations located there, it was entitled to a preference over the other applicant, which controlled the only morning and Sunday paper in the city and which, in turn, was closely affiliated with the only other paper in the city. The newspaper applicant argued that operation of a television station will attract a greater portion of a radio station's listeners than of a newspaper's readers, and thus a grant to the newspaper applicant would achieve a greater degree of competition. The Commission did not agree and preferred the radio applicants. *The Commission observed that it seeks to achieve diversification in the control of all media of communications and not merely of broadcast facilities.* See *Radio Fort Wayne, Inc.,* 9 RR 1221 (1945). *This case reflects the FCC's proclivity to prefer moderate "concentration of control" of broadcast facilities*

to a combination of broadcast and newspaper ownership.

In a Public Notice issued December 18, 1964 (FCC 64-1171, 29 FR 18399, 3 Pike & Fischer RR 2d 909), the Commission, citing figures, expressed its concern over the marked increase in multiple ownership of television stations in recent years,—*especially of vhf stations in the largest markets* where the number of viewers is greatest and where diversity of interests and viewpoints should be maximized.

Subsequently, on June 21, 1965, after further study of the matter, the Commission released a Notice of Proposed Rule Making and Memorandum Opinion and Order in Docket 16068 (FCC 65-547, 30 FR 8166, 5 Pike & Fischer RR 2d 1609) which proposed adoption of an amendment to the concentration of control portion of the TV multiple ownership rule thereby providing *for ownership of not more than three TV stations or more than two vhf stations in the top fifty television markets.*

At the same time, the Commission terminated the interim policy expressed in the December 18 Public Notice and substituted therefor a new interim policy as follows:

> Absent a compelling affirmative showing to the contrary, we will designate for hearing any application filed after June 21, 1965, for a new television station, assignment of license, or transfer of control, the grant of which would result in the applicant or any party thereto having interests in violation of those set forth in proposed §73.636(a)(2)(ii) in the attached Appendix. *Divestiture will not be required, but commonly owned stations in excess of the number set forth in the proposed rule which are proposed to be assigned or transferred to a single person, group, or entity will be designated for hearing.* However, no hearing will be designated in any of the foregoing situations which involve applications for assignment or transfer of control filed in accordance with §§1.540(b) or 1.541(b) of the Commission's rules, or applications for assignment or transfer of control to heirs or legatees by will or intestacy if the assignment or transfer does not create common interests which would be proscribed by the above-mentioned section — — — — —. (Emphasis supplied.)

The new interim policy was published in a Public Notice released on June 21, 1965 (FCC 65-548, 30 FR 8173, 5 Pike & Fischer RR 2d 271), the same date on which the Notice of Proposed Rule Making and Memorandum Opinion and Order was released in Docket 16068. The latter document, in addition to proposing an amendment of §73.636 of the Rules, disposed of petitions for reconsideration of the December 18 interim policy and requested comments as to the aforementioned "top fifty market" rules.

The notice, after having presented statistics showing that there is an apparent trend toward more vhf stations coming under group ownership in the largest markets and a corresponding decline in the number of single-station owners, stated that the Commission was concerned that under the present limitation of five vhf stations per owner there might be a continuation of the trend. It also expressed concern that the future growth of uhf—which has its greatest immediate potential in the largest markets—might follow the vhf pattern. The proposed rule was designed to counter the apparent vhf trend and to prevent the development of a similar trend in uhf. *The Top-Fifty-Market Concept* was proposed for three reasons. These are (a) the substantial degree of ownership concentration reached in these markets; (b) the high proportion of the total population resident in these areas and consequently the very large audiences reached by the individual vhf stations; and (c) the availability of ample economic support for individual, local ownership of both vhf and uhf stations in these markets."

The Notice of Proposed Rule Making (para. 19) asked that parties focus their comments ". . . upon the question of need for the changed rules and the appropriateness of the specific rule proposed. In arguing need, or lack of need, for a new rule, parties may submit programming showings in a manner which seeks to demonstrate that the programming was made possible solely by virtue of a multiple ownership situation which

could not arise under the proposed rule. Parties opposing the proposed rule should concentrate primarily upon the question of public benefits which may be ascribed to multiple ownership in excess of the level proposed herein. In short, the issue posed is not as between multiple ownership and single ownership, but as between the present level and a more limited degree of such ownership."

Elsewhere in the Notice (paras. 16-18) comments were requested on six specific questions. The Commission studied all of the comments filed. Only one filed expressed the view that there was an undue concentration of control in television broadcasting. However, the commenting party also stated that the proposed rule would be ineffective *without the further requirement of divestiture! All other parties expressed the view that there was no undue concentration of control and opposed the proposed rule.*

Finally, on February 7, 1968, the Commission issued a Report and Order deciding *that the proposed rule should not be adopted and that the proceeding should be terminated.*

First, the Commission noted that since the institution of the instant rule making proceeding many new uhf stations have been activated in the major markets. This has lowered the previous degree of concentration of station ownership in these markets, and the development of uhf is providing as many separate owners and separate viewpoints as would have occurred with a more restrictive multiple ownership rule in the absence of these stations. Equally important, the Commission observed that, insofar as uhf stations are concerned, an absence of the type of restriction proposed in the rule may well serve to make for a more rapid development of such stations and enhance the chances of development of a fourth commercial TV network. It would significantly contribute to the entry of persons who have the know-how and the financial resources to enter into and carry on uhf television broadcasting

during this most crucial period. Indeed, the Commission believed this consideration of possible benefits to television service through entry of the multiple areas, although not as critical as in the uhf area, is also relevant to the public interest judgment to be made in this field with respect to vhf operation. Consequently, the Commission decided that *the problem of concentration in the top 50 markets should continue to be dealt with upon the basis of case-by-case consideration within the standards of the present multiple ownership rules*. Of course, while there are the benefits of predictability in the adoption of a specific limit for the 50 largest markets, the Commission decided that the greater flexibility permitted by an ad hoc approach is preferable. Since there is a standard in the rules limiting total ownership and control by any one party, the Commission emphasized that it *will continue carefully to scrutinize every acquisition, whether in the top 50 markets or in other communities, to prevent undue concentration*.

More particularly, in light of the special problems concerning the top 50 markets set forth in the Notice of Proposed Rule Making above, the Commission will *expect a compelling public interest showing by those seeking to acquire more than three stations (or more than two vhf stations) in those markets. The compelling showing should be directed to the critical statutory requirement of demonstrating, with full specifics, how the public interest would be served by a grant of the application*—that is, the benefits in detail that will be relied upon to overcome the detriment with respect to the policy of diversifying the sources of mass media communications to the public. In other words, within the total limits now contained in the rules, the Commission will continue to adhere to the ad hoc approach in order to deal with particular situations in particular communities. A fixed limit would be too restrictive and the Commission's conclusion in this respect was further reinforced by the present critical phase of uhf

development and the need to have enough flexibility to take appropriate action.

Conclusion

From the foregoing discussion, broadcasters might assume that the Commission's refusal to adopt its proposed Top Fifty Market rule and return to the case-by-case approach means that the multiple ownership criteria have not been changed. This assumption appears false.

Today, the FCC's case-by-case approach to all transfer and assignment applications is appreciably more intense; any sign of concentration of control will require extensive explanation to pass the rigors of Commission review.

To augment the anxieties of broadcasters the Top Fifty Market Proposal was rejected by a 4-3 vote, and three dissenting opinions were attached to the *Report and Order*. Commissioner Bartley's dissent was cryptic, but Commissioners Johnson and Cox were lengthy and vitriolic. Finally, in a recent address, Commissioner Cox, in discussing the multiple ownership rules usually said, in effect, "The rules don't require divestiture *now* . . ." The obvious, unintended implication was that the rules some day may require divestiture.

In closing, the broadcasters may prudently expect more trouble in all facets of the multiple ownership. They should have their legal counsel maintain close surveillance of all developments and file comments liberally in future rule making proceedings.

The FCC's Position on Television-CATV Cross-Ownership

PREVIOUS BM/E ARTICLES have dealt with the Commission's long-standing concern with any actions increasing monopoly of the communications industry. (See (1) *BM/E*, May 1966, "The Drive For Diversified Ownership," (2) *BM/E*, June 1966, "Concentration Of Control Of Mass Media," and (3) *BM/E*, July 1966, "The Multiple Ownership Philosophy.") These FCC interests have been aimed primarily at cross ownership between radio, TV and newspapers. Currently, the Commission is considering the application of similar "monopoly" restraints to CATV.

Background

With the extraordinary growth of CATV, the Commission's concern was evidenced in the case Lompoc Valley Cable TV (2 RR 2d 22), adopted March 4, 1964, when it was faced with the following question:

> . . . [A]s a matter of policy, whether a multiple owner should be permitted to acquire . . . extensive holdings in the community antenna field or whether the policy underlying the Commission's multiple ownership rules requires that the Commission strive to prevent such entry.

The question was not then answered, since the Commission determined that a hearing was re-

quired on independent grounds and, in addition, that a pending application (2400-C1-TV-(9)-64) for transfer of Lompoc Valley's parent corporation would "provide a more convenient vehicle for Commission consideration." The following week, on March 11, 1964, the Commission adopted its Opinion in Rust Craft Broadcasting Company, FCC 64-208 (2 RR 2d 83), in which *although it consented to the transfer of control* of a television broadcast station in Clarksburg, West Virginia to a CATV system operator in that city, *it stated,* in relevant part, as follows:

> [W]e regard situations of this kind with growing concern and therefore propose in the near future to institute an inquiry into the problem of joint ownership of CATV systems and television stations in the same communities. Pending that event, we serve notice that any applications involving such combined ownership—however accomplished—will be carefully scrutinized and may, in appropriate cases, be deferred until we finally develop a long range policy with respect to this problem.

In addition, other activities illustrated the increasing problems facing the Commission in this general area. For example, a television broadcast licensee in Dayton applied to the Dayton City Council for a franchise to operate a CATV system in Dayton. Similarly, the television station licensee in Utica, New York obtained a franchise for a community antenna system to serve Utica, and applications for microwave relay facilities to serve the system were before the Commission. Apart from these specific cases, there were many instances in which television broadcasters acquired ownership interests in the CATV field outside of their own service areas. These acquisitions, of course, did not require Commission approval unless authorizations issued by the Commission were involved. The Commission believed that it was the appropriate time to institute an inquiry looking toward establishing and clarifying its policy with respect to broadcast licensee owner-

ship of CATV systems. If it was to carry out its statutory responsibilities in this field, policy determinations had to be made without further delay.

Early Proposal for Rule

For the purpose of obtaining pertinent information on the problems described above, on April 16, 1964, an inquiry was instituted (*In the Matter of Acquisition of Community Antenna Television Systems By Television Broadcast Licensees*, Docket No. 15415.) Views and data were invited from the broadcasting industry, the CATV industry, and any other interested groups or members of the public. The particular questions included the following: (1) to what extent do television broadcast licensees now own interest in CATV systems; (2) to what extent and in what manner do CATV systems originate any programming, including commercial announcements, which they furnish to their subscribers; (3) to what extent, if any, does ownership of CATV systems, or interests therein, by television broadcast licensees conflict with §73.636 (a) (2) of the Commission's rules relating to concentration of control, or the policies underlying such rule; (4) under what conditions, if any, should television broadcast licensees be permitted to own CATV systems, or interest therein, where the CATV systems serve portions of the area served by the licensee's television broadcast station; and (5) does ownership by a television broadcast licensee of CATV interests, in substantially the same area or in different areas, raise any question of conflict of interest detrimental to the public interest in television broadcasting?

The comments received in response to the *Notice of Inquiry* generally took the following positions:

(1) CATVs are not broadcast stations, particularly since they generally do not originate programs, and they therefore do not come under the

Commission's multiple ownership rules. Nor should CATVs be deemed to come within the spirit of the multiple ownership rules, since they promote diversity by bringing in new signals, and do not really compete with television broadcast stations.

(2) There really is no problem on common ownership. CATVs serve very few people in comparison to television stations. Furthermore, they provide a complementary service, and broadcasters are in a good position to enter this new field with their existing knowledge. Additionally, the interests of subscribers and viewers will not be subordinated because the investments in both the cable system and the television station are large. Local bodies and the Commission are also present to make sure that the interests of CATV subscribers and television audiences are both protected.

(3) In many places, especially small communities, CATV will come in any event and it is necessary for the television station to own the CATV to protect it against ruinous competition.

(4) Program origination by CATVs is not a problem at this time since it is very expensive and cannot compete with the regular popular television programs. At the present time program origination is limited to weather scanning with few exceptions.

(5) Television broadcasters have an absolute right to enter any legitimate business, and it would be arbitrary to permit CATVs to develop in great numbers in other hands, including multiple ownerships, while preventing broadcasters from entering this business.

On July 27, 1965, the Commission adopted its *First Report* terminating this proceeding. While no anti-cross ownership rules were adopted, the Commission indicated that it was concerned with the possibility that cross-ownership between CATV systems and television broadcast licensees might give rise to abuses inconsistent with the public interest—at least in particular cases. However, *two things persuaded the Commission that the danger of such abuses is not sufficiently great to warrant an overall or across-the-board prohibition against cross-ownership of CATV system and television stations.* The inquiry that

the Commission conducted in the docket did not disclose any substantial evidence of widespread abuses. Further, since the issuance of the Notice Of Inquiry and Opinion, referred to above, the Commission issued its *First Report and Order* in Dockets No. 14895 and 15233 (4 RR 2d 1725) and its *Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971* (4 RR 2d 1679). The rules that the Commission promulgated and proposed to promulgate appeared to be adequate to prevent discriminatory use of a CATV system to favor one local broadcaster against another. Additionally, the Commission's general rules should ordinarily suffice to insure a technically efficient operation by any broadcaster; and any broadcaster who fails to make a reasonable effort to put out an efficient signal runs the risk of losing his license. The Commission believed that these considerations were adequate to prevent the dangers of any general abuse of cross-ownership.

The Commission realized that the problems involved in determining the proper role for CATV in the mass communications system are complex and far reaching and involve many interrelated policies. These considerations were mentioned by the Commission to emphasize the fact that this Report with the conclusions stated therein were (1) preliminary, (2) tentative, and (3) subject to further consideration and modification.

Current Inquiry and Proposal to Restrict CATV-Broadcast Monopoly

True to its promise, *on April 12, 1967,* the Commission instituted an *Inquiry into Developing Patterns of Ownership in the CATV Industry* (Docket No. 17371, 32 Fed. Reg. 6221). No proposed rules were appended.

The Commission observed that the emerging pattern of growth indicates that CATV is ceasing to be simply a passive reception device of utility solely in outlying areas away from regular tele-

vision service; rather, it is developing into a significant force in communications on its own merits. Coupled with this development, the Commission observed an increasing trend toward *program origination on CATV systems*. Taken together, the rapid spread and changing nature of CATV call for consideration by the Commission of the long range function and role of CATV in the totality of communication services. Consequently, the Commission believes that the promised emergence of CATV systems with programming capability in large metropolitan markets requires that it begin to consider the application of more traditional policies and rules on *concentration of control, duopoly, and diversification of mass media*. This proceeding again *inaugurated general inquiry into the present ownership of the CATV industry and the probable future ownership of the industry*. On the basis of the limited information available, the Commission does not believe it appropriate to do more at this time than *seek views and suggested courses of action from interested parties;* however, if the early responses to this inquiry appear to justify such action, this inquiry *may be expanded to include proposed rule making designed appropriately to establish guidelines for the ownership and control of the CATV industry*.

Without intending to restrict comment, the Commission believes it helpful to point out that *its main areas of concern at this time are focused on the public interest questions arising from ownership and control of CATV systems by Commission licensees* in other communication services, excluding the new Community Antenna Relay Service; and the public interest problems that may be inherent in such cross-ownership. As indicated, it also desires comments on the question of *whether its present rules and policies relating to such matters as multiple ownership, duopoly, concentration of control and diversification of mass media should be adapted to ownership and*

control of CATV by licensees, or whether other more appropriate standards are indicated.

Comments were filed in June 1967, and the Commission has not yet issued its comments or decision. Nevertheless, this proceeding is basically a continuation of the previous investigation of the entire cross-ownership problem in Docket 15415, supra. In any event, *this proceeding seems to lay a foundation for sweeping rules restricting such cross ownership in the following possible ways:* (1) preclusion of cross ownership of broadcast and CATV facilities in the same or closely related markets, (2) limitation as to the number of CATVs that may be owned by the same individual, group of individuals, corporation, or individuals, groups, or corporations related thereto. (3) limitations upon ownership of newspaper and CATV in the same or related communities, (4) application to CATV of something akin to the diversification of control of mass media, multiple ownership and duopoly (overlap) rules and policies now applicable to broadcasters, and (5) furtherance or restriction of program origination by CATV.

Such restrictions serve as "two-edged swords," cutting both ways. That is, the adverse effects, potential herein, may injure broadcasters and CATV operators alike. *Consider the following possible effects of such rules.*

1. A restriction as to the number of CATVs that may be owned by one group will restrict somewhat the potential buyers of CATV properties and tend to depress CATV prices or, at the minimum, decrease future appreciation.
2. A preclusion of broadcast-CATV ownership in the same or related areas (e.g., within the Grade B of a TV or the 1 mV/m contours in a-m and fm) would:
   (a) Prevent the broadcaster from acquiring ing a CATV in the area specified, and
   (b) Prevent the CATV owner from acquiring a broadcast facility in the said area.
3. Restriction of newspaper-CATV ownership will similarly reduce (a) investment opportuni-

ties for such newspapers and (b) eliminate many, affluent would-be buyers.

4. In general, such rules will militate against "bigness" in CATV.

In both 2(a) and 2(b) above, we have situations that tend to diminish the opportunities of the broadcaster and the cablecaster from logical expansion into a closely related business. Not only does this diminish investment opportunities but will constitute further reduction of potential buyers for radio, television, and CATV properties.

We have indicated, in previous articles, that the Commission is gradually directing its policies toward complete separation among, and diversification of, broadcast facilities and newspaper interests. *Effectively, the Commission seeks the greatest possible diversity of public opinion sources. Ideally, it would like to separate the ownership of TV from a-m, a-m from fm, and newspaper from TV, a-m, and fm, in every community.*

With the emergence of CATV as a program originator, the Commission may be expected to add CATV to the list. Moreover, unlike broadcasting, it has an opportunity to "nip CATV in the bud."

We recommend that all licensees keep a close watch on this proceeding, and, consult with their communications counsel whenever the Commission requests further comments that may affect their interests. While the time for filing comments has passed, it may well be advisable to file informal comments expressing your views —be they pro or con.

The CATV Rules Reviewed

VOLUMES HAVE BEEN WRITTEN and even more has been said about the complex enigmas and problems posed by the meteoric rise of Community Antenna Television ("CATV" or "Cable TV").

Great questions face all concerned: How does the cable operator adjust to federal regulation? To broadcasters? How does the broadcaster adjust to the cable operator? What aid and protection has been accorded the broadcaster under the so-called CATV rules? Will the rules really impede cable development? Legally and generally, where has CATV been and where is it going? Commission rulings on the matter of CATV as in all others, reflect the ever-changing attitudes and policies of the government and may well foreshadow new *broadcast* rules. In times of augmented bureaucracy, and corresponding private unrest, it is incumbent upon *all communicators* to pay close heed to all promulgations of the ubiquitous Federal Communications Commission.

Background of CATV Rules

The story of the development of the CATV rules weaves an interesting and almost theatrical tale. It began obscurely (allegedly in Penn-

sylvania and Oregon) in 1949. Since no one was directly affected by CATV operations in mountainous and television-void areas, the FCC, the broadcast industry, and the public were silent. As cable TV began to assume a more forceful and ominous posture, a series of momentous rulings were issued by the Federal Communications Commission. These include the following (details are included in footnotes):

- August 1956 - Rule on restricting radiation from CATV cables[1]

- January 1958 - Commission denied its right to control CATV (Intermountain Microwave case) [2]

- Later in 1958 - CATV systems were viewed as intrastate not requiring Commission's authority to contruct or operate[3]

- 1959 - After extensive inquiry decided there was no basis for asserting jurisdiction over CATV[4]

- 1962 - Commission reversed itself and denied a common carrier's application to expand its services to improve CATV on the grounds that a local station might suffer economic ruin[5]

- 1964 - Adapted a notice of Proposed Rule Making[6]

- April 1965 - Adopted First Report and Order invoking rules on CATV systems using microwave services[7]

- April 1965 - Adopted notice of Proposed Rule Making covering all CATV systems[8]

- February 1966 - Issued Public Notice 79927, top 100 market rule, wherein Grade B signals of any station could not be extended into a top 100 market with an evidentiary hearing[9]

• March 1966 - Released Second Order and Report regulating all CATV systems.[10]

The rule on restricted radiation caused little concern and was passively accepted. Actions in 1958 and 1959 clearly indicated a hands-off policy. It was rather sudden in 1962 that the FCC made evident that it did want to regulate CATV, prior repudiations of jurisdiction notwithstanding. This change in view did follow, however, after a considerable change in the members making up the Commission. The April 1965 First Order and Report became the first significant CATV rules invoked. The top 100 market rule is now infamous. This action created near panic in the hearts and minds of many cable investors. If valid and enforceable, and so far it is deemed both, this action stood to preclude CATV's from offering service in markets wherein they obtained franchises and expended hundreds of thousands of dollars. Would such blatantly unconstitutional deprivation of rights be upheld in the courts? While this issue is presently being litigated in several circuits, it seems certain that *the Commission will be sustained.*

Before delving into the CATV rules as such, it is important to recognize that the rules adopted to date are not dispositive of many of the issues and questions posed in the April 1965 *Notice of Inquiry!* In other words, the *Notice of Inquiry* was divided into two major sections: *Part I* concluded that the FCC has legal jurisdiction over all CATV systems and proposed (a) to extend to *non*microwave CATV's the rules adopted to date are not dispositive of many of systems (the carriage and nonduplication provisions), and (b) invited comment on various other matters relating to color duplication, educational television, and the like. *Part II* of the Notice initated a *broader inquiry* into (a) the effect of CATV entry into major cities, (b) the need for limitations upon carriage of "distant" television signals, (c) "leap-frogging," (d) program origination by CATV, and mis-

cellaneous matters. In adopting the CATV rules in the March 1966 *Second Report* (the basis of all cable rules to date), the Commission stated, "This Report and Order deals only with these aspects (Part I and paragraph 50 of Part II) of the proceeding." An erroneous impression exists that, while more CATV rules are coming some day, the Commission has completed its activity for the moment. This is not so! Under the *still-pending Notice*, more rules are both possible and probable in the not distant future.

Major Divisions of the CATV Rules

There would appear to be an undue amount of confusion concerning the major categorizations of the CATV rules. The rules appended to the widely-read and little understood *Second Report* appear repetitious and confusing. What are the distinctions between Parts 21, 74, and 91? Why are they there? A logical and understandable analogy rests in the rules applicable to a-m, fm and TV services. Quite frequently a rule adopted for one service will be adopted (in precisely or substantially the same form) in the remaining two services. For example, the Program Log Rules may be found in Sections 73.112 (for a-m), 73.282 (for fm), and 73.670 (for TV). Each of these is substantially the same as the others. Such is the case with Parts 21, 74 and 91 relating to CATV systems in general; more specifically these three parts may be ascribed to the several methods by which CATV's receive their TV signals. In brief, the distinctions are as follows:

Part 21: Relates to CATV systems receiving some or all of their television signals from *microwave* common carriers.
Part 74: Subpart J relates to those CATV systems receiving some or all of their TV signals via *CARS* (Community Antenna Relay Service), a special portion of the spectrum reserved for microwave use by CATV operators. The CARS spectrum space is a *private microwave* service

and must be distinguished from public microwave services (such as common carrier, business radio, etc.). The CARS spectrum is less desirable from both technical and economic aspects. Through CARS, the FCC is gradually forcing CATV's out of using the valuable and superior portion of the spectrum allocated for "public" microwave service.
Subpart K relates to the rules applicable to all *non-microwave* CATV systems and covers approximately 75% of the now-operating systems.
Part 91: Relates to CATV's receiving some or all of their TV signals from *business or industrial radio microwave* service. This accounts for the smallest segment of the CATV industry.

Since the vast majority of CATV systems are *not* served by microwave (common carrier, CARS, or industrial in origin), they need *not* concern themselves with Parts 21 and/or 91 of the Rules and may concentrate upon Subpart K of Part 74. Therefore, by treating the rules affecting "all" CATV systems, as set forth in Part 74, the reader can glean an adequate comprehension of the effect of federal regulation upon CATV to date.

Divisions of Part 74, Subpart K of the Rules

Section 74.1101 - Definitions of terms
Section 74.1103 - Carriage, Non-duplication (program exclusivity), and miscellaneous requirements.
Section 74.1105 - Notification (to TV stations and others) *Prior* to commencement of *any* new system or extension of service to a "new geographic area."
Section 74.1107 - "Top 100 Market" Rule.
Section 74.1109 - Procedures for waiver of rules, special relief, ruling, and other relief.

Section 74.1101 - *Definitions of Terms.* This Section is fundamentally self-explanatory, providing rudimentary definitions of the "terms of art," and need not be paraphrased here. However, interpretive comment on several points is warranted.

First, the term "*community antenna television system*" does *not* include any CATV system which (a) has *less* than 50 subscribers or (b) serves only the residents of one or more apartment dwellings under common control, ownership, and management.

Second, the terms "Grade A" and "Grade B" contour are defined in a manner consistent with established (FCC) engineering practice and Rules 73.683 and 73.684. Unfortunately, the distinctions between the "predicted (or theoretical) contour" and "measured (or actual) contour" give rise to endless controversies and imbroglios between engineering experts. From the standpoint of the carriage, nonduplication, and "top 100 market" rules, the definitions of Grade A and B contours is crucial. It is generally known, and even accepted by the Commission (Memorandum Opinion and Order of January 19, 1967, FCC 67-34, paragraphs 11-13), that *the so-called "predicted contour"* may be erroneous and *may be rebutted* by a "substantial supporting (engineering) showing." While the Commission specifies that the *method* of engineering necessary to rebut the predicted contour must be made in conformance with procedures set forth in Section 73.684 (f), *it does not define "substantial showing."* So, while the cablecaster or broadcaster may rebut the predicted contour to meet his peculiar needs, the required amount of rebuttal evidence (number of measurements, amount of data, etc.) is left open to speculation. In any event, if there is a *bona fide* question as to the validity of a predicted contour, and it serves the reader's interests to challenge same, it would be prudent to have an engineer (recognized by the FCC as an expert) prepare a definitive showing pursuant to 73.684 (f).

Section 74.1103 - *Carriage and Nonduplication Aspects.* The Commission adopted its carriage and nonduplication requirements on two basic

grounds: (1) the failure of CATV's to carry *local* stations (those providing a Grade B or stronger signal to the community served by the CATV system), and to afford them fundamental exclusivity upon their programming, constitutes unfair competitive practices; and (2) a failure to impose these requirements might result in grevious and irreparable injuries to existing and future television service. The specific provisions of the carriage requirements are set forth below.

Section 74.1103 (a) - *Carriage Requirement in General.* Upon request of the station, CATV's must carry, in order of highest priority, the following:

(1) All TV stations delivering a *principal city contour signal* to the community of the CATV.
(2) All TV stations delivering a *Grade A signal* to the community of the CATV.
(3) All TV stations delivering a *Grade B signal* to the community of the CATV.
(4) All translator stations with power of 100 W or higher, operating *in* the community of the CATV system.

The reader should note that the CATV system does *not* need to carry the above stations *unless* there is a *request for carriage by said TV station (s)*. Moreover, those with insufficient channel capacity to comply may file a petition for waiver (under Section 74.1109) or extension of time to comply *within* 15 *days* after receipt of the requests for carriage. *Requests for waiver, or extension of time to comply, based upon grounds other than limited channel capacity, have enjoyed little success!*

In minor amendments to the rules (FCC 67-34 as released January 1967), the Commission noted that where a CATV system is within the Grade B or better signal of both a satellite and its parent station, it shall carry the one of higher priority (stronger signal) and may select between stations of equal priority.

Finally, the Commission has made infinitely clear that carriage is required where *any* part of the community of the system falls within the Grade B or stronger contour of any station. Under existing precedent, there are limited methods of obtaining a waiver. These include: (1) demonstrating insufficient channel capacity or (2) providing a "substantial supporting showing" to prove that the "predicted contour" is not the "actual contour," and therefore that the rule is inapplicable. In addition, the CATV operator may qualify under one of the following exceptions:

Section 74.1103(b) - *Exception to Carriage Rules.* CATV system need NOT carry a station's signals IF:

(1) That station's network programming is "substantially duplicated" (74.1101 (f)) by one or more stations of higher priority; *and* carrying such signal would prevent the system from carrying an *independent TV;*
(2) There are two or more signals of *equal* priority which "substantially duplicate" each other, and carrying either would preclude carriage of an *independent TV;* and
(3) A *translator* signal duplicates or substantially duplicates a higher priority signal carried by the CATV.

Section 74.1103(c) - *Switching Devices.* Where the CATV qualifies for one of the above exceptions and does not carry a 100-W translator signal of Grade B or higher priority, *it must* (1) *install and maintain a switching device for each subscriber* (to permit switching from cable to "off-air" reception), or (2) obtain *written* statements from the subscribers indicating that they do not desire the switching device. Obviously, "high band" or 12-channel systems, in most cases, will *not* be able to take advantage of exceptions 1 or 2 discussed under 74.1103(b) above.

Section 74.1103(d) - *Manner of Carriage.* In addition to the requirement that the CATV system may not degrade the signal quality of the stations carried, *it cannot, if requested by a station, carry that station's signal on more than one channel of its system.*

This provision is designed to prevent CATV operators from carrying the "protected" station on the channels of duplicating stations during times when the latter must be deleted. By such procedure, the CATV system could maintain programming on as many channels as possible. The FCC was, and is, concerned that such tactics might disrupt viewer loyalty by confusing the identities of individual stations. Accordingly, "local" stations may preclude the CATV, *by specific request*, from carrying its signal on more than one channel of the system. Cases to date on point have shown that the Commission will require rigid enforcement of this provision.

As additional protection for the broadcaster, the Commission has provided in Par. 74.1103(d)(2) that, *upon request of the TV station, the CATV shall carry the said TV signal on the channel upon which the TV is transmitting.* In other words, the cable channel must be the same number as the channel of origination.

However, this rule provides the CATV system with an *escape.* It says that this requirement need not be adhered to unless it is "practicable without material degradation." While the rule fails to state who shall be the judge of the technical feasibility (of carrying TV signal(s) on the same channel as it originates), the logical implication is that the CATV system must make the decision. Accordingly, if it appears technically more sound, the CATV system can arrange TV signals in any manner it chooses—contrary requests of the TV station(s) notwithstanding.

Section 74.1103 (e) - *Nonduplication in General.*

The CATV system shall *maintain the program exclusivity* of all 100-W translators and Grade B or higher priority signals carried on the systems *against signals of lower priority.* CATV's cannot duplicate the programs of such stations *on the same day* as broadcast by the protected station.

Section 74.1103(f) - *Notice Required for Nonduplication.* The following provisions apply:

(1) The television station must *request* nonduplication protection from the CATV system.
(2) The CATV, in turn, may *request* that the TV station seeking protection provide:
(a) Eight days prior notice of the date and time of every program to be protected; and
(b) Eight days prior notice of the date and time of every program to be deleted.

In order to force the TV station to give eight days prior notice, the CATV—*after* the TV's initial request for protection—must provide a list of all TV stations it carries and indicate channel substitutions, if any. *This places the burden of determining and listing programs to be protected and deleted upon the TV station seeking protection.* Technically, *all CATV systems should be prepared by now to provide this protection upon request*; that is, they should have the "switching" equipment installed and operable. It should be emphasized that, contrary to the rules proposed in April 1965, only "same day" protection need by afforded; that is, the CATV may provide programming, duplicative of the local stations, any day prior or subsequent to the day of its telecast by the latter.

Section 74.1103(g) - *Exceptions to Nonduplication Rule.* The CATV system need *not* delete a program IF:

(1) In so doing, it would leave available to subscribers *less than two network programs;*
(2) It is offered by the network in prime time (6:00 P.M. to 11:00 P.M., Eastern time) and is broadcast by the station requesting deletion, in

whole or in part, outside of what is locally considered prime time;
(3) The *time* of presentation is of special significance (e.g., a speech), only *simultaneous* nonduplication protection need be afforded;
(4) It is offered in *color* but will be broadcast in black and white by the station seeking protection.

Section 74.1105 - *Notification Necessary Prior to Commencement of New or Expanded CATV Service.* No CATV system may commence operation of a new system, expand its system into a "new geographic area," or commence provision of a distant signal (extend a station's signal beyond its Grade B contour and offer same to its subscribers) *unless*:

(1) It provides notice to:
(a) All TV stations entitled to carriage on the system (i.e., those providing a Grade B or stronger signal to the community served by the CATV);

(b) The licensee of a 100W or higher power translator operating in the community of the CATV;

(c) To all local, area, and state educational authorities where a noncommercial educational TV signal will be extended.

(2) Copies of all such notice must be supplied to the FCC.

(3) These notices should be supplied within 60 days after receipt of a franchise.

(4) In any event, *no CATV system shall commence such operations until thirty days after notice has been given.* It appears that a number of CATV systems have ignored the above requirements; such CATV's are subject to *cease and desist proceedings and fines* by the FCC.

(5) The notice shall include:

(a) name and address of the CATV,

(b) all of the communities to be served by the CATV,

(c) all TV signals to be carried by the CATV, and

(d) the estimated time upon which new service will commence.

Where a petition opposing the service is filed with the FCC, new service may *not* be offered

until the Commission issues its decision. The apparent purpose of this provision is to provide all interested parties with an opportunity to file objections with the FCC. In the absence of such objections, service may be instituted within 30 days after provision of notice.

Interestingly, *cases to date reflect an unwillingness* on the part of the Commission *to grant special relief*—even to broadcasters. *In re Tucson Cable TV Company,* FCC 67-69 as released January 24, 1967, the Commission denied a broadcaster's request for application of CATV rules more stringent than those adopted. The FCC reasoned that the TV station had failed to show that it is contrary to the public interest to apply the existing rules.

This case, and others like it, create the distinct impression that the Commission is not disposed to waive its CATV rules, nor is it apt to grant special relief for more strict rules, in the absence of amended rules. Effectively, the FCC places a heavy burden upon all petitioners (those seeking something more or less than the rules provide) to demonstrate that the public interest clearly justifies such action. Of course, nowhere do the cases or rules reflect or imply the extent or kind of showing necessary to obtain such special relief, and it is unlikely that such requests will be granted. This position seems to aid and injure CATV and broadcast interests equally.

It is important to recognize that the so-called carriage and nonduplication rules are *not* applicable, absent a *request* from the TV station(s). In the case of nonduplication, this affords the CATV operator to request *eight* days *prior* notice of the date and time of *each* program to be (1) protected and (2) deleted. This imposes the substantial clerical burden upon the TV station(s).

Section 74.1107 — "Top 100 Market" Rule

Section 74.1107(a) - Requirement for Evidentiary Hearing: Reduced to its simplest terms,

this provision requires that those CATV systems —operating in a community which receives a Grade A signal from *any* TV station licensed to serve any market ranked in the 100 largest television markets—*may not extend* the Grade B signal (offer a "distant" TV signal) of any television station *UNLESS:*

(1) a petition for waiver of this requirement is filed with and granted by the FCC; or,

(2) a request for FCC approval is filed, an evidently hearing held, and subsequent Commission approval obtained.

Section 74.1107 (b) - Procedures Relating to Evidentiary Hearing:

After the CATV system has obtained any necessary franchises or has entered into a lease (with a telephone company) or other arrangement authorizing construction of a CATV system in the "top 100 markets," it must file a request (pursuant to Section 74.1107(a) above) for evidentiary hearing. Section 74.1107(b) provides that this request shall set forth:

(1) the name of the community involved;

(2) the date upon which the franchise, or other legal authorization, was obtained;

(3) the signal(s) proposed to be extended beyond their Grade B contours; and,

(4) the specific reasons demonstrating that such approval is consistent with the public interest.

The commission will give public notice of the filing of such requests, and interested parties may file a response or statement (opposition to request) within *thirty* days after such public notice; and a reply to such opposition must be filed within *twenty* days after the latter.

After interested parties have had an opportunity to file pleadings espousing their views, the Commission shall designate the request for approval for evidentiary hearing. Issues will be specified in the hearing order. The *burden of*

proceeding with the introduction of evidence, and the burden of proof, shall be placed upon the CATV system making the request. Thus, the CATV is assigned the onerous burden of proving that its proposed operation will not impair the (1) development of new television service and/or (2) healthy maintenance of existing television service in the area.

Effectively, the CATV system must prove a negative, involving questions of potential economic injury. As the reader may know, the Commission has frowned upon and refused to hear economic injury cases advanced *by* broadcasters *against* broadcasters. (See *BM/E*, March 1965 issue, article entitled "The Volatile Question of Economic Injury.") Since few, if any, broadcasters have ever succeeded in proving, in evidentiary hearing or otherwise, that the proposed operation of another broadcast facility would cause sufficient economic injury to force the complaining station out of business, the FCC, in recent years, has denied all requests for hearing. In short, the FCC has not denied a competing broadcast application upon economic grounds.

These salient and probative facts notwithstanding, the Commission *has* seen fit to place the burden of proving economic injury, in a *negative* form, upon CATV operators — that is, the CATV system must prove that it will *not* cause undue economic injury. Thus, the CATV operator must meet a burden of proof—that broadcasters historically have been unable to sustain against applications in the *same* broadcast service—concerning an indirectly related service (TV vs. CATV). Moreover, there is no precedent, in either broadcast or cable law, to establish the type and quantity of evidence necessary to meet this burden. In brief, the Commission has created what is tantamount to an "air-tight" case for the broadcaster. In so doing, the FCC has created the unavoidable impression that it does *not* intend to permit waivers of the "top 100

market" rule. Perhaps this procedure is justified and perhaps not. In any event, this burden of proof constitutes a formidable, if not totally insurmountable, barrier to the extension of Grade B signals within the top 100 markets.

Countless petitions for stay, petitions for reconsideration, and petitions for waiver of this rule have been denied. (See FCC 66-455, FCC 66-456, Report No. 3821, et al.) This trend is borne out in nearly all of the precedents to date.

There have been limited exceptions to the above. For example, in *Chenor Communications, Inc.* (FCC 66-468), *Coldwater Cablevision Incorporated* (FCC 66-569), and *Martin County Cable Company, Inc.* (FCC 66-570), all released in July 1966, the Commission granted requests for waiver of the top 100 market provisions. While numerous allegedly supporting reasons were given, the Commission's favorable action was obviously stimulated by one *primary* factor—*no one opposed the waivers!*

Another minor area of exception to the "no grant" policy is evidenced in a series of cases that reflects the Commission's disposition to grant waivers of 74.1107 wherever it will permit carriage of a noncommercial educational television station. (For example, see *Buckeye Cablevision, Inc.*, Report No. 6146, September 1966.)

It is conceivable that amendments to the copyright law will result in a relaxation of these rules. Such amendments might remove one of the FCC's primary concerns—the unfair competitive positions from which broadcasters and cablecasters compete. More likely, in time, restrictive CATV rules will be relaxed as a direct result of public demand. However, such a change may be 5 or 10 years in coming.

Section 74.1107(c) - Procedures for Special Relief: In addition to the *prima facie* applicability of the top 100 market rule to all CATV systems falling within prescribed classification, 74.1107(c) affords interested parties an opportunity to file (pursuant ot 74.1109) for the imposition of the

top 100 market rules in areas *not* encompassed in the normal definition of the term.

From a practical standpoint, the Commission is not disposed to grant such requests. Wherever a party requests the implementation of CATV rules greater or lesser than those in effect, it imposes the burden of proving that the public interest warrants such extraordinary relief. The burden required is an unknown quantity, and the cases to date reflect only denials of such requests. (See *Old Pueblo Broadcasting Company* and *TV Transmission, Inc.,* both reported in January 1967 Report No. 2522.)

Section 74.1107(d) - Effective Dates and Minor Consideration: This provision provides that: (1) the top 100 market rule became effective on February 15, 1966; (2) those providing "distant" signals, in the top 100 markets on or before that date, need not comply with this rule; (3) such systems, however, must comply with the rule as to service commenced—which would extend service to a "new geographic area" in the same or a new top 100 market—after February 15, 1966.

This Section raises the difficult problem of defining a *new geographic area.* This puzzling problem is best explained in the context of the Commission's January 1967 *Opinion and Order* (Dockets 14895 et al., FCC 67-34) making minor amendments to the CATV rules adopted in the March 1966 *Second Report and Order.* Therein, the Commission states that the entry of the CATV system *into any new, incorporated area* will be considered as entry into a "new geographic area." Thus, in the case of *incorporated* areas, a clear and comprehensible definition is set forth. Unfortunately, *unincorporated areas* will be treated on a case-by-case basis. They may, or may not, be deemed "new geographic areas."

To wit, in the *Mission Cable* case, 4 FCC 2d 236, the CATV system urged that—by the virtue of the fact that it had commenced service in one portion of the unincorporated County prior to

February 15, 1966—it was entitled to "grandfather" rights to provide service to the balance of the County after that date. The Commission *rejected* this view and held that the presence of substantial tracts of undeveloped land between subdivisions within the County created separate communities. Accordingly, further expansion was held to be into "new geographic areas," and the top 100 market rule was applicable thereto; approval, via evidentiary hearing, must be held pursuant to 74.1107(a).

Therefore, in cases involving *unincorporated* areas, the decision must be made on a case-by-case basis. *It would appear that most doubtful cases will be deemed to be "new geographic areas."*

Section 74.1109 - Procedures for Relief

Section 74.1109(a) - Procedures in General: While Section 74.1107(c) provides for certain relief under the top 100 market rule, Section 74.1109 is the *primary* provision relating to requests for relief from the CATV rules (affecting *non*microwave systems); 74.1109 provides TV stations, CATV systems, and other interested parties with *broad rights* to petition (by formal pleading or informal letter-request) for modification of the CATV rules. Thereunder, the Commission asserts that it may (1) waive any provision of the instant rules, (2) impose additional or different requirements than promulgated, or (3) issue a ruling on a complaint or disputed question.

Section 74.1109(b), 74.1109(h) - Mechanics of Procedure: These provisions provide, in substantial part, as follows:

(1) The petition shall state the relief requested, detailed facts, and demonstrate a "public interest" need for warranting the grant.

(2) Factual allegations must be supported by the affidavit of a person(s) having actual knowledge of the facts, and exhibits must be verified by the person preparing same. (Note: Some CATV petitioners have failed to comply with this provision, and the Commission has found the pleading

fatally defective. See *In Re Durfee's TV Cable Company,* FCC 66-1044, November 1966.)

(3) Interested persons may submit comments (oppositions) to petitions or requests filed under 74.1109(a). Correspondingly, the petitioner may file a reply (to comments submitted in opposition to its initial request) within twenty days after the opposition(s) is filed.

(4) The Commission may (a) grant the request in whole or in part, (b) deny the request, (c) issue a ruling on a dispute, (d) specify other procedures, or (e) issue temporary relief pending in-depth consideration.

Effectively, 74.1109 *provides all persons with an opportunity to express their views on the activities or proposals of any CATV System* of interest. The Commission has opened the door to all and has disregarded the normal requirements of "legal standing."

Evidence of "Bureacratic Trends"

The vast majority of legal "experts" in the Communications Industry do not believe that the FCC has jurisdiction over CATV. They assert that the existing statutes and precedents indicate a lack thereof. Commissioners Lee Loevinger and Robert Bartley have consistently observed that the Commission is devoid of legal jurisdiction: their dissents have been numerous, prolific, and carefully documented.

However, the validity of jurisdiction appears to be an academic and irrelevant point. The appellate courts today have an overwhelming proclivity to spare no effort to unearth any legal reasoning that will support the several regulatory agencies. In short, it is highly unlikely that any of the numerous pending cases, challenging the FCC's jurisdiction, will prove beneficial to the CATV industry.

Commissioner Loevinger and others have aptly stated that the Commission's assumption of jurisdiction over CATV has laid the foundation for more extensive and restrictive regulation of

the Broadcasting Industry and others within its domain. For example, it is most probable that the FCC will deny, for the first time, a pending microwave common carrier application based upon the *content* of the matter to be provided by the carrier to several CATV systems. (See the pending applications of Dal-Worth Microwave, Inc., File Nos. 7661-2-CI-P-66, proposing to provide certain channels of nonbroadcast programming to several CATV systems in the State of Texas.)

In adopting its CATV rules, be it properly or improperly, the FCC has stated, for all practical purposes, it has or will assume jurisdiction over *anything* that *may* affect or injure broadcasting service to the public. While such conduct may be appropriate and in the public interest, it does not appear to be within the purview of existing statutes. In any event, it is entirely conceivable that the assumption of jurisdiction over CATV will be cited as precedent for future encroachment upon and regulation of less related industries.

Moreover, the Commission's intense interest in program origination by CATVs will result, in all likelihood, in Congressional and/or agency action restricting and/or dictating the substance of such originations. *This,* of course, *will bring the FCC squarely into the area of regulating program content.* Historically, the Commission has judiciously avoided such regulation and has repeatedly stated that its controls and directives do not cover program content. See *United States v. Paramount,* 344 U.S. 131, 166 (1948); *Superior Films v. Department of Education,* 346 U.S. 587 (1954). See *Report & Statement of Policy Re: Commission En Banc Programming Inquiry,* 20 *RR* 1901. Also, see First Amendment to the United States Constitution and Section 326 of the Communications Act of 1934 as amended; the latter states, in pertinent part,

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over radio signals . . . and no regulation or condition shall be promulgated or fixed by the Com-

mission which shall interfere with the right of free speech by means of radio commmunication."

Obviously, the reason why the Act refers to this restriction in terms of *radio* is because there was no CATV at the time. In radio, TV, and other areas of communication, the Commission has avoided regulation of program content—except insofar as lotteries, libel, and criminal acts are concerned. In recent years, the FCC has "crowded" this area by refusing to grant renewals, because (1) their commercial content was too high or (2) their programming proposal did not appear to be offered in response to adequate surveys of the tastes, needs and desires of the audience. In so doing, by indirection, the FCC has begun to regulate program content. *Very* gradually, the "free speech" protection accorded broadcasters is being eroded.

With the advent of FCC control of program origination over CATV—a matter which appears clearly unconstitutional and without precedent or statutory support—it logically follows that the FCC is free to expand its endeavors into the program content offered by broadcasters! After all, if the Commission is entitled promulgate rules concerning program content for one "communications" service (i.e., CATV), the authority for similar promulgations, affecting other services within its administrative domain (i.e., radio, television, microwave, etc.) must surely exist. To be trite, "If it's good for the goose, it's good for the gander."

Undoubtedly, there are many at the Commission who would disagree and "scoff" at the above-suggested extension of regulation into the area of program content. But, then, FCC faces and personalities do change, and there was a time when the Commission's upper eschelon "scoffed" at the suggestion that the FCC would ever assume even limited jurisdiction of CATV—without Congressional mandate.

We do not presume to pass upon the propriety

or impropriety of the Commission's regulation of CATV. The fact is, limited regulation of CATV is *now* in effect. More regulation will surely come, and ultimate licensing of CATVs by the Commission (as well as by local government authorities) may be forthcoming and other regulations as suggested above. It appears a matter of logical deduction that the CATV rules have laid the foundation for greater and more extensive regulation of the broadcast industry.

If broadcasters were to view CATV rules in the above light, their disposition to encourage or ignore additional CATV regulation might be altered graphically. Unquestionably, the independent regulatory agencies have been accorded extensive powers and broad discretion in the exercise thereof; but, if democratic government is to survive, this power and discretion must be mollified and mellowed with restraint.

(1) In August 1956, the Commission adopted (Docket 9288, 13 RR 1546a) a Rule (Section 15.161) restricting radiation (electrical impulses escaping from CATV cables) in certain specific respects. This rule is of a solely technical (engineering) nature. It should be noted that this early action related to *use of the airwaves,* and as such fell clearly within the purview of the Commission's widely-recognized jurisdiction under the Communications Act. This action was accepted passively by the cable industry, was accorded little coverage in the communications trade press.
(2) In January 1958, in *Intermountain Microwave,* 24 FCC 54, the Commission explicitly *denied its right to control CATV* and asserted that an assumption of jurisdiction under Titles II and/or III of the Communications Act would be ". . . arbitrary, capricious and discriminatory and unwarranted . . ."
(3) Later in 1958, in *Frontier Broadcasting Company,* 24 FCC 251, the Commission observed that—even though it held CATV systems to be common carriers—they would come within the scope of Section 214 (*intra*state wire communications) and, therefore, would *not* require Commission authority to construct or operate.
(4) In 1959, the Commission conducted an extensive inquiry and adopted a *Report and Order* (Docket No. 12443, 26 FCC 403) concluding that (a) there is ". . . no present basis for asserting jurisdiction or authority over CATV's . . ." and (b) *rules* requiring CATV's ". . . to carry the signals of the local station . . . (*would*) *require changes in the Communications Act* . . ." (Emphasis supplied.)
(5) In 1962, after some 14 years of CATV activity, and 3 years after its lengthy Inquiry Into The Impact of Community Antenna Systems et al, and disavowal of jurisdiction over same (note 4 above), the disposition, began to undergo a metamorphosis—partially as a result of changes in members making up

the commission. Suddenly, in *Carter Mountain Transmission Corp.*, 32 FCC 459, it became evident that the FCC did indeed want to regulate CATV—*prior repudiations of jurisdiction notwithstanding*. The FCC denied a common carrier's application for a license to expand its facilities—and thus improve its service to CATV customers—on the grounds that the local TV station (KWRB) might suffer economic ruin via CATV. This case contradicted, although it did not formally reverse, the prior decisions and laid the foundation for a series of rule making proceedings that gave rise to the CATV rules.

(6) In July 1964, the Commission adopted a *Notice of Proposed Rule Making* (Docket 15586, FCC 64-72) promulgating rules relating to the licensing of microwave services used to relay television signals to CATV systems. In light of the many changes therein, it would be an academic exercise to recount those proposals here.

(7) In April 1965, the Commission adopted the *First Report and Order* (FCC 65-335) in the above matter and made applicable (to CATV systems using microwave services to provide television signals to their subscribers) a substantial portion of the CATV rules as we know them today. Thus, the first significant CATV rules were invoked.

(8) On the same day, April 22, 1965, the Commission adopted a *Notice of Inquiry and Notice of Proposed Rule Making* (Docket 15971, FCC 65-334, 1 FCC 2d 453). This Notice suggested the adoption of rules, (akin to and *greater than* those made applicable to microwave-served CATV's (as discussed in note 7 above) affecting *all* CATV systems—whether microwave was used or not. The documents discussed in notes 6 through 8, and the prolific comments filed by interested parties, comprise the pillars upon which the current CATV rules are founded.

(9) On February 15, 1966, by its Public Notice 79927, the Commission announced that it was adopting rules affecting all CATV systems forthwith. By this notice, it made effective immediately its now infamous "top 100 market" rule. The latter provides that any CATV system, operating within the Grade A contour of any TV station licensed to serve any market ranked in the "top 100 television markets" by the American Research Bureau, may *not* extend the Grade B signal of any television station without an evidentiary hearing before the Commission resulting in the latter's "approval."

(10) On March 8, 1966, the Commission released its *Second Report and Order*, FCC 66-220, 2 FCC 2d 11, promulgating that which we now identify loosely as "the CATV rules." Effectively, these rules made applicable, to nonmicrowave-served CATV's, the rules adopted in April 1965 relating only to *microwave*-served systems. Moreover, the March 1966 rules were, in general, more harsh upon CATV than the 1965 promulgations.

Translator Policies and Rules

SINCE THE EARLY 1950's, numerous licensees as well as the Commission have wrestled with the "translator problem" and the place that translators should occupy in the total broadcast allocations scheme. On various occasions, broadcasters have alleged that translator stations constitute substantial adverse economic impact upon existing or potential television broadcast stations—particularly those in small markets.

On April 23, 1965, the Commission issued a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971 (CATV and Related TV Auxiliary Services) FCC 65-344 [4 RR 2d 1679], in which it proposed "a reexamination of all our rules and policies relating to auxiliary services to see if they are holding back or encouraging a variety of off-the-air services." On March 8, 1966, the Commission released its Second Report and Order in Dockets 14895, 15233, and 15971, (Distribution of TV Signals to CATV Systems and Related Matters), 2 FCC 2d 725, [6 RR 2d 1717], in which it resolved some of the questions presented and terminated the proceedings in Docket Nos. 14895 and 15233. However, it ordered that the proceedings in Docket No. 15971 were not terminated pending consideration of the comments filed in Part II of that proceeding. These comments included the question of the Commission's future policies for

television broadcast translator stations. On June 22, 1967, a second notice initiated a general reexamination of the Commission's policies and rules applicable to television broadcast stations.

Background Of Present Rules And Policies

In 1956, in order to make possible the provision of television service to small, isolated communities and sparsely settled areas beyond the range of existing stations, the Commission began the authorization of uhf translator stations (relatively inexpensive installations which picked up television signals and rebroadcast them on channels in the higher portion of the uhf band). Initially, they were permitted to operate with a maximum power of 1 watt; thereatter, in order to increase the opportunity for reception of this service, the Commission amended its rules so as to permit operation with power up to 10 watts. For technical reasons, translators were not permitted to originate any broadcast material themselves or to rebroadcast any signal except that of a broadcast station or another translator. Therefore, they did not, in their own operations, generate any revenue. They were usually operated by nonprofit corporations or associations, and built by subscription, or operated by public bodies; in a few instances, television licensees constructed translators to fill "holes" in the coverage areas of their stations. Like broadcast stations generally, translators were required to have the consent of the stations whose signals they rebroadcast.

Although the authorization of uhf translators eased the situation, in view of the relatively high installation and operating costs of uhf translators as well as the limited number of receivers, public demand for the licensing of vhf translators continued. This demand was finally satisfied in 1960 when Congress amended the Communications Act by adding Section 319 (d) to permit the Commission to license the pre-existing vhf repeaters, and by amending Section 318 to allow operation of

translators without an operator. The Commission then adopted rules permitting the licensing of one-watt vhf translators, and provided for a change-over procedure to permit the licensing of existing repeaters until they could obtain permits and equipment for regular vhf translator operation under the new rules. Ten hundred and forty-four repeaters were authorized under the change-over procedure, and provision was made for conversion of these repeaters to regular translator operations.

The policies and rules developed in the early translator proceedings were shaped by the nature of the repeater operations as they then existed. As a result, the policies and rules were primarily designed to accommodate the interests of small community groups, principally in the far west, which sought translators to supply service not otherwise available. Soon, however, a new element appeared. With the legalization of vhf translators, numbers of commercial television broadcast licensees filed applications for vhf translators to rebroadcast their stations' signals. The motive underlying many of these applications was mainly competitive, and it posed obvious new problems. When the new trend became apparent, the Commission formulated limitations on the use of vhf translators by commercial licensees which were adopted in 1962. In essence, these limitations prevent the use of vhf translators by commercial licensees for competitive purposes by: (a) authorizing their use only within the predicted Grade B contour of the primary station (§ 74.732(e) (1) of the Rules); and (b) forbidding their use where program duplication would result within the predicted Grade A contour of the duplicated station and beyond the predicted principal community contour of the primary station (§74.732(e) (2) of the Rules). Because the Commission considered that a demonstrated public demand for vhf translator service was a countervailing consideration not present in the case of licensee applications, no such

limitations were imposed on the use of vhf translators by private parties. At the same time, in order to promote the wider use of uhf generally, the Commission placed no restrictions on licensee use of uhf translators.

While these events were occurring in the translator field, a great territorial expansion of CATV was taking place. Since the unregulated CATVs were not subject to the limitations imposed on translators, this development proved to have significant implications in the translator field. Television stations were faced with the competition of distant and duplicating signals but the signals were supplied by CATVs rather than translators. At the same time, the rapid spread of CATVs minimized the public's anticipated role in seeking translators, both as a result of lessened demand and because of the CATV's other advantages over translators. These advantages included (1) the CATV's ability to use microwave relays to obtain input signals regardless of location or distance; (2) the ability of the CATV to furnish a large number of signals; and (3) the assured financial base of the CATV which, in contradistinction to most translator operators, can enforce payment for its service. The growth of CATV has affected the Commission's translator policies in other ways. As concern mounted over the possible adverse effects of CATV on regular television stations, the Commission recognized that some of the considerations applicable to CATV are, in at least related form, applicable to translators. Thus, the Commission has found it has to devote considerable attention to questions of economic impact and program duplication in connection with translator applications.

On July 7, 1965, the Commission adopted a Report and Order in Docket 15858 to permit high power TV translators on unoccupied assignments in the Table of Assignments. The Order (1) permitted vhf and uhf translators of 100 watts transmitter output; (2) regular TV

station licensees as well as other qualified parties were eligible to be a licensee of a high-power translator; (3) the high power translator would in no way preclude the grant of an application for a regular or satellite television station on the channel, and the licensee of the translator also would be given an opportunity to file a competing application to convert the translator to a regular broadcast station, (4) the rule prohibiting existing TV stations to extend their Grade B coverage by means of vhf translators could be used on the remaining vhf assignments in the Table; and (5) objections to high power translators from regular TV stations would be treated on a "case-by-case" basis. Basically, the Commission adopted the foregoing Order because it believed that TV assignments are unused due to the financial problems associated with small markets. The Order established a simple and economical method whereby existing licensees and others could provide service to people in underserved areas on a translator basis until such time as a regular station may become economically feasible. With respect to the impact of the high power translator stations on regular TV stations, the Commission decided to treat this on a "case-by-case" basis. Several parties commenting were concerned that the impact of these high-power translators on small market stations required safeguards such as nonduplication of programs; however, the Commission stated, "We do not believe that we should at this time attempt to foresee all the problems which may occur and to cure them in this proceeding. As we stated in our Notice [4 RR 2d 1679] "More generally, we are of the opinion that all of our rules and policies should be reexamined to see if they are holding back or encouraging a variety of off-the-air services." Pending the formulation of a definitive policy with respect to these matters, we have in recent actions on translator requests, adopted the policy of generally conditioning

grants upon the outcome of Docket 15971, and further that the translator, upon the request of a television broadcast station within whose Grade A contour the translator will operate, will not duplicate a program broadcast by the TV station, simultaneously or within 15 days."

On November 30, 1966, the Commission adopted a Report and Order (Docket No. 16424) amending the rules providing for certain frequencies in the 1990- to 2110-MHz band be made available for use by TV translators as microwave relays from TV stations to translators.

Policy Problems

The Commission believes that the policy areas now requiring consideration in Docket 15971 include: (a) the need for continuing the policy of prohibiting licensee-owned vhf translators beyond the primary station's Grade B contour; (b) the limitations, if any, to be imposed on translator duplication of regular television stations; (c) the possibility of different requirements for translator stations used in connection with educational television stations; (d) the limitations, if any, to be imposed on vhf translators in areas with predicted uhf service; (e) the possibility of higher power for vhf translators; and (f) new steps, if any, which may be taken by the Commission to encourage the wider use of translators. In addition, this proceeding provides a convenient forum in which to consider various other changes which have been suggested but not yet acted upon. These possible changes include tightening of the technical requirements for translator equipment, origination of local announcements and programming on uhf translators, and use of translators solely as relays to carry broadcast signals greater distances for ultimate use by translators. The following paragraphs contain a brief discussion of these matters.

Licensee-Owned Vhf Translators Beyond the Primary Station's Grade B Contour

Licensee use of vhf translators beyond the primary station's Grade B contour is now prohibited by §74.732(e) (1) of the Rules. The Commission adopted this restriction after a rule making proceeding and a determination that, "The vhf spectrum is too crowded and the problems of potential interference are too great for the Commission to authorize vhf translators unless there is a clear and compelling need therefor demonstrated by active interest of the people in the area." The Commission also said at that time that it was apparent that some television stations were planning to use vhf translators to extend their service ". . . into new markets at relatively little cost and with no responsibility for meeting the needs of the new community for local programming and might result in delaying the development of new stations and keep existing stations from expanding their service to cover these areas through authorized facilities."

The reasoning set forth above still largely obtains today. However, the proliferation of CATV systems and the Commission's actions on requests for waiver of this translator rule require a new look at the problem. The Commission has waived the rule in several instances where it was indicated that the proposed vhf translator would be located beyond the predicted Grade B of *any* regular television broadcast station. This has been done in the sparsely populated southwestern states and in Alaska and Hawaii. The Commission believes, on the basis of its experience since 1962, that it may now be appropriate to allow television stations to establish vhf translators beyond their predicted Grade B contours when doing so does not result in the invasion of another television station's predicted Grade B contour. In those situations, the Commission's concern with potential inter-

ference and the effect on the possible development of new stations would appear to be less valid now—particularly, since with respect to the latter concern, CATV is being established freely in such areas under the CATV rules adopted earlier in Docket 15971. Accordingly, the Commission proposes to amend §74.732(e) (1) of the Rules to permit a television broadcast licensee to establish a vhf translator beyond its predicted Grade B contour when it does not invade the predicted Grade B contour of another television station.

The Commission also believes that it may be appropriate to amend §74.732(e) (1) to allow television broadcast licensees to contribute to the costs of operation and maintenance of established vhf translators which rebroadcast their signals wherever such translators are located. It believes that this type of support can be allowed without doing damage to its policies beyond the present rule. Since the establishment of the translator usually disposes of the interference problem, it may additionally dispose of its concern that vhf translators not be used merely as competitive weapons, but, rather, reflect the true interests of the public within the communities concerned.

Translator Duplication of Regular Television Stations

In its 1962 rule making, the Commission attacked the problem of duplication by adopting a rule refusing to permit a licensee-owned vhf translator within the predicted Grade A contour of another regular television station if program duplication would result, except where the primary station to be rebroadcast furnishes a predicted principal community contour over the area to be served. However, since such a station would be affected regardless of the status of the translator applicant as a licensee or nonlicensee, this solution does not really meet the question

of the translator's impact on the duplicated station. The Commission has responded to this problem in two ways: (a) beginning in 1963, it has authorized licensee-owned vhf translators within the Grade A contour of duplicated television stations provided the translator is operated on a nonduplication basis, and (b) it has considered the possible effects of duplication in all cases without regard to the ownership of the translators or whether the translators would be vhf or uhf. A product of this case-by-case approach to duplication problems was adopted as an interim policy in *Lee Co. TV, Inc.*, FCC 65-483, [5 RR 2d 257] (1965). In this proceeding, the Commission announced that as an interim measure, pending the outcome of this proceeding (Docket 15971), it would impose nonduplication conditions on all translators proposed within the predicted Grade A contour of a duplicated station.

Frequently, the duplicated station had not sought protection; therefore, the *Lee Co.*, approach to the duplication problem presented difficulties. Additionally, the task of providing nonduplication protection added to the difficulties confronting the translator operator—especially if it was not a commercial operator. Consequently, in its Second Report and Order in this proceeding (Docket 15971), the Commission amended its interim policy and returned to a modified form of its 1962 policy requiring imposition of a nonduplication condition only in the case of a licensee-owned vhf translator located within the predicted Grade A contour of a duplicated station.

The Commission's experience with translators has been that only in a relatively few situations do proposals for translators result in controversy concerning duplication of programming or economic impact. However, when problems arise, they arise whether or not the translators are licensee-owned and with both vhf and uhf proposals. Therefore, the Commission believes that

it would be desirable to take a completely new look at its translator nonduplication policy.

Vhf Translators in Areas with Predicted Uhf Service

The Commission's present policy regarding the use of vhf translators, in areas receiving uhf service, is contained in Section 74.732(d) of the Rules. It prohibits the authorization of a vhf translator in an area which is receiving satisfactory uhf service from either a television station or a translator—except upon a showing of exceptional circumstances justifying such intermixture. This rule has served both to promote the broader use of uhf and to avoid the adverse impact of vhf signals on uhf service areas. In view of the passage of the all-channel receiver legislation in 1962, and, since the passage of time should insure the circulation of uhf-equipped television receivers which the rule was intended to promote, it seems likely that Section 74.732(d) of the Rules will gradually outlive its usefulness. (In an abundance of caution, the Commission may never eliminate the rule.) *In the interim, the Commission will continue its policy of designating for hearing vhf translator applications which threaten to have an adverse impact on an area's potential for uhf* (*e.g.*, *Spartan Radiocasting Company*, FCC 64-95, 1 RR 2d 1085 (1964).)

Different Requirements for Translators Used With Educational Television Stations

The Commission's Rules do not impose any special requirements on the use of translators with educational television broadcast stations, and, to date, no special problems have arisen as a result. Nevertheless, the Commission invited comments directed to the question of whether there are any special requirements which should be adopted with respect to the use of translators with educational television broadcast stations.

Higher Power for Vhf Translators

The Commission has periodically received both formal and informal requests urging that it increase the permissible output power of vhf translators from the present limit of one watt.[1] The arguments in support of such requests are that: the present one-watt limit prevents the transmission of an adequate signal in many areas where the population is widely scattered; higher power would provide better signals in all locations; it would eliminate the need for some existing translators; higher power is sometimes necessary to overcome interference (for example, the interference caused by some CATV radiations); and higher power would be especially useful where a translator rebroadcasts another translator.

The Commission proposes to strike a balance by (1) lifting the power limit for vhf translators to *10 watts transmitter peak visual power in the continental United States west of the Mississippi River and in the States of Alaska and Hawaii, and (2) maintaining the 1-watt maximum in the rest of the United States.* In order to keep the potential of interference to other services at about the same level, it also proposes to amend Section 74.750 (c) (2) of the Rules to require that all emissions appearing on frequencies more than 3-MHz above and below the upper and lower edges of the assigned channel be attenuated no less than 50 decibels for transmitters of more than one-watt transmitter peak visual power. The present requirement is 30 decibels for uhf translators of 1 watt or less. Since the rules require that greater attenuation may be required if interference results from any out-of-band emissions, the Commission believes the requirement of 60-dB attenuation for harmonics is adequate. It

[1]Two basic considerations led to the selection of the present one-watt limit on vhf translators, (1) the danger of interference to other services and (2) the problem of interference among the translators themselves.

recognizes that greater power may make it more difficult for individual communities to find vhf channels on which to operate translators without mutual interference. In this regard, it should be noted that in the absence of offset carrier operation, such as is used with regular television stations, there is a greater interference potential—the loss being 17 decibels. This means that a 10-watt translator would be the equivalent of a 500-watt regular television station so far as co-channel interference potential is concerned. Further, the service range for a similar increase in power increases by a relatively small amount so that a point of diminishing returns is soon reached so far as translator operation is concerned. In view of the foregoing, comments were invited on the proposal (1) to increase the permissible power of vhf translators to 10 watts, (2) on the impact that such an amendment might have on the availability of frequencies for translator use, and (3) on the desirability of imposing geographical limitations on the areas where such translators could be utilized.

Type-Accepted Equipment May Be Required

Consideration of the possibility of increasing the authorized power of vhf translators leads to a question regarding the status of the equipment to be used. In 1960, in order to lessen the impact of the vhf translator rules on existing repeater operations, the Commission provided that construction permits could be issued for custom-built transmitters which had not been type accepted. Section 74.750 (d) (3) of the Rules presently provides a procedure for type accepting such transmitters after issuance of a construction permit but prior to issuance of a license. Since many translator operators have been unable to comply strictly with the technical requirements for type acceptance, the Commission has found that this procedure is unsatisfactory. As a result, the Commission has experienced undue delays in

processing applications involving custom-built equipment with the further result that the processing time for all translator applications has been extended. While this result was an unavoidable consequence of rapidly legalizing more than a thousand existing repeaters, the Commission sees no reason to continue to cope with this problem; it noted that there are now a variety of inexpensive type-accepted translators available. Consequently, to assure the use of acceptable equipment, and thus shorten the processing time for all translator applications, the Commission proposes to require that all applications for new translator stations specify the use of type-accepted equipment. Custom-built equipment could still be proposed, but only if it was type accepted prior to the filing of an application for construction permit. Comments have been requested on this proposal.

Origination of Local Announcements

It has been suggested periodically that the translator rules be amended to permit translators to originate both programs and advertising. The Commission is now considering these possibilities. Since financing is a substantial handicap facing translator operators, thereby discouraging the wider use of translators, parties proposed that the Commission authorize the origination of program material on translators. However, they misunderstood the technical operation of a translator, and, as a result, made proposals which exceed a translator's capabilities. A translator does nothing more than convert or "translate" a television signal to another channel and retransmit it. This type of operation does not require that the translator be able to maintain frequency tolerance and band width requirements, and the present rules do not require the use of equipment designed to satisfy these requirements. (See *Notice of Proposed Rule Making* in Docket No.

16424, Microwave Relays to Translators, FCC 66-41, 1966.) On the other hand, if such a transmitter is modulated with locally generated program material, maintenance of frequency tolerance and band width requirements would be an immediate problem. Thus, in net effect, proposals to permit translators to originate programs are proposals for the further relaxation of the technical requirements for television broadcast stations to permit the use of inexpensive and technically inferior transmitting equipment. Unless it can be demonstrated that these standards are high enough to provide a quality picture and to prevent interference, the Commission is not disposed to change them. It will, of course, give careful consideration to any comments designed to make such a showing. However, *in the absence of a persuasive showing in this regard, the Commission will not authorize the origination of program material on translator stations.*

Nonetheless, the Commission believes it is necessary to take what action it can to assist translator operators in securing their financial base so that the benefits of this valuable auxiliary service can be fully realized. The most logical new source of revenue for translator operators would appear to come from the origination of some sort of visual announcement: for example, solicitations of funds for the maintenance of the translator or announcements to the effect that the translator operation is subsidized by one or more local merchants. Brief announcements or "credits" could be presented in the form of slides or still pictures with comparatively inexpensive signal generating and scanning apparatus which could be substituted for the signal normally transmitted by the translator. While the technical characteristics of the modulating signals generated by such apparatus would not meet the requirements of the Commission's Rules, the Commission believes that they could be tolerated if limited to brief periods and infrequent intervals. However, in view of the difficulties which could arise from even such

limited operations. *the Commission believes it necessary to limit this proposal and to authorize it only for use with uhf translators.* Three additional considerations support this limitation: (a) vhf translators are relatively less expensive than uhf translators. so there is less need to seek additional financial support for them: (b) the Commission is of the view that uhf translators are to be encouraged where possible: and (c) most important. should there by an improper operation in the uhf band the translator would not interfere with the critical safety frequencies which would be vulnerable to a malfunctioning vhf translator. (For example, on September 14, 1967, the Commission granted its first rule waiver whereby a uhf translator station in Florida was permitted to broadcast visual announcements for seven days in the form of still slides to solicit public financial support. The announcements, not to exceed sixty seconds duration, were broadcast daily between 7:00 P.M. and 9:00 P.M. on schedule half-hour station breaks. A visual monitor was employed on the transmitted signal at all times, and a report on public reaction to the operation was made to the Commission. Sources at the Commission indicate that the report was inconclusive —possibly because other advertising efforts were in progress at the same time.)

The question of the time when these announcements would be transmitted would be one for mutual agreement between the translator operator and the primary station. Since there are periods of time devoted to purely local advertising, it seems likely that agreement could be reached for the use of this time for translator announcements. Additionally, noncommercial stations rebroadcast by translators should also be permitted to agree to the use of specific times for such announcements. *Consequently, the Commission will consider amending the rules, governing uhf translators, to permit the limited transmission of local slides or still pictures and voice announcements* containing advertising, public

service announcements, acknowledgements, and other similar material by automatic means—for brief periods of time, not to exceed twenty seconds, at intervals of no less than one hour.

Use of Translators as Relays—'Chain' Translators

One of the serious difficulties facing translator operators is the fact that in some areas a satisfactory signal may not be available for rebroadcast. One way to bring television signals to such areas is by rebroadcasting the signals of one or more translators. Variations of this system are in wide use; however, there is an upper limit to the number of translators which can be used for this purpose due to the poorer signal to noise ratio. Section 74.731 (c) of the Rules prohibits the use of translators solely as relays but permits them to be used incidentally for this purpose provided they also serve the general public. While this rule has generally been effective, it does not provide the best signal to communities at the far end of a particular chain. If there are locations, which could get more or better signals from a translator relay system, *it may be in the public interest to permit such operation*, and the Commission will consider this possibility. *Nonetheless, the Commission will generally adhere to the policy that translators should serve surrounding areas*—even if they are being used by other translators as a pickup point, and *a convincing showing of the need for pure relay operation would be required.* The Commission has invited comments on the question whether Section 74.731 (c) of the Rules should be amended to allow the use of translators as relays—where a showing is made that this is the most feasible method of obtaining a usable signal in the area for which service is proposed.

Comments Requested by the Commission

In view of the foregoing, the Commission in-

vited comments from interested parties on the following proposed rule changes:

(a) Amend Section 74.732 (e) (1) to permit regular television broadcast licensees to own and operate vhf translators beyond their predicted Grade B contours in situations where the translator would not be located in another station's predicted service area;
(b) Amend Section 74.732 (e) (1) to permit regular television broadcast licensees whose signals are being rebroadcast to contribute to the operating and maintenance costs of established vhf translators without regard to location;
(c) Amend Section 74.735 (a) to raise the maximum allowable power for vhf translators located west of the Mississippi River and in Alaska and Hawaii from one (1) to ten (10) watts transmitter peak visual power;
(d) Amend Section 74.750 (c) (2) to require, with respect to more than one (1) watt vhf translators, that all emissions appearing on frequencies more than 3-MHz above and below the upper and lower edges of the assigned channel be attenuated no less than 50 decibels (the present requirement is 30 decibels);
(e) Amend Section 74.731 (c) to permit the use of translators solely as relays when necessary to carry the desired broadcast signal to another translator to be rebroadcast;
(f) Amend Section 74.750 (d) (3) which provides for licensing of non-type-accepted vhf translators transmitters, to provide that all applications for new translator stations specify the use of type-accepted equipment; and
(g) Amend Section 74.731 to permit uhf translator operators to engage in limited origination of local slides or still pictures and voice announcements containing advertising, public service announcements, acknowledgments, and other similar material by automatic means and for brief (not to exceed twenty (20) seconds) periods of time, at intervals of no less than one hour.

In addition, the Commission invited comments concerning the appropriate role of translators in television transmission and broadcasting, and particularly concerning the following specific suggestions or proposals:

(a) The limitations, if any, to be imposed upon translator duplications of regular television stations' programming;
(b) The limitations, if any, to be imposed upon

vhf translators in areas with predicted uhf service;

(c) Whether there are any special requirements which should be adopted with respect to the use of translators rebroadcasting educational television broadcast stations;

(d) Whether translator licensees should be permitted to originate program material, and, if so, subject to what increased technical requirements; and

(e) Whether the television station licensee whose signal is being rebroadcast should receive a preference over other applicants for a translator authorization in case of conflicting requests.

Conclusion

While comments were due in August 1967, the Commission has not acted on the above and comments on same are still welcome. It is apparently safe to conclude that, absent abundant and convincing comments to the contrary, the Commission will adopt rules (1) insofar as it will not hamper the growth of uhf, permitting as much expansion of translators as is technically feasible and (2) creating as much competition as possible for CATV systems.

New Pre-Sunrise Rules for Class III (Regional) Stations

ON JUNE 28, 1967, the Commission adopted an "Amendment of the Rules with Respect to Hours of Operation of Standard Broadcast Stations" (Docket Number 14419, RM-268). The Report and Order was released July 13, 1967 (FCC-67-767), whereby the Commission amended Sections 73.87, 73.190 and added Section 73.99 to the Rules. Some licensees may have received a copy of the Report and Order; however, it seems that a great many licensees are completely devoid of any knowledge whatsoever concerning the new rules.

Although the reports in the trade press may have created the impression that a simple solution to the long pending and extremely complicated pre-sunrise operation problem has been found, we regret to report that, for many stations—at least for most stations operating on regional (Class III) channels—the reports are not well founded.[1]

All standard (a-m) broadcast station assignments in the United States are subject to the Communications Act of 1934, as amended, and

1. Class III stations operate on the following regional channels: 550, 560, 570, 580, 590, 600, 610, 620, 630, 790, 910, 920, 930, 950, 960, 970, 980, 1150, 1250, 1260, 1270, 1280, 1290, 1300, 1310, 1320, 1330, 1350, 1360, 1370, 1380, 1390, 1410, 1420. 1430, 1440, 1460, 1470, 1480, 1590 and 1600.

two treaties with other North American countries, the United States-Mexican Agreement and the North American Regional Broadcast Agreement (NARBA), the latter encompassing Canada, Cuba, the Bahamas, Jamaica, and the Dominican Republic.

Although the United States no longer maintains diplomatic relations with Cuba, the United State scrupulously adheres to the Agreement. Unfortunately, Cuba has not done so in recent years. The treaties have been supplemented by a series of notes covering specific engineering (technical) matters exchanged between the governments directly involved. All rules, regulations, and policies of the Federal Communications Commission must be compatible with the Communications Act, the treaties, and the supplemental notes. The new pre-sunrise rules must be interpreted and applied accordingly.

For many years, the Commission's rules and policies have permitted Class III stations, whether unlimited time or daytime only, to operate with their daytime facilities (power and antenna system) between the hours of 4 A.M. and sunrise (local *standard* time), even though the license of unlimited time stations specified operation with daytime facilities only between sunrise and sunset and the licenses of daytime only stations specified operation only between sunrise and sunset; provided that no unlimited time station operating with its nighttime facilities complained of objectionable interference.

Until 1954 the Commission received virtually no complaints of pre-sunrise interference from unlimited time stations. That year, unlimited time WING Dayton, Ohio, complained to the Commission of extremely severe pre-sunrise interference from daytime only WGRD, Grand Rapids, Michigan (both on 1410 kHz). After the Commission refused to order WGRD to cease pre-sunrise operation, the United States Court of Appeals (D.C. Circuit) reversed the Commission, held that WGRD was not entitled to a hearing on the

complaint, and ordered WGRD to cease pre-sunrise operations. *Music Broadcasting Company* v. *FCC*, 217 F. 2d 339. In 1961, the same Court held that unlimited time Class III stations could prosecute objections against applications which would cause pre-sunrise interference. The effect of the two decisions was to make it virtually impossible for any Class III station to operate pre-sunrise with its daytime facilities if any unlimited time station operating with its nighttime facilities objected. These decisions threatened to interrupt the long established pre-sunrise operation of all but a handful of the 2000 Class III stations.[2]

The history of the Commission's attempts to find a reasonable and practical solution to the pre-sunrise problem is set forth in the accompanying *Report and Order* and will not be repeated here. It suffices to say, only a very few of the Class III stations will be completely happy with the solution. However, is appears to be the best compromise possible of a most difficult problem.

Before the Commission could amend its rules, it was absolutely necessary to reach an agreement with Canada because the seasonable fluctuations of sunrise and sunset are greatest in northern areas of the United States. Even with the recently completed agreement with Canada, the possibility of interference with Mexican and Cuban Class III stations also must be considered under the United States-Mexican Agreement and NARBA. Although discussions have been held between the United States and Mexican Governments, the date of final agreement revising the present agreement cannot be estimated with certainty. For obvious reasons, there is no possibility of any agreement concerning pre-sunrise operations with Cuba in the foreseeable future.

The New Rules:

The new and amended rules will bring about

2. **Broadcasting Yearbook, 1967 Issue, lists 2063 Class III stations on regional channels.**

the following changes in the operation of every unlimited time Class III station now using its daytime facilities (power and antenna system) before sunrise:[3]

1. Every unlimited time station now operating before sunrise with a power of 1 kW or 5 kW and its daytime antenna system must discontinue such pre-sunrise operation on and after October 28, 1967;

2. When pre-sunrise occurs prior to 6 A.M. local *standard* time every station must use its nighttime facilities before sunrise; and

3. When sunrise occurs after 6 A.M. local standard time, each station may request a Pre-sunrise Service Authorization (PSA) to operate between 6 A.M. local *standard* time and sunrise with a power of not more than 500 W and its daytime antenna system.

Similar restrictions have been imposed upon all daytime only Class III stations. No daytime only station will be permitted to operate before sunrise unless sunrise occurs after 6 A.M. local standard time and a Pre-sunrise Service Authorization for operation with not more than 500 W has been granted by the Commission.

Procedures to be followed to obtain a PSA:

1. The request for a Pre-Sunrise Service Authorization may be submitted in letter form, signed by the same persons authorized to sign formal applications;

2. The letter request must be accompanied by a study of a consulting or other qualified engineer showing that cochannel stations in foreign countries will not receive interference from the requested pre-sunrise operation. The engineer must first determine the nighttime interference free limit (or contour) of any foreign station which might possibly be affected by the proposed oper-

3. The only possible exception is for unlimited time Class III stations now operating with a daytime power of 500 W

ation. Then he must show that additional interference will not be caused to any foreign station by use of the following methods of computation:

(a) With respect to all foreign stations under consideration, except those in Mexico but including those in Canada and Cuba, the propogation curves and procedures of NARBA must be used to determine the existing nighttime interference free limits (or contours) [4]: for stations in Mexico, the propogation curves and procedures of the United States-Mexican agreement must be used;

(b) Computations to determine if pre-sunrise operation with 500 W power will cause additional interference to any Canadian station must use the new propogation curve (Figure 12) adopted by the amendment of Section 73.190 of the rules; such computations to foreign stations in countries other than Canada must use the appropriate curves and procedures of NARBA or the United States-Mexican Agreement; and

(c) If the computations show that pre-sunrise operation with 500 W power would cause additional interference to any foreign station, the maximum power which could be used without causing such additional interference must be determined.

Significant Dates:

1. *August 31, 1967;* Deadline for submission of letter requests for Pre-Sunrise Service Authorization (PSA) to obtain prompt consideration; and

2. *October 28, 1967;* Discontinuance of all pre-sunrise operations by Class III stations except those using their nighttime facilities or those having been issued PSA's.

Additional Comments

Pre-sunrise operation by unlimited time stations with either their nighttime facilities or under a PSA will cause a loss of existing pre-sunrise service in most cases because of the weak signals in the nulls of the nighttime directional antenna arrays. The new pre-sunrise service will

4. It is understood the Canadian Department of Transport soon will supply to the Federal Communications Commission computations of the nighttime interference free limits (or contours) of Canadian Class III stations.

not be as good as evening service when all cochannel stations are operating with their nighttime facilities because interference will be received from daytime only stations operating pre-sunrise under PSA's.

However, there will be improvements in some cases. In many cases, daytime only stations now operating pre-sunrise with 5 kW cause most severe interference to the present pre-sunrise operations of unlimited time stations. Much of this interference will be substantially reduced. In many other cases, pre-sunrise operation of unlimited time stations with their daytime facilities cause most severe interference to present pre-sunrise operations of other unlimited time stations. Most, if not all, of this interference will be cut back to the nighttime level. The end result may not be as severe as first expected.

Nevertheless, the new rules will cause substantial hardship upon many Class III stations as well as severe hardship upon the public by loss of service. However, most of the pre-sunrise operations with daytime facilities would have been shut down completely if the Commission had been required to enforce its rules (and treaty obligations) in the manner ordered by the Court whenever an unlimited time station operating pre-sunrise with its nighttime facilities objected to pre-sunrise interference.

On the other hand, some daytime only Class III stations will be able to operate pre-sunrise for the first time, thereby providing a new service to the public.

It seems reasonable to believe that petitions for reconsideration will be filed with the Commission and appeals will be filed with the United States Court of Appeals. However, unless the petitions and appeals present some new and novel questions of law and supporting arguments, we believe that the Commission's action will be affirmed. The possibility is a little greater that a stay of the effective date of the new rules pending action upon appeals will be ordered by the Court.

There appears to be a reasonable possibility, however, that the Commission will grant a fairly short extension of the effective date of the new rules. Some consulting engineers have already advised that they expect to be so overloaded with requests to prepare pre-sunrise studies for daytime only stations that they may not be able to meet the deadline for many clients.

The possibility of any significant changes in the new rules by the Commission appears most remote. It is unrealistic to expect that the Commission, on its own initiative, would ask Canada to modify the agreement which took so many years of negotiation to obtain.

Recommendations

In some instances, particularly when the present daytime power is 1 kW and/or when a deep null of the nighttime array falls over a very heavily populated area, 6 A.M. to sunrise operation with a power of not more than 500 W may provide better service than operation with the nighttime facilities. Accordingly, we recommend the following:

1. Have your consulting engineer study the pros and cons of pre-sunrise operation with a PSA;

2. Make every effort to obtain Report and Order FCC-67-767, dated July 13, 1967, amending Sections 73.87, 73.190, and adding Section 73.99.

3. If your operation will be most severely and adversely affected, you should contact your communications attorney in order to advise him of such adverse effects so that he may evaluate the desirability of further action.

The Emergency Broadcast System

IN THE EARLY 50's the big bomber, in combination with atomic devices, was the most potent offensive air-weapon devised. Guided missiles were still on the drawing boards. It was common knowledge that the Japanese had employed homing devices on the Hawaiian radio stations at the time of the attack on Pearl Harbor; similarly, the Germans had employed this technique to find their targets in England. Consequently, the Department of Defense was fearful that our highly developed broadcast system might be our enemy's best friend during a surprise attack. Test flights over the eastern portion of the U.S. disclosed that, under normal operation, a clear-channel station could provide a good navigational aid—at distances up to 400 miles during the day and more than 1,000 miles at night—to aircraft employing automatic direction finders flying at an altitude of 10,000 feet.

The Development of CONELRAD

Operation Without Identification: This entailed operation on the regularly assigned frequency *without identification.* This proposal was very simple, and it might provide some confusion to the enemy; however, a station can

be easily identified by its frequency and bearing. Therefore, this method had no real practical value.

"On-and-Off" Transmission on a Station's Regularly Assigned Channel: This method contemplated operating the station on its regular frequency without identification; however, it would only broadcast for approximately 30 seconds every 10 to 15 minutes. This proposal was not deemed feasible because of (1) insufficient deception and (2) insufficient time for broadcast of Civil Defense messages to the public.

Change of Station Frequency: In this method, all stations would shift to one of two frequencies (640 kc and 1240 kc) and operate without identification. This method provided greater deception than the other methods described. In each case the system frequency chosen for a station would be the result of an engineering study, with a view to providing the greatest deception to aircraft navigation. Therefore, it was essential that these stations be able to operate on the specified emergency frequency as well as their normal frequency. The resulting ability by large numbers of stations to operate on a common frequency created good deception and, at the same time, suitable ground coverage for Civil Defense purposes. With so many stations having knowledge of the plan, it was highly probable that the enemy would also be aware of its details; even so, the plan provided effective security because the station signals could not be used for navigation. The Commission arranged various groups of stations into "clusters." Each member of the cluster would operate in a non-cyclical sequence. Each station would be on the air for a short period of time—such as one minute. There would be no lost air-time, and the length of time and order of operation would be varied. Consequently, since an automatic direction finder indicates the direction of the strongest signal,

the "sequential" operation of the system by various clusters of stations on the same frequency would greatly reduce the possibilities of use for air navigation.

The system, as finally adopted, in the early 50's, was called CONELRAD—a shortening of the words "Control of Electromagnetic Radiation." The Air Defense Control Center (ADCC) was given overall supervision for activation of the system. Special telephone lines were run to Basic Key Stations. These stations then relayed alerts to Relay Stations either by telephone or radio broadcast. Additionally, other stations were designated Skywave Key Stations. They were designated to disseminate alerts primarily during the experimental period as alternates for local key stations which might not be in operation.

The stations arranged in clusters were also interconnected with wire lines. This enabled these cluster stations to be turned on and off in sequence from a central control point.

Under the CONELRAD plan, FM and TV stations were required to leave the air for the following reasons:

(1) Aircraft direction finders can be manufactured for use on the FM and TV spectrum. These stations were usually high powered and were often located directly in, or close to, a city. Therefore, they made excellent navigation beacons.

(2) Battery-operated portable or automobile receivers were usually not available to the general public for the reception of FM or TV signals; therefore, widespread power failures would render FM and TV programs ineffective.

The Emergency Broadcast System (EBS)

During the late 1950's, it became apparent that a different system must replace CONELRAD. Formulated during the days when radio

stations were employed as "homing devices," the system became outmoded as technology reduced this problem. Most of the new bombers contained numerous alternate and highly sophisticated navigational systems that almost flew the bomber to the target unassisted. Additionally, the advent of missiles, with their inertial guidance systems, were replacing the obsolete bombers that may have used radio stations as homing beacons. The cost to the U.S. Government of maintaining private-line communications between the various cluster stations in order to operate sequentially on either 640 kc or 1240 kc was proving highly expensive. As long as the enemy might use our stations to seek out their targets, the expense could be justified; howver, when it became apparent that CONELRAD's primary purpose was no longer necessary, a new concept was evolved—the Emergency Broadcast System (EBS). The plan was adopted pursuant to Executive Order 11092, as signed by the President on February 26, 1963. It was based on the requirements of the White House, the Department of Defense (Office of Civil Defense), the Office of Emergency Planning, and various Rules and Regulations of the FCC.

The Basic EBS Plan

The primary purpose of EBS is to provide the President with a reliable means of communicating with the general public during the period preceding, during, and following an enemy attack. *Only the President can order the activation of EBS.* All of his messages, intended for the public, must be carried live.

The secondary purposes of EBS, in order of priority, are: (1) state programming, (2) local programming, and (3) national programming. Despite the technical requirement permitting only the President to activate EBS, the facilities of EBS are available for use at other times by the Governor of a state, or any other regional

or local official charged with responsibility in case of an emergency.

No licensee is required to participate as a member of EBS; *it is purely voluntary.* If a licensee participates, it is issued a National Defense Emergency Authorization (NDEA) by the Commission. Each NDEA station assumes the responsibility for serving a certain designated area with Presidential messages, national programming, state information, and local news and messages.

The National Industry Advisory Committee (NIAC) was created in order to implement and perfect EBS on a nationwide basis. The committee is composed of members from broadcasting, amateur radio, citizens radio, domestic common carriers, industrial communications, internal common carriers, maritime communications, and public safety communications. This main group has its working counterparts on the local and regional level. These are: (1) Regional Industry Advisory Committee (RIAC), serving eight regional units of the Federal Government; (2) State Industry Advisory Committees (SIAC), serving state areas; and (3) Local Industry Advisory Committees (LIAC), serving local areas. All of these committees work in close liaison with each other in order to formulate plans and procedures to make EBS function as effectively as possible.

The EBS plan provides that as many stations as possible remain on the air on their normal frequencies, licensed power, and hours of operation in order to take full advantage of the public's normal listening habits. Numerous stations across the country have been selected as primary and alternate stations for the purpose of relaying information. Under a monitoring system, if a primary station were to fail, then the alternate station would go into operation. This alternate choice of routes will be especially needed during a post-attack period. It is assumed that many

of the major metropolitan areas would be devastated. The major land-line and broadcast facilities in these areas would be disrupted; then the alternate stations surrounding these areas will assume the information relay functions originally assigned to the stations in the devastated areas.

Technically, because the off-air pickup and relay of AM signals is highly unsatisfactory, the state defense networks are being organized through selected FM and TV (aural) facilities. These signals are more readily susceptible to relay and less prone to be affected by outside electrical interference.

The EBS station will be able to receive information from a variety of sources, including: (1) a land line to the local telephone company exchange, (2) off-air-pickup of FM signals from the state defense network, (3) the AP/UPI ticker, and (4) land line or remote pickup to the city and other local government offices such as Civil Defense, Police, Mayor, Fire, Health, Water, and various County authorities.

Presidential messages, of course, have top priority clearance; *state and local information* have second and third priority clearance, respectively; *national news* is fourth in order of importance. The plan is coordinated so that any of the alternative sources can be utilized to relay information across the country. Major metropolitan areas have been bypassed by hardened (underground) land lines. If these become inoperative, the alternate off-air pickups can be employed.

Activation of EBS

If the President is in Washington, D.C., he will be able to activate the system through the White House Communications Agency (WHCA). This center is connected by land-line to a telephone company toll test center. This, in turn, is con-

nected by land-line to the four major networks, ABC, CBS, NBC, and MBS. They, in turn, are connected to the Intermountain and Yankee Networks. Additionally, the White House is connected by remote FM links to major stations in Washington, D.C., as well as in surrounding communities. These, in turn, will be able to relay information by land-line and off-the-air pickup.

If the President is away from the White House, he will have the same alternatives available to him via telephone toll test centers nearest him, remote broadcast, short-wave, and, of course, classified methods known only to a few top echelon government authorities.

Criteria for Eligibility in EBS

In order to apply for a National Defense Emergency Authorization, the usual governmental "red tape" has been reduced to a minimum. The application consists of a simple letter, in quadruplicate, identifying your station and requesting NDEA for permission to participate in EBS. If your station is located in Minnesota or any state east of the Mississippi River, you address the letter to: FCC Field Supervisor, OEC, Eastern United States, OCD Region Three, Thomasville, Georgia. Stations located west of Minnesota and the Mississippi River should write: FCC Field Supervisor, OEC, Western United States, OCD Region Seven, Naval Auxiliary Air Station, Santa Rosa, California.

The following explanatory documents should be attached to the formal letter of application:

(1) *Presidential and National Programming News*: A statement that you are affiliated with one of the major networks or that your station has arranged for interconnection with the networks by local land-line loop will suffice.

(2) *State Programming*: A statement that you are cooperating with the SIAC is adequate.

(3) *Local Programming*: A letter countersigned by both your station and the local gov-

ernment authority setting forth a brief description of arrangements made is sufficient.

(4) *FCC Engineering Requirements (Standard Broadcast)*: Since the FCC Field Supervisor has already completed this evaluation, no explanatory statement is necessary.

(5) *Cooperation in the origination and broadcasting of the common local emergency program*: A statement setting forth the action taken in establishing a Local Industry Advisory Committee (LIAC) is adequate.

(6) *Public education concerning EBS*: A statement that you will cooperate with the Office of Civil Defense to disseminate public education materials meets this requirement.

(7) *Hours of operation*: Merely indicate your daily sign-on and sign-off schedule.

(8) *Adequacy of staff and physical facilities*: At a later date, additional information may be requested; however, no explanatory statement is required initially.

(9) *Participation in the Radiological Fallout Monitoring Program*: You should contact the local or state civil defense director to make arrangements to be provided with a CD radiological fallout monitoring set. (CD pays for this.) A statement of the action taken will be adequate.

(10) *Special information as to issuance of NDEA's to FM and TV stations*: FM and TV stations are additionally charged with the responsibility of developing a State Defense Network (SIAC). Consequently, the SIAC Chairman will submit a coordinated proposal reflecting the total State Defense Network to NIAC for transmittal to the FCC for approval. Only then will an NDEA be issued to an FM or TV station.

FM or TV stations participating in *state defense networks only* do not need to comply with the criteria set forth above. These are networks that have been established within separate states in order to provide the Governor and other officials access to the public in times of emergency.