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## COMPETITION OR CONTROL II: RADIO AND TELEVISION BROADCASTING

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*The evils which result from the failure of the competitive mechanism to operate smoothly and equitably in an imperfect market have given rise to two theoretically distinct bodies of law, one aimed at strengthening the competitive forces which drive the self-regulating mechanism, and the other founded on an abandonment of the competitive principle in favor of direct government control. As a rule where industries generally considered "public utilities" are involved, government attitudes and policies have tended toward the latter course. Often, however, elements of both "competition" and "control" appear in the pattern of laws applying to a particular utility. This Article explores the phenomenon as it occurs in the field of radio and television broadcasting. The Hales have collaborated on other articles in the field and on a recently published book on market power under the Sherman Act.*

### STATEMENT OF THE PROBLEM

In our introductory study<sup>1</sup> we presented a broad panorama of the application of the antitrust laws to public utilities. We found that in some instances the existence of regulation had given rise to an exemption, express or implicit, from the impact of statutes like the Sherman

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1. Hale & Hale, *Competition or Control I: The Chaos in the Cases*, 106 U. PA. L. REV. 641 (1958).

Act.<sup>2</sup> In other instances, despite the existence of interventionist regulation, antitrust legislation was found to be given full effect. Upon concluding a superficial survey of a considerable number of industries commonly considered "public utilities," we were unable to perceive a rationale for the application of antitrust principles to regulated business.<sup>3</sup>

It was therefore proposed to examine several regulated industries in detail. The objective is to learn just how regulation operates; what freedom remains in the firms affected; and to what degree antitrust enforcement would hamper exercise of controls in the hands of the regulators. This study, dealing with broadcasting, is the first of a projected series. From intensive examination of a few industries<sup>4</sup> we hope to derive general principles applicable to the entire field.

For present purposes we may define broadcasting as the wireless transmission of messages destined for general reception. It is contrasted with "point to point" carriage of individual messages and it does not include a host of radio services furnished for specific purposes such as the guidance of aircraft, the safety of ships, and the control of military operations.<sup>5</sup> Transmission of broadcast programs began shortly after the termination of World War I, and by the middle of the 1920's it was apparent that the skimpy legislation then in effect was wholly inadequate to protect the wave lengths utilized from electrical interference. Accordingly, in 1927 Congress undertook to control broadcasting, and the statute was revised less than ten years later.<sup>6</sup> Now known as the Communications Act of 1934,<sup>7</sup> the legislation prohibits the transmission of broadcasts except such as may be licensed by

2. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952).

3. It has been suggested that the "rule of reason" familiar to students of the antitrust laws be used as a vehicle for applying those statutes to regulated business. Note, *Regulated Industries and the Anti-Trust Laws: Substantive and Procedural Considerations*, 58 COLUM. L. REV. 673, 682 (1958). Unfortunately this suggestion does not carry us far toward resolution of substantive problems involved.

4. A study of this type can of course only encompass available information. There is no way of knowing, for example, to what extent administrative determinations are influenced by improper means. *E.g.*, WKAT, Inc., 17 P & F RADIO REG. 271 (1958); ABA Administrative Law Section, Communications Committee, *Report*, 10 AD. L. BULL. 129, 131-45 (1958).

5. Actually the number of non-broadcast stations has outnumbered those in the broadcast portion of the spectrum by a wide margin. 15 FCC ANN. REP. 1 (1949). There is an active controversy with respect to the allocation of frequencies. Some observers argue that too little of the spectrum is available for broadcasting. This, however, is a matter beyond the scope of this Article.

6. MORRIS, NOT SO LONG AGO 449 (1949); HEAD, BROADCASTING IN AMERICA 112-13 (1956); FRIEDRICH & STERNBERG, CONGRESS AND THE CONTROL OF RADIO BROADCASTING 797 (Studies in the Control of Radio No. 5, 1944); WHITE, THE AMERICAN RADIO ch. 7 (1947); Conrad, *Economic Aspects of Radio Regulation*, 34 VA. L. REV. 283, 286-88 (1948); Hugin, *Radio Broadcasting Under Governmental Regulation*, 4 OKLA. L. REV. 417, 420-22 (1951).

7. Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified in scattered sections of 15, 47 U.S.C.).

the Federal Communications Commission.<sup>8</sup> In granting licenses the Commission is directed to act in such a way as to further the public convenience, interest or necessity.<sup>9</sup> This phrase, obviously derived from statutes of an interventionist character,<sup>10</sup> is counterbalanced by the express language of section 313 of the measure providing that all laws of the United States relating to unlawful restraints and monopolies and to combinations in restraint of trade are applicable to interstate radio communication.<sup>11</sup>

In the United States broadcasting has generally been conducted on a commercial basis, *i.e.*, the costs have been met by advertisers and not by listeners, taxpayers or charitable institutions.<sup>12</sup> Originally all transmissions were oral in character and on AM frequencies. Subsequently the Commission authorized broadcasting of FM messages and finally of television signals.<sup>13</sup> At the present time all three types of broadcasting are to be found throughout the United States.

#### LICENSING

As indicated, the law now prohibits transmission of broadcast messages except pursuant to a license granted by the Commission. Licenses are issued for a period of three years.<sup>14</sup> In granting licenses the Commission has proceeded by several stages. In the first place, a portion of the total radio spectrum has been allocated to broadcasting<sup>15</sup> and the rest is reserved for activities beyond the scope of this Article. A second step is to allocate the frequencies within the broadcasting

8. 48 Stat. 1098 (1934), as amended, 47 U.S.C. § 318 (1952).

9. 48 Stat. 1087 (1934), as amended, 47 U.S.C. § 307(a) (1952).

10. Note, *Old Standards in New Context*, 18 U. CHI. L. REV. 78, 79 n.8 (1950). A member of Congress has referred to broadcasting as a "supervised industry." *Hearings Before the Senate Committee on Interstate and Foreign Commerce: Television Inquiry, Network Practices*, 84th Cong., 2d Sess., pt. 4, at 1193 (1956) (hereinafter cited as *Television Inquiry*).

11. Note, *FCC Regulation of Competition Among Radio Networks*, 51 YALE L.J. 448, 455 (1942).

12. HEAD, *BROADCASTING IN AMERICA* 114-15, 135 (1956); SIEPMANN, *RADIO TELEVISION AND SOCIETY* 7-8, 10 (1950); Coase, *The Development of the British Television Service*, 30 LAND ECON. 207, 214-15 (1954).

13. By 1927 the number of AM stations was 681. The first FM construction permits were granted in October 1940. The famous "freeze" in the granting of television broadcasting licenses ran from the autumn of 1948 to July 1, 1952. 1 FCC ANN. REP. 23 (1935); 7 FCC ANN. REP. 30 (1941); 18 FCC ANN. REP. 6 (1953).

14. 48 Stat. 1081, 1087 (1934), as amended, 47 U.S.C. §§ 301, 307(a) (1952); 47 C.F.R. §§ 3.34, 3.630 (1958). The procedure is slightly different when it is sought to construct new facilities. There the statute (48 Stat. 1089 (1934), as amended, 47 U.S.C. § 319 (Supp. V, 1958)) provides for the issuance of a construction permit rather than a license. A license is later to issue if conditions have not changed and the like. A proceeding under this section avoids the formal protest procedure provided in 48 Stat. 1085 (1934), as amended, 47 U.S.C. § 309(c) (Supp. V, 1958).

15. *Hearings Before Antitrust Subcommittee No. 5 of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 22, at 5000 (1956) (hereinafter cited as ANTITRUST SUBCOMMITTEE REPORT).

spectrum among geographic areas. Here Congress has given the Commission some purported guidance, requiring the issuance of licenses so as to provide "fair, efficient and equitable distribution of radio service."<sup>16</sup> Accordingly, the Commission has prepared an extensive table of assignments of television channels by states and communities, and applications are only received for licenses on the wave lengths provided thereunder.<sup>17</sup> In making its geographical allocation the Commission has endeavored to assure each community at least one local broadcasting service, and the courts have generally sustained it in that position.<sup>18</sup>

In the third place, even within the broad categories of AM, FM and TV the Commission has ample power to prescribe the nature of the service, fix the location of transmitters, the power to be utilized and the hours of operation. This power has conspicuously been exercised in the AM field wherein the licensees have been classified as regional, clear-channel and local stations for the purpose of assigning powers and frequencies. In many instances, too, licensees are required to share time with other licensees.<sup>19</sup>

No serious problem is faced by the Commission when but a single person applies for a specific available frequency.<sup>20</sup> When, however,

16. 48 Stat. 1087 (1934), as amended, 47 U.S.C. § 307(b) (1952); Telephone Message Service, 4 P.U.R.3d 562 (FCC 1953).

17. 47 C.F.R. § 3.606 (1958). A less careful plan was used in licensing AM broadcasting. *Hearings on S. 133 Before the Senate Committee on Interstate and Foreign Commerce*, 80th Cong., 1st Sess. 38 (1947) (hereinafter cited as *Hearings on S. 133*); see 20 FCC ANN. REP. 94 (1954).

18. Ionia Broadcasting Co., 7 P & E RADIO REG. 569, 578 (1952); FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 361-62 (1955); Easton Publishing Co., 8 P & F RADIO REG. 31, 68-69 (1953); Connecticut Electronics Corp., 14 F.C.C. 1190, 1230 (1950); Enid Broadcasting Co., 14 F.C.C. 1054, 1071 (1950); Great South Bay Broadcasting Co., 15 P & F RADIO REG. 257 (1957); cf. *Courier Post Publishing Co. v. FCC*, 104 F.2d 213, 216 (D.C. Cir. 1939). Television stations are licensed to serve only a single "principal" community and the rules require that the main studio be located there with some exceptions. 22 FCC ANN. REP. 101 (1956); 47 C.F.R. §§ 3.30, 3.613 (1958). Recently to increase coverage to small communities the Commission authorized new low power "translator" broadcast services which would pick up programs from larger cities and rebroadcast them. 22 FCC ANN. REP. 4 (1956). There has been some complaint that licensees in the larger cities "overshadow" those in the smaller ones; that is, that national advertisers prefer to buy space on the Cleveland station rather than the one located in Akron. Furthermore, there is complaint that the allocation on a geographic basis assigns frequencies to towns too small to support a station. ANTITRUST SUBCOMMITTEE REPORT 4495-96; FCC Network Study Staff, *Network Broadcasting*, H.R. REP. No. 1297, 85th Cong., 2d Sess. 234 (1958) (hereinafter cited as *Network Broadcasting*).

19. 48 Stat. 1082 (1934), as amended, 47 U.S.C. § 303 (1952); 47 C.F.R. §§ 3.21, 3.22, 3.25, 3.26 (1958); 19 FCC ANN. REP. 98 (1953); ROSE, NATIONAL POLICY FOR RADIO BROADCASTING 103-04 (1940). The Commission has taken the position that it has power to allocate air space to non-commercial licensees despite some ambiguity in the legislative history. Amendment of § 3.606 of the Commission's Rules, 7 P & F RADIO REG. 371, 379 (1951). For an account of the financing of an educational television station, see *Time*, June 16, 1958, p. 78.

20. Even if there is no competing applicant the Commission makes an informal inquiry into the would-be licensee's previous business experience, his citizenship, his

two or more applicants stand before the Commission, it has been forced to choose among them and to develop at least ostensible standards of choice. One such criterion is local ownership. In case after case the Commission has awarded a license to an applicant whose shareholders or other owners resided in the community to be served as against an applicant with absentee ownership.<sup>21</sup> In like vein the Commission prefers an applicant whose owners propose active personal participation in the management of the station as opposed to those who will permit its operation to fall into the care of hired hands.<sup>22</sup> Similarly, other things being equal, the Commission prefers an applicant who can demonstrate a record of civic participation in community matters;<sup>23</sup> and it prefers applicants whose owners have engaged in a broad range of business to those whose experience is confined to a single type of

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financial resources, his antitrust record, his plans for serving the community, his technical installation plans and the location of his antenna. Wall & Jacob, *Communications Act Amendments, 1952—Clarity or Ambiguity*, 41 GEO. L.J. 135, 146 (1953); *Hearings on S. 133* at 34. Even in uncontested applications there has been some complaint with respect to the speed at which the Commission has moved in granting licenses. ANTITRUST SUBCOMMITTEE REPORT 4536-37.

21. KFAB Broadcasting Co., 12 P & F RADIO REG. 317, 380 (1956); South Dade Broadcasting Co., 15 P & F RADIO REG. 231, 241 (1957); Richmond Newspapers, Inc., 11 P & F RADIO REG. 1234, 1278b (1955); Radio Wisconsin, Inc., 10 P & F RADIO REG. 1224, 1241 (1955); WMBD, Inc., 11 P & F RADIO REG. 533, 607 (1956); James Cosby Byrd, 8 P & F RADIO REG. 140c, 147 (1952); Homer Rodeheaver, 12 F.C.C. 301, 308 (1947); Alladin Radio & Television, Inc., 9 P & F RADIO REG. 1, 39 (1953). The courts have approved the Commission's position in this respect. *Magnolia Petroleum Co. v. FCC*, 76 F.2d 439, 441 (D.C. Cir. 1935); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677, 682-83 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951). See Conrad, *Economic Aspects of Radio Regulation*, 34 VA. L. REV. 283, 293 (1948); *Network Broadcasting* 127; *Hearings on S. 133* at 35. The Commission also prefers "local live" programs to those produced by networks or made available on records and other mechanical means of production. In one instance an absentee applicant proposed more local live programs than the would-be licensee from the community in question. It was held within the discretion of the Commission to prefer the absentee applicant who promised the "local live" program. *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204, 205-06 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956). A captious critic might ask the Commission what kind of localism it really preferred.

22. Herbert L. Wilson, 9 F.C.C. 56, 63 (1941); WMBD, Inc., 11 P & F RADIO REG. 533, 607 (1956); Richmond Newspapers, Inc., 11 P & F RADIO REG. 1234, 1278b (1955); Southeastern Mass. Broadcasting Corp., 12 F.C.C. 363, 371-72 (1947); Southland Television Co., 10 P & F RADIO REG. 699, 748 (1955); South Dade Broadcasting Co., 15 P & F RADIO REG. 231, 242 (1957). The courts have approved this criterion. *Bay State Beacon, Inc.*, 12 F.C.C. 567, 574, *aff'd*, 171 F.2d 826 (D.C. Cir. 1948); *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33, 35 (D.C. Cir. 1951); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677, 683 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951). Ordinarily the Commission does not look with favor upon applicants whose stockholders are merely trustees. See *Easton Publishing Co.*, 8 P & F RADIO REG. 31, 67-68 (1953) (dictum).

23. *Travellers Broadcasting Serv. Corp.*, 12 P & F RADIO REG. 689, 799 (1956); KFAB Broadcasting Co., 12 P & F RADIO REG. 317, 390 (1956); *Pilgrim Broadcasting Co.*, 14 F.C.C. 1308, 1345, 1347 (1950); *Community Serv. Broadcasting Corp.*, 12 F.C.C. 159, 166 (1947). Approved by the court in *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15, 19 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957). At times the Commission appears to give weight only to local civic activity and to ignore the rendering of public service at the state and national levels. *E.g.*, *Scripps-Howard Radio, Inc.*, 11 P & F RADIO REG. 985, 1035 (1956-1957). *But cf.* *Biscayne Television Corp.*, 11 P & F RADIO REG. 1113, 1155 (1956).

endeavor.<sup>24</sup> At the same time the Commission likes to award licenses to those who have already demonstrated capacity to conduct a station in the public interest, *i.e.*, those who have had experience in broadcasting.<sup>25</sup>

Beyond the foregoing criteria the Commission examines the program proposals of the several applicants. It prefers applicants who promise programs of an educational character such as those containing discussions of current issues,<sup>26</sup> and frowns upon applicants who emphasize network programs at the expense of local "live" production.<sup>27</sup> Furthermore, it is apt to prefer applicants who propose a minimum amount of time to be devoted to commercial sponsorship as opposed to "sustaining" features.<sup>28</sup> By express statutory direction the Commission must refuse a license to any person whose prior license has been revoked for violation of the antitrust laws under the provisions of section 313.<sup>29</sup> The Commission has also considered violations of the

24. *E.g.*, Richmond Newspapers, Inc., 11 P & F RADIO REG. 1234, 1278c (1955). Note however the Commission's preference for those not engaged in other communications activities. See text following note 64 *infra*.

25. Succession Louis Pirallo-Castellanos, 16 P & F RADIO REG. 113, 151 (1957); Scripps-Howard Radio, Inc., 11 P & F RADIO REG. 985, 1042 (1956-1957); Pilgrim Broadcasting Co., 14 F.C.C. 1308, 1348 (1950); Lansing Broadcasting Co., 14 F.C.C. 294, 312 (1949); Edward J. Doyle, 9 F.C.C. 107, 111 (1942). See KFAB Broadcasting Co., 12 P & F RADIO REG. 317, 397 (1956) (dictum).

26. South Dade Broadcasting Co., Inc., 15 P & F RADIO REG. 231, 242 (1957); Television City, Inc., 14 P & F RADIO REG. 333, 462b (1957); Travellers Broadcasting Serv. Corp., 12 P & F RADIO REG. 689, 797 (1956); Western Gateway Broadcasting Corp., 9 F.C.C. 92, 102 (1942); FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 7 (1946). This criterion was said to be proper in Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 358 (D.C. Cir. 1949) (dictum).

27. KFAB Broadcasting Co., 12 P & F RADIO REG. 317, 393 (1956). This criterion was approved in *Simmons v. FCC*, 169 F.2d 670, 671 (D.C. Cir.), *cert. denied*, 335 U.S. 846 (1948). In that case the court of appeals said, at 671: "We are of the opinion that such program policy which makes no effort whatsoever to tailor the programs offered by the national network organization to the particular needs of the community served by the radio station does not meet the public service responsibilities of a radio broadcast licensee." See also *Network Broadcasting* 140-41. Even in an isolated community (Wolf Point, Montana) the Commission prefers an applicant who promises a local live program over one who proposes to bring metropolitan network broadcasts into the community. *Hi-Line Broadcasting Co.*, 13 P & F RADIO REG. 1017, 1044 (1957).

28. Foulkrod Radio Engineering Co., 14 F.C.C. 180, 190-91, 201 (1949). *Bay State Beacon, Inc. v. FCC*, 171 F.2d 826, 827 (D.C. Cir. 1948). The Commission will also give preference to an applicant proposing auxiliary studios in a nearby city or one whose service for other reasons will reach a broader audience. *Tampa Times Co.*, 10 P & F RADIO REG. 77, 129 (1955); *Central Conn. Broadcasting Co.*, 12 F.C.C. 855, 866 (1948). More elaborate broadcasting facilities, when related to programming, entitle an applicant to a preference. *WJR*, 9 P & F RADIO REG. 227, 260e, 260i (1954). Failure of the applicant to adhere to program proposals made with respect to another station may be treated as an adverse factor. *Television City, Inc.*, 14 P & F RADIO REG. 333, 453 (1957). *But see Tampa Times Co.*, 10 P & F RADIO REG. 77, 126-27 (1955) (dictum). Other criteria with respect to licensing are considered at notes 58-81 *infra* under the heading of "Diffusion."

29. 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 311 (1952). Section 311 was amended in 1952. Before that time the Commission had been authorized to withhold a license if the applicant had been found guilty of violating the antitrust laws by a federal court. After 1952 the Commission was directed to withhold the license if it had been revoked by a court order under the provisions of 48 Stat. 1087 (1934), 47

antitrust laws which have not been adjudicated in determining whether a license should issue. Despite the express provisions of the statute, which might be read as exhausting the Commission's powers in this respect, the courts have sustained the Commission in taking account of activities of applicants which might be considered a violation of anti-monopoly legislation.<sup>30</sup>

The statute also carefully limits the term of each license to a period of three years.<sup>31</sup> Considerable importance therefore attaches to the action of the Commission in passing upon applications for renewal. In some instances the Commission has had no difficulty in denying renewal. Thus an AM license was allowed to expire when the licensee had become hopelessly insolvent and his creditors had obtained possession of his broadcasting equipment.<sup>32</sup> Persistent disregard of the Commission's rules has similarly afforded ground for the denial of renewals.<sup>33</sup> Given a modicum of good conduct on the part of the licensee, however, renewal has tended to become automatic. Both the Commission and the courts have recognized that failure to renew the bulk of the licenses would endanger large investments and discourage the rendering of good service. As a practical matter, therefore, a newcomer cannot unseat an existing licensee.<sup>34</sup>

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U.S.C. § 313 (1952). The Commission may also revoke licenses for violation of the statute or its rules, particularly for operating on unassigned frequencies and the like. 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 312 (1952).

30. *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 34 (D.C. Cir. 1950); see *National Broadcasting Co. v. United States*, 319 U.S. 190, 222 (1943) (dictum). The Commission has experienced some difficulty in applying the foregoing rule, particularly with respect to applicants whose violations occurred in the somewhat remote past and those who were convicted of infringement of the antitrust laws under the doctrine of "soft competition." *Paramount Pictures, Inc., 8 P & F RADIO REG. 135, 138* (1952); see *Aladdin Radio & Television, Inc., 9 P & F RADIO REG. 1, 35* (1953) (dictum). Cf. *Southeastern Mass. Broadcasting Corp., 12 F.C.C. 363, 372* (1947); *ANTITRUST SUBCOMMITTEE REPORT 3236, 3298-302*; *Brown, Character and Candor Requirements for FCC Licensees*, 22 *LAW & CONTEMP. PROB.* 644, 648-49 (1957). There has been some complaint from the industry against the additional penalty of license revocation on the ground that persons engaged in other businesses are not subject to any such special jeopardy. *NATIONAL ASS'N OF BROADCASTERS, BROADCASTING AND THE BILL OF RIGHTS 167-68, 196* (1947). A prohibition in the statutes against the acquisition of telegraph facilities if the effect is to lessen competition apparently applies only to common carriers and not to broadcasters. 48 Stat. 1087 (1934), 47 U.S.C. § 314 (1952).

31. 48 Stat. 1083 (1934), as amended, 47 U.S.C. § 307(d) (1952). By 66 Stat. 717, 47 U.S.C. § 316 (1952), it provided that the Commission may modify a license if such action will promote the public interest, convenience or necessity. Apparently little resort has been had to the latter section.

32. *Sproul v. Federal Radio Comm'n*, 54 F.2d 444 (D.C. Cir. 1931). Comparable cases are *Boston Broadcasting Co. v. Federal Radio Comm'n*, 67 F.2d 505 (D.C. Cir. 1933); *Beebe v. Federal Radio Comm'n*, 61 F.2d 914 (D.C. Cir. 1932); *Technical Radio Lab. v. Federal Radio Comm'n*, 36 F.2d 111 (D.C. Cir. 1929).

33. *Greater Kampska Radio Corp. v. FCC*, 108 F.2d 5 (D.C. Cir. 1939). Cf. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) (renewal denied because applicant had made misrepresentations in application for license).

34. *Evangelical Lutheran Synod v. FCC*, 105 F.2d 793, 795 (D.C. Cir. 1939); *Don Lee Broadcasting System v. FCC*, 76 F.2d 998, 999 (D.C. Cir. 1935); see *Ashbacker*

## PROTESTS

When the Commission receives an application for a license "any party in interest" is permitted to protest its grant and participate in the hearing thereon.<sup>35</sup> In cases of prospective electrical interference the courts have insisted that existing licensees receive ample protection. Thus, in one case the Commission, without affording the operator of an existing AM station an opportunity to be heard, increased the power of stations operating on the same frequency in other areas of the country. As a result the injured licensee, who supposedly had enjoyed a regional channel, could only be heard in a twenty-mile radius about his antenna. The court held this action of the Commission to be erroneous, saying:

"The installation and maintenance of broadcasting stations involve a very considerable expense. Where a broadcasting station has been constructed and maintained in good faith, it is in the interests of the public and common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons. . . . Unless such a policy is maintained, the public will not receive the character of service which we are convinced the Radio Act was intended to insure. No station that has been operated in good faith should be subjected to a change of frequency or power or to a reduction of its normal and established service area, except for compelling reasons."<sup>36</sup>

More difficulty has been experienced in coping with the protests of existing licensees who could not establish electrical interference and claimed mere economic injury. In other words, the new applicant proposes to operate in the same territory but on a different wave length.

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Radio Corp. v. FCC, 326 U.S. 327, 332 (1945) (dictum). In the *Evangelical Lutheran* case the court said at 795: "The public interest requires, on the contrary, that existing arrangements be not disturbed without reason. 'The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of established stations should arbitrarily be withdrawn from them, and appropriated to the use of other stations.'" See also *Network Broadcasting* 162-63. Compare Levin, *Workable Competition and Regulatory Policy in Television Broadcasting*, 35 LAND ECON. 101, 111 (1958). Some further discussion of the renewal problem will be found at notes 82-111 *infra* under the heading of "Production Controls."

35. 48 Stat. 1085 (1934), as amended, 47 U.S.C. § 309(c) (Supp. V, 1958). But compare 48 Stat. 1089 (1934), as amended, 47 U.S.C. § 319(c) (1952). See Huntley, *Growing Pains in Broadcast Regulation*, 14 WASH. & LEE L. REV. 186, 210 (1957); Wall & Jacob, *Communications Act Amendments, 1952—Clarity or Ambiguity*, 41 GEO. L.J. 135, 147 (1953).

36. *Journal Co. v. Federal Radio Comm'n*, 48 F.2d 461, 463 (D.C. Cir. 1931). To the same effect, the *Chicago Fed'n of Labor v. Federal Radio Comm'n*, 41 F.2d 422, 423 (D.C. Cir. 1930). Compare *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); *Beaumont Broadcasting Corp. v. FCC*, 202 F.2d 306, 309 (D.C. Cir. 1952). The regulations are found in 47 C.F.R. § 3.612 (1958). Note that the problem of electrical interference is closely allied to the geographic allocation of licenses discussed in text accompanying note 16 *supra*.



Here the law has crystallized into a twofold rule. In the first place, the existing licensee has standing to participate in the licensing proceeding. It may be heard on the issues which would otherwise come before the Commission.<sup>37</sup> At the same time the economic injury threatened to the existing station is not to be considered in determining whether the new applicant shall prevail in securing his license. On that subject the United States Supreme Court said some years ago:

“We hold that resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the petitioner [FCC] must weigh, and as to which it must make findings, in passing on an application for a broadcasting license.”<sup>38</sup>

Hence by the weight of authority a protesting party may only adduce evidence with respect to the applicant's financial responsibility, technical

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37. *Elm City Broadcasting Corp. v. United States*, 235 F.2d 811, 815 (D.C. Cir. 1956); *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511 (D.C. Cir. 1955); *Metro-politan Television Co. v. FCC*, 221 F.2d 879 (D.C. Cir. 1955); *South-Eastern Enterprises, Inc.*, 13 P & F RADIO REG. 139, 141-42 (1957); *Versluis Radio & Television, Inc.*, 9 P & F RADIO REG. 102 (1953). An existing licensee may not secure an injunction against the issuance of a license to a rival station by the Federal Communications Commission; the matter lies in the discretion of the Commission. *Sunshine Broadcasting Co. v. Fly*, 33 F. Supp. 560 (D.D.C. 1940). A licensee has standing to protest a change in the transmitter location of another licensee whereby that other might obtain network affiliation which would make economic competition more difficult. *Spartan Broadcasting Co.*, 10 P & F RADIO REG. 287, 290 (1954), *rev'd sub. nom.* *Greenville Television Co. v. FCC*, 221 F.2d 870, 872 (D.C. Cir. 1955).

38. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 473 (1940). *Accord*, *Magnolia Petroleum Co. v. FCC*, 76 F.2d 439, 441 (D.C. Cir. 1935); *Kaiser Hawaiian Village Radio, Inc.*, 15 P & F RADIO REG. 84a (1957); *Iredell Broadcasting Co.*, 13 P & F RADIO REG. 996, 998-99 (1957); *South-Eastern Enterprises, Inc.*, 13 P & F RADIO REG. 139, 145, 151 (1957); *WWSW*, 14 P & F RADIO REG. 492, 495 (1956); *Radio Wis., Inc.*, 10 P & F RADIO REG. 1224, 1250 (1955); *Voice of Cullman*, 14 F.C.C. 770, 771, 775 (1950); *Independent Broadcasting Co.*, 9 F.C.C. 40, 41 (1941). Deintermixture in the St. Louis area was denied on the same general theory. Amendment of § 3.606, 10 P & F RADIO REG. 7, 9 (1953). See also *FCC, AN ECONOMIC STUDY OF STANDARD BROADCASTING I* (1947); *Hearings on S. 133* at 33, 34. Application of public utility principles was also denied in *Pulitzer Publishing Co. v. FCC*, 94 F.2d 249 (D.C. Cir. 1937). In that case Pulitzer already had an existing AM license and had applied for a change of frequency. Specifically, Pulitzer had applied for the exclusive use of the frequency it then shared with another licensee. Then a third party applied for a license for another AM station on a different frequency in the same area. The Commission granted that license. Pulitzer contended that the license should not have been granted until its application for longer hours had been acted upon; but the court sustained the Commission, saying that since a radio license was not the same as an ordinary public utility franchise there was no need to let one already in the field expand before licensing another broadcaster. *Id.* at 251-52. The court said: “Its [Pulitzer's] theory in this respect is that the established station is entitled to priority of consideration over an application for the establishing of a new station. The ground of this contention is the claim that a broadcasting licensee is a public utility, and from this ground Pulitzer argues that a new utility ought not to be allowed to enter the field until an old established utility is given an opportunity to extend its service. In other words, that a new license should not be granted until it is determined whether the facility already in the field can meet the full requirements of public convenience and necessity . . . . But we have never said that a radio broadcasting station is a public utility in the sense in which a railroad is a public utility.” *Id.* at 251.

qualifications and other subjects which would be considered by the Commission regardless of the existence of the protest. At the same time several decisions indicate that the Commission has some power to protect existing licensees. In the opinion announcing the rule that no protection was to be afforded the Court nevertheless indicated that the Commission should take account of potential rivalry to the extent that too much competition would put all licensees out of business and hence make it impossible for any to serve the public.<sup>39</sup> Similar views have been expressed by lower courts. Thus, it has been said:

"The mere loss of profit to an existing station would not, of course, be an adequate basis for denying a license to a proposed station. If, however, the result of the grant to the proposed station is to make it financially impossible for an existing station to continue its operations or maintain a high level of service, the resultant loss of service might be adverse to the public interest and therefore warrant denying the new license."<sup>40</sup>

And from time to time an all-out protectionist policy has been vigorously urged upon the Commission.<sup>41</sup>

Perhaps UHF licensees have sought shelter more earnestly than any other group. The Commission, in an effort to provide each area with a broadcast service at the earliest possible time, rapidly doled out all available VHF television channels. The UHF channels are less desirable because their signals are weaker. Furthermore, since only

39. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476 (1940); Note, *Economic Injury in FCC Licensing: The Public Interest Ignored*, 67 *YALE L.J.* 135, 136 n.5 (1957).

40. *Democrat Printing Co. v. FCC*, 202 F.2d 298, 302 n.14 (D.C. Cir. 1952). In the *Democrat Printing Co.* case the court held at 302 that it was improper for the Federal Communications Commission to grant a new license which would cause interference to an existing AM licensee without evidence on the economic impact on the broadcaster first in the field. Even stronger language is found in *Yankee Network, Inc. v. FCC*, 107 F.2d 212 (D.C. Cir. 1939). In that case the Northern Corporation, already in possession of one AM license, applied for a change of frequency and increased power. Four other licensees protested but its change was nevertheless granted. The other licensees appealed and the court of appeals found it had jurisdiction but that the appeals should be dismissed on substantive grounds. The court used language indicating that it thought an existing licensee had something closely akin to a property right and that licensees should be protected from destructive competition. *Id.* at 216, 217, 219. The action of the Commission, however, was affirmed. See *Great W. Broadcasting Ass'n v. FCC*, 94 F.2d 244, 248 (D.C. Cir. 1937) (dictum); *American So. Broadcasters*, 11 P & F RADIO REG. 1054, 1057 (1955). See also *Network Broadcasting 71*; Conrad, *Economic Aspects of Radio Regulation*, 34 *VA. L. REV.* 283, 294, 303 (1948); Note, *The "Fringe Area" of Public Utilities*, 58 *W. VA. L. REV.* 390, 397 (1956). Compare *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957); *Tri-State Broadcasting Co. v. FCC*, 107 F.2d 956 (D.C. Cir. 1939).

41. Note, *Economic Injury in FCC Licensing: The Public Interest Ignored*, 67 *YALE L.J.* 135, 141 (1957); Conrad, *Economic Aspects of Radio Regulation*, 34 *VA. L. REV.* 283, 302-03 (1948). Compare *Voice of Cullman*, 14 *F.C.C.* 770, 777 (1950) (concurring opinion).

VHF stations were in operation, manufacturers of receiving sets generally did not equip their products to receive UHF signals. Thus, when some UHF channels were sought and assigned it was found difficult to compete with VHF stations in the same areas.<sup>42</sup> Failures among the VHF operators are negligible but many UHF stations have left the air. As a result the proprietors of the UHF stations seek "de-intermixture," meaning the revocation of the VHF licenses and the assignment of all licensees to UHF channels so as to provide more equal competition among licensees.<sup>43</sup> At first the Commission decided to allocate UHF and VHF channels to the same areas and for a time it stuck to its guns.<sup>44</sup> More recently, however, both the courts and the Commission have indicated a tendency to favor the UHF licensee.<sup>45</sup> Any widespread program of cutting VHF stations off the air would not only endanger the continuance of service but also give rise to widespread protests upon the part of persons whose receiving sets are not equipped to view UHF channels. Since the UHF channels, however, greatly exceed in number those available for VHF transmission, the issue is crucial to a determination of how many broadcasting services shall be available in each area of the country.<sup>46</sup>

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42. 20 FCC ANN. REP. 91 (1954); *Television Inquiry* pt. 2; Huntley, *Growing Pains in Broadcast Regulation*, 14 WASH. & LEE L. REV. 186, 195 (1957); Note, *Diversification and the Public Interest: Administrative Responsibility of the FCC*, 66 YALE L.J. 365, 391-92 (1957).

43. ANTITRUST SUBCOMMITTEE REPORT 3178, 4529, 4559, 4560, 5272-74; House Comm. on the Judiciary, Antitrust Subcomm., *Report on Television Broadcasting*, H.R. REP. No. 607, 85th Cong., 1st Sess. 6-7, 9 (1957); *Network Broadcasting* 18-19, 226. For obvious reasons the UHF licensees have had difficulty in securing network affiliation.

44. *Gerico Inv. Co. v. FCC*, 240 F.2d 410, 413 (D.C. Cir. 1957); *Coastal Bend Television Co. v. FCC*, 234 F.2d 686 (D.C. Cir. 1956); Amendment of § 3.606 of Commission's Rules, 8 P & F RADIO REG. 467, 468-69 (1952). See *Lebanon Broadcasting Co.*, 14 P & F RADIO REG. 297, 320, 324 (1957) (dictum); *Network Broadcasting* 57 n. 24.

45. *Greylock Broadcasting Co. v. United States*, 231 F.2d 748 (D.C. Cir. 1956); *Durham Broadcasting Enterprises, Inc.*, 17 P & F RADIO REG. 296, 301 (1958); *Deep So. Broadcasting Co.*, 14 P & F RADIO REG. 1001, 1117 (1956); *WJR*, 13 P & F RADIO REG. 763, 825, 846 (1956); 23 FCC ANN. REP. 3 (1957); *Network Broadcasting* 76-78; House Comm. on the Judiciary, Antitrust Subcomm., *Report on Television Broadcasting*, H.R. REP. No. 607, 85th Cong., 1st Sess. 16-17 (1957); see ANTITRUST SUBCOMMITTEE REPORT 3250-51.

46. In turn the UHF controversy bears on the number of networks which can be operated since a greater number of UHF channels would permit the formation of more chains. *Id.* at 4492.

Broadcasting on the FM frequencies has had a history somewhat akin to that of the UHF channels. At one time FM broadcasting seemed filled with promise; but with change of frequency, competition from television and the like, audiences declined drastically and about 85% of the FM broadcasters became affiliated with AM outlets. The Commission reluctantly permitted the FM licensees to engage in activities which differed slightly from broadcasting. At last reports FM was shown to be enjoying something of a revival. HEAD, *BROADCASTING IN AMERICA* 149 (1956); WILCOX, *PUBLIC POLICY TOWARDS BUSINESS* 660-61 (1955); 20 FCC ANN. REP. 6-7 (1954); 21 FCC ANN. REP. 103-04 (1956); 23 FCC ANN. REP. 4 (1957); Goldin, *Economic and Regulatory Problems in the Broadcast Field*, 30 LAND ECON. 223, 232 (1954).

## DEVELOPMENT OF BROADCASTING

By whatever standards might be thought applicable AM and VHF broadcasting have enjoyed phenomenal growth. In 1943, for example, there were only 912 AM stations on the air. In 1954 the number had grown to 2,565 and the increase in radio revenue was even more spectacular.<sup>47</sup> Only six VHF licenses had been issued at the end of 1943 but by June 30, 1957, 774 television stations of all types had been authorized, of which 408 were in the VHF band.<sup>48</sup> The number of licensees is not of great significance since the range of the various types of broadcast differs significantly: mere national totals do not indicate the amount of service available to any particular area.

The situation in radio differs markedly from that which obtains in television. In the first place, many AM broadcasters occupy regional or clear channel frequencies and hence may be heard over large geographic areas. In the second place, their absolute number is larger than that of the television broadcasters and in the period following World War II the bulk of new radio licenses has been granted to operators in small communities. As a result in many areas listeners have a significant range of choice with respect to radio service.<sup>49</sup> Despite its phenomenal growth television has not achieved a comparable position. As of 1956 only nine communities had four or more television stations. Some twenty-six had access to three stations and eighty-one enjoyed two services. All the rest of the stations were isolated in single service locations.<sup>50</sup> In part this situation reflects a shortage of available channels; it also reflects a considerable element of indivisibility. In the operation of a VHF transmitter costs can only be recovered if spread over a wide audience and hence there is no room for a second station in less populated areas.<sup>51</sup> Availability of network affiliation is

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47. 14 FCC ANN. REP. 26 (1948); 20 FCC ANN. REP. 106 (1954); *Network Broadcasting* 605. The peak of FM licenses was reached in 1949 when 865 were outstanding. It fell to 569 in 1954, of which only 553 were in operation. 20 FCC ANN. REP. 106 (1954).

48. 15 FCC ANN. REP. 30 (1949); 23 FCC ANN. REP. 3 (1957). In June 1957 more than 90 % of the population of the United States could receive at least one television signal. *Ibid.*

49. 16 FCC ANN. REP. 106 (1951); HEAD, BROADCASTING IN AMERICA 150, 375-76 (1956). But compare Comment, *Old Standards in New Context: A Comparative Analysis of FCC Regulations*, 18 U. CHI. L. REV. 78, 91 (1950).

50. ANTITRUST SUBCOMMITTEE REPORT 3110.

51. Even one station may have difficulty operating in a sparsely populated area. The networks have difficulty in selling such stations to national advertisers and both the leading chains have adopted special programs of discounts to encourage the national advertisers to order those stations on their hookups. *Id.* at 5181-82, 6320-21; *Network Broadcasting* 228. Compare HEAD, BROADCASTING IN AMERICA 168 (1956). By regulation the Commission will not issue a television license to one who owns a peculiarly suitable transmission site and refuses to share it with others. 47 C.F.R. § 3.635 (1958).

another important factor and it works in two directions: the limited number of networks makes it difficult to establish more than three stations in a community and the paucity of stations in turn renders it impossible to operate a large number of networks.<sup>52</sup>

It may be improper to attach significance solely to the number of broadcasters of a particular type in a single area. The various types of broadcasters are in competition both with themselves and with magazines, newspapers, billboards and many other media of advertising. The dynamic rise of television as an advertising medium strongly suggests that the "relevant market" should be defined to include those other services; after all, much of the advertising that is on television today must have been in the other media only a few short years ago.<sup>53</sup>

In these circumstances it is scarcely surprising that a difference of view exists as to the competitive character of the broadcasting industry. Some observers have found the number and calibre of the licensees adequate to provide vigorous competition.<sup>54</sup> Certainly the situation in the United States has furnished a vivid contrast to the monopoly position enjoyed by governmental broadcasters abroad.<sup>55</sup> On the other hand some observers characterize even the radio end of the spectrum as a "virtual monopoly" and there is considerable complaint with respect

52. Goldin, *Economic and Regulatory Problems in the Broadcast Field*, 30 LAND ECON. 223, 229 (1954). Note also the situation of the "overshadowed" towns: they cannot secure network service if there is an existing affiliate in the nearby large city. *Network Broadcasting* 248. See also the discussion under the heading "The Network Controversy" at notes 112-47 *infra*.

As indicated above, a station in a large market has about the same costs of operation as one in a small market, which makes the big city broadcaster much more profitable. In addition he may pay less in the way of transmission costs. ANTITRUST SUBCOMMITTEE REPORT 3184; Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 LAW & CONTEMP. PROB. 549, 554-55 (1957). Apparently the costs involved in setting up broadcasting stations have not deterred would-be entrants into the industry. FCC, REPORT ON CHAIN BROADCASTING 33 (1941); Goldin, *Economic and Regulatory Problems in the Broadcast Field*, 30 LAND ECON. 223 (1954). In some instances costs are substantial but apparently investor information is sufficiently good to overcome them. Compare HALE & HALE, MARKET POWER § 3.12 (1958). But compare ROSE, NATIONAL POLICY FOR RADIO BROADCASTING 88 (1940).

53. Ohio Valley Broadcasting Corp., 10 P & F RADIO REG. 452, 456 (1954); Paramount Television Prods., 8 P & F RADIO REG. 541, 631 (1953) (dissenting opinion); HEAD, BROADCASTING IN AMERICA 176-77, 220 (1956); FCC, AN ECONOMIC STUDY OF STANDARD BROADCASTING 93-94 (1947); Levin, *Competition Among Mass Media and the Public Interest*, 18 PUBLIC OPINION Q. 62, 78 (1954); *Hearings on S. 133 at 43*; *Television Inquiry* 1653; *Network Broadcasting* 64. See HALE & HALE, MARKET POWER § 3.4 (1958). But see *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957).

54. NATIONAL ASS'N OF BROADCASTERS, BROADCASTING AND THE BILL OF RIGHTS 137, 193 (1947); ANTITRUST SUBCOMMITTEE REPORT 6060; CLEMENS, ECONOMICS AND PUBLIC UTILITIES 379-80 (1950); *Network Broadcasting* 102, 606. The Commission may have suggested that seven broadcasting stations in a service area constitute a sufficient number. See *Boston Broadcasting Co. v. Federal Radio Comm'n*, 67 F.2d 505, 506 (D.C. Cir. 1933).

55. Coase, *The Development of the British Television Service*, 30 LAND ECON. 207, 211-12 (1954).

to the number of licenses issued for television broadcasting.<sup>56</sup> An interesting question arises as to whether programs would be "better" if licenses were more or less freely granted.<sup>57</sup> That, however, goes to the quality of the product and not to the competitive character of the industry.

### DIFFUSION

In discussing the comparative hearing licensing procedure we have deferred consideration of the Federal Communications Commission's policy of diffusing<sup>58</sup> broadcast licenses over a large number of persons. That policy has several facets. In the first place, the Commission enforces a rigid policy against the issuance of a license to a person who already enjoys control of the same type of medium in the same area. Thus, a person who is already the licensee of one AM station in a given territory will not be given consideration as an applicant for a second license therein.<sup>59</sup> The Commission has also limited control of similar broadcasting facilities in other areas. At the present time it has an over-all limitation of seven AM, seven FM and seven TV broadcasting licenses regardless of location.<sup>60</sup> Despite that fact it appears that some

56. ANTITRUST SUBCOMMITTEE REPORT 3995, 4698, 4705; *Network Broadcasting* 520; Conrad, *Economic Aspects of Radio Regulation*, 34 VA. L. REV. 283, 286 (1948). An interesting analysis of the relationship between population, geographic area and the limited number of frequencies will be found in Innis, *The Geographic Characteristics of Radio*, 20 CAN. J. OF ECON. & POL. SCI. 83, 87 (1954).

57. Steiner, *Program Patterns and Preferences*, 66 Q.J. OF ECON. 194, 206, 219 (1952) (more listener satisfaction might result from the control of all broadcasting stations by a discriminating monopoly than under present patterns of ownership).

58. The FCC refers to its policy of spreading broadcast licenses over a large number of persons as "diversification" of the control of media of communication. The word "diversification" has, however, another meaning in an antitrust context. HALE & HALE, *MARKET POWER* ch. 6 (1958). Accordingly we have thought it preferable to refer to that policy as "diffusion."

59. 47 C.F.R. §§ 3.35, 3.136, 3.240, 3.636(a) (1958); *Network Broadcasting* 110, 555; approved in *Plains Radio Broadcasting Co. v. FCC*, 175 F.2d 359, 363 (D.C. Cir. 1958).

60. The regulations referred to are known as the multiple ownership rules. 47 C.F.R. §§ 3.240, 3.636(a) (2) (1958). Although the rules are phrased in terms of a ceiling of seven stations and contemplate that less may be permitted, as a practical matter no applicant holding less than seven licenses has been turned down on the ground that an additional award would constitute undue concentration of control. *Network Broadcasting* 555. The validity of the multiple ownership rules was sustained in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). The rules have been changed from time to time and provided for different numbers of stations at various times in the past. Two of the TV licenses must be in the UHF band. 20 FCC ANN. REP. 5-6 (1954).

The multiple ownership rules apply in uncontested proceedings as well as in comparative hearings. In the latter category, however, the Commission takes the position that it would favor applicants without existing broadcast facilities even though other applicants own fewer stations than those permissible under the multiple ownership regulations. *WJR*, 9 P & F RADIO REG. 227, 260b (1954). This position of the Commission was approved in *Plains Radio Broadcasting Co. v. FCC*, 175 F.2d 359, 363 (D.C. Cir. 1949). In that case the court said: "It seems to us that in considering the public interest and the maintenance of competition in the

of the most important and lucrative broadcasting facilities are owned by "chain" broadcasters.<sup>61</sup>

A bitter controversy has raged over the granting of licenses to applicants owning other types of media in the same area. That controversy has focused on the applications of newspaper publishers seeking to diversify their operations into broadcasting fields. The Commission has repeatedly held that publication of a newspaper in the same area is an adverse factor<sup>62</sup> but at least in recent times it has not denied such applications without weighing other considerations.<sup>63</sup> The courts have approved this position, saying:

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dissemination of news, the Commission cannot select the one fact that one applicant is the owner of the town's only newspaper and ignore the fact that the other applicant is directly related to several newspapers and radio stations in the same general section of the country (although not in this immediate community). A concentration of news dissemination by a chain of stations over an area would seem to us to be a factor in a comparative evaluation from the standpoint of competition and news dissemination." Compare *Jefferson Standard Broadcasting Co.*, 11 P & F RADIO REG. 1059, 1060 (1955) (dissenting opinion). The foregoing principle applied by the Commission appears to be in conflict with its view that an applicant in a comparative proceeding is entitled to preference by reason of its greater broadcasting experience. *E.g.*, *WJR*, *supra* at 260; *Network Broadcasting* 569.

61. *Id.* at 562; Levin, *Economic Structure and Regulation of Television*, 72 Q.J. OF ECON. 424, 429 (1958). It is claimed that multiple owners enjoy advantages in competing for network affiliation, obtaining better terms for networks and other suppliers and in selling time. *Network Broadcasting* 245-46, 563, 566, 640. Apparently the Commission does not object to a multiple owner selling time on several of his stations in a "package" combination, including a discount for national advertisers. Richard E. Lewis, Jr., 15 P & F RADIO REG. 382c, 395 (1957). But compare *Rochester Broadcasting Co.*, 14 P & F RADIO REG. 560, 563 (1956).

62. *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957); *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 518-19 (D.C. Cir. 1955); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677, 683 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951); see *Stahlman v. FCC*, 126 F.2d 124, 127 (D.C. Cir. 1942) (dictum); *Tampa Times Co.*, 10 P & F RADIO REG. 77, 138 (1955); cf. *WHITE, THE AMERICAN RADIO* 158, 159, 160, 161 (1947); Heckman, *Diversification of Control of the Media of Mass Communication*, 42 GEO. L.J. 378, 380-90 (1954).

63. Two particularly interesting cases are *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955), and *Don Lee Broadcasting Sys. v. FCC*, 76 F.2d 998 (D.C. Cir. 1935). In the *Allentown* case the Commission's choice lay between licensing in Allentown or an adjacent city. In one area four stations were already in operation while only one served the other city. The applicant in the town with only one broadcasting service was affiliated both with the local newspaper and the local television broadcasting station. The choice of the Commission, approved by the Court, was to encourage competition within the sparsely served area despite the newspaper affiliation. The Court particularly adverted to the fact that the applicant was affiliated with the newspaper and said, 349 U.S. at 363, that that fact was not in itself a bar to the grant of a license. The Court also said, 349 U.S. at 362: "Fairness to communities is furthered by recognition of local needs for a community radio mouthpiece. The distribution of a second license to a community in order to secure local competition for originating and broadcasting programs of local interest appears to us to be likewise within the allowable area of discretion." In the *Don Lee* case, two AM licensees applied for renewal of their licenses and a newcomer applied for their frequencies. The two existing licensees were prepared to sell out, if their licenses were renewed, to a Hearst company which published an important newspaper in the area. The Communications Commission approved the renewals and the court of appeals affirmed, saying, 76 F.2d at 1000, that the service which the publishing company proposed to render to the public would undoubtedly have high character and great value. *Accord*, *Hi-Line Broadcasting Co.*, 13 P & F RADIO REG. 1017,

"We hold the Commission is entitled to consider diversification of control in connection with all other relevant facts and to attach such significance to it as its judgment dictates.

"This does not mean that the owner of a newspaper is disqualified as a licensee. . . . Nor does it mean Commission may reject a newspaper's application and grant that of a competing non-newspaper application without also considering and comparing all other relevant factors. But it does mean that the Commission is free to let diversification of control of communication facilities turn the balance, if it reasonably concludes that it is proper to do so."<sup>64</sup>

Ownership of other media of communication has also been considered an adverse factor. Thus, if an applicant for a television license already holds an AM license the Commission will normally prefer a competing applicant.<sup>65</sup> It appears, however, that ownership of radio or theatre facilities is less of a handicap to a TV applicant than publication of a newspaper.<sup>66</sup> On the other hand the Commission has not confined its demerits to the communications field: if the applicant enjoys a dominant economic power in the community without any connection with newspapers, theatres, magazines or other means of communication he may still be passed over in favor of another less powerful would-be licensee.<sup>67</sup>

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1047 (1957); Easton Publishing Co., 8 P & F RADIO REG. 31, 66 (1953); W. H. Greenhow Co., 8 P & F RADIO REG. 730, 761 (1952); FCC, *Newspaper Ownership of Radio Stations*, 9 Fed. Reg. 702 (1944). See Heckman, *Diversification of Control of the Media of Mass Communication*, 42 GEO. L.J. 378, 390-93 (1954); Conrad, *Economic Aspects of Radio Regulation*, 34 VA. L. REV. 283, 291-92 (1948). In Edward H. Butler, 9 F.C.C. 141 (1942), one newspaper publisher had two AM stations in the area and the other publisher in the city had none. In such circumstances the Commission approved the transfer of one station to the second publisher, apparently adopting the theory of countervailing power. In Easton Publishing Co., 8 P & F RADIO REG. 31, 66 (1953), the publisher of a newspaper promised to keep his radio broadcasting operation wholly separate from the newspaper despite common ownership. This somewhat naive commitment apparently was given weight by the Commission.

64. *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957).

65. *Sunbeam Television Corp. v. FCC*, 243 F.2d 26, 27 (D.C. Cir.), *reversing* *Biscayne Television Corp.*, 15 P & F RADIO REG. 317, 320, 11 P & F RADIO REG. 1113, 1163, 1165 (1957); *Puerto Rico Advertising Co.*, 9 F.C.C. 181, 185-86 (1942). The Commission has gone so far as to refuse to waive its rule against entertaining multiple applications in the same area despite a showing that an existing FM station could not be self-supporting unless integrated with a proposed AM station. The Commission said that mere monetary losses were not a sufficient ground for waiver. *Johnston Broadcasting Co.*, 7 P & F RADIO REG. 291, 295 (1951). See SIEPMANN, *RADIO'S SECOND CHANCE* 244, 246 (1946).

66. *Southland Television Co.*, 10 P & F RADIO REG. 699, 749, 758 (1955) (*semble*); *Radio Ft. Wayne*, 9 P & F RADIO REG. 1221, 1222e(1) (1955); *North-eastern Ind. Broadcasting Co.*, 9 P & F RADIO REG. 261, 318 (1953); *Macon Television Co.*, 8 P & F RADIO REG. 703, 705, 897, 901 (1953).

67. *Midland Broadcasting Co.*, 12 F.C.C. 611, 623-24 (1948). See *Travellers Broadcasting Serv. Corp.*, 12 P & F RADIO REG. 689, 790 (1956) (*dictum*).



Ownership of other media, however, is not a per se disqualification.<sup>68</sup> It is merely a factor to be considered in granting a license. The Commission takes this position on the ground that it must give weight to other factors, such as the experience of the applicant.<sup>69</sup> As a result of such considerations, or perhaps because it has not always been zealous in the application of its principle that ownership of competing media should disqualify a would-be licensee, many instances of cross-ownership now exist. It has been said, for example, that in 1954 newspapers were affiliated with nineteen per cent of all AM broadcasting stations, thirty-three per cent of all FM stations and thirty-seven per cent of all television stations.<sup>70</sup> This situation has been a source of complaint by those who believe that no one person should be permitted to own more than one communication medium in a given area.<sup>71</sup>

Even ownership of communications media in other geographic areas has met with the disfavor of the Communications Commission. In comparative proceedings it has tended to award applications to those who have less total interests in the communications field regardless of geographic location.<sup>72</sup> On the other hand, ownership of newspapers and broadcasting facilities in other areas is not a bar<sup>73</sup> to the issuance of a license and the Commission has several times indicated its realization of a distinction between ownership of local media and ownership of non-competing facilities in distant territories.<sup>74</sup>

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68. *E.g.*, *Biscayne Television Corp.*, 15 P & F RADIO REG. 317, 324, *rev'd sub nom.* *Sunbeam Television Corp. v. FCC*, 243 F.2d 26 (D.C. Cir. 1957).

69. WHITE, *THE AMERICAN RADIO* 159 (1947); Huntley, *Growing Pains in Broadcast Regulation*, 14 WASH. & LEE L. REV. 186, 192-93 (1957); *Network Broadcasting* 105, 118-19; Goldin, *Economic and Regulatory Problems in the Broadcast Field*, 30 LAND ECON. 223, 232 (1954).

70. *Id.* at 233; WILCOX, *PUBLIC POLICY TOWARD BUSINESS* 666-67 (1955); Levin, *Competition Among Mass Media and the Public Interest*, 18 PUBLIC OPINION Q. 62 (1954); 7 FCC ANN. REP. 25-26 (1941); 13 FCC ANN. REP. 20-21 (1947). Compare the efforts of the Securities and Exchange Commission to separate ownership of gas and electric public utilities. WILCOX, *op. cit. supra* at 514. Public Utilities Holding Company Act of 1935, 49 Stat. 817, 15 U.S.C. § 79i (1952).

71. *Network Broadcasting* 103, 121-24, 241; Note, *Diversification and the Public Interest: Administrative Responsibility of the FCC*, 66 YALE L.J. 365, 367, 369-70, 375 (1957). In part the complaint is based on the theory that owners of multiple media enjoy cost advantages which make competition difficult for rivals.

72. *Federal Broadcasting Sys. v. FCC*, 225 F.2d 560, 563-64 (D.C. Cir.), *cert. denied*, 350 U.S. 923 (1955); *KFAB Broadcasting Co.*, 12 P & F RADIO REG. 317, 395-96 (1956); *WMBD, Inc.*, 11 P & F RADIO REG. 533, 607 (1956); *Richmond Newspapers, Inc.*, 11 P & F RADIO REG. 1234, 1237e (1955); *Southern Tier Radio Serv., Inc.*, 11 P & F RADIO REG. 143, 207, 211 (1954); *KTBS, Inc.*, 10 P & F RADIO REG. 811, 876a (1955); *McClatchy Broadcasting Co.*, 9 P & F RADIO REG. 1190, 1220i (1954); *Enterprise Co.*, 9 P & F RADIO REG. 816, 8180, *rev'd on other grounds*, 231 F.2d 708, 709-10 (D.C. Cir. 1955); see WHITE, *THE AMERICAN RADIO* 158, 162 (1947); *Midwestern Broadcasting Co.*, 15 P & F RADIO REG. 479, 505 (1958) (*dictum*); *Network Broadcasting* 108.

73. *E.g.*, *Alladin Radio & Television, Inc.*, 9 P & F RADIO REG. 1, 40 (1953), further proceedings reported in 10 P & F RADIO REG. 773 (1954).

74. *Television City, Inc.*, 14 P & F RADIO REG. 333, 462-63 (1957); *KFAB Broadcasting Co.*, 12 P & F RADIO REG. 317, 395 (1956); *Biscayne Television Corp.*, 11 P & F RADIO REG. 1113, 1163 (1956); *Radio Wis., Inc.*, 10 P & F RADIO REG. 1224, 1246-47 (1955). See WHITE, *THE AMERICAN RADIO* 158-59 (1947).

On the surface the Commission's attitude toward ownership of other communications media is perplexing. Little account is taken of geographic dispersion,<sup>75</sup> and the multiple ownership rules themselves permit control of twenty-one different broadcast facilities in addition to newspapers and other media.<sup>76</sup> In part the Commission appears to have been trying to equalize competitive conditions in favoring the single station licensee against the competition of those who enjoy the alleged advantages of multiple ownership.<sup>77</sup> In some measure, however, the Commission appears merely to be attempting to equalize wealth by denying licenses to those with greater economic resources. The Commission's preference for owner-management of broadcasting facilities<sup>78</sup> lends credence to that view of its motivation. In addition, and perhaps more important, the Commission is fearful lest multiple ownership, no matter how geographically dispersed, may give rise to undue political power and influence over public opinion.<sup>79</sup> On the other hand, as indicated above, the Commission's preferences have on numerous occasions yielded to other factors,<sup>80</sup> and in this connection it is well to note that the commercial impetus for television broadcasting came from the radio broadcasting industry.<sup>81</sup>

75. HALE & HALE, *MARKET POWER* §3.6 and ch. 7 (1958).

76. Huntley, *Growing Pains in Broadcast Regulation*, 14 WASH. & LEE L. REV. 186, 203-04 (1957).

77. *Network Broadcasting* 564, 565; Note, *Diversification and the Public Interest: Administrative Responsibility of the FCC*, 66 YALE L.J. 365, 367, 368 (1957). The actual effect of the Commission's policies upon competition would be difficult to determine. Compare Levin, *Competition Among Mass Media and the Public Interest*, 18 PUBLIC OPINION Q. 62, 73 (1954). At times the Commission has displayed a somewhat naive attitude toward multiple ownership saying, for example, that a newspaper publisher applicant could be awarded a license because he did not propose joint rates with the prospective television station and hence no lessening of competition for advertising would result. See Tampa Times Co., 10 P & F RADIO REG. 77, 138 (1955) (dictum). Compare Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957). On the relationship between radio and newspaper control of news gathering facilities, compare Harris, *Radio and the Press*, 177 ANNALS 163 (1935), with Dill, *Radio and the Press: A Contrary View*, 177 ANNALS 170 (1935).

78. KTVS, Inc., 10 P & F RADIO REG. 811, 872 (1955); Tampa Times Co., 10 P & F RADIO REG. 77, 136 (1955); Homer Rodeheaver, 12 F.C.C. 301, 308 (1947).

79. Sunbeam Television Corp. v. FCC, 243 F.2d 26, 28 (D.C. Cir. 1957); *Network Broadcasting* 107, 109, 592. The authors of the last cited study report that the concentration of station ownership in the top twenty-five market areas of the United States causes them "grave concern." *Id.* at 562. From an economic standpoint, of course, lumping together the twenty-five largest markets has little, if any, significance but compare United States v. Paramount Pictures, Inc., 334 U.S. 131, 172-73 (1948), in which "first-run" theatres in the ninety-two largest cities in the United States were found to constitute a relevant market for antitrust purposes.

From time to time the political interests of the Commission have taken on a more sinister aspect. Voliva v. WCBD, Inc., 313 Ill. App. 177, 39 N.E.2d 685 (1942); Heckman, *Diversification of Control of the Media of Mass Communication*, 42 GEO. L.J. 378, 380 (1954).

80. It may, for example, be necessary to permit newspaper publishers to own broadcasting facilities in order to permit them to survive. A similar situation may obtain with respect to FM broadcasting. Note, *Diversification and the Public Interest: Administrative Responsibility of the FCC*, 66 YALE L.J. 365, 372 (1957).

81. *Network Broadcasting* 17.

## PRODUCTION CONTROLS

For obvious reasons the Commission fixes the location of transmitters, the frequencies employed in broadcasting, the type of antenna which may be utilized, hours of transmission and the minimum and maximum power which the licensees may employ.<sup>82</sup> In addition, it exercises some control over licensees for administrative reasons. The Commission, for example, relies heavily upon statements made by applicants themselves in seeking licenses and has found it necessary to revoke such licenses when misrepresentations were disclosed in order to encourage candor on the part of other would-be licensees.<sup>83</sup> More important is the Commission's control over the engineering standards of broadcasting and particularly innovation in the industry. Here the Commission has power to deny or delay important changes in broadcasting techniques.<sup>84</sup>

Whatever the professions of the Commission,<sup>85</sup> it must be conceded that it controls considerably more than the technical matters involved in the transmission of broadcasts. As we have seen, in comparative proceedings looking to the licensing of a broadcast facility the Commission examines the proposed programs of the applicants.<sup>86</sup> Perhaps program controls are most vividly apparent in the Commission's opinions with respect to applications for renewal of licenses. While rarely denying renewal the Commission frequently admonishes the licensee with respect to his program content in a manner which has proven reasonably effective.<sup>87</sup> Furthermore, while denying a power to

82. 47 C.F.R. §§ 3.501-.591, 3.711-.792, 3.181-.190, 3.614, 3.651 (1958). Regulations with respect to the keeping of logs are found in 47 C.F.R. §§ 3.111, 3.663 (1958). Such matters as the power employed in transmission may also be controlled in individual cases. The Birmingham News Co., 9 F.C.C. 125 (1942). A restriction on the power employed is, of course, to a degree a limitation upon the quantity of output. Note also that the Commission requires the identification of sponsors of both commercial and non-commercial programs. 47 C.F.R. § 3.119 (1958). See generally 20 FCC ANN. REP. 101 (1954); 23 FCC ANN. REP. 12 (1957); HEAD, BROADCASTING IN AMERICA 341 (1956).

83. Oil City Broadcasting Co., 7 P & F RADIO REG. 1, 35 (1951). The Commission of course also denies renewal applications when licensees violate rules with respect to the maintenance of logs, the burning of lights on antenna towers and the like. *E.g.*, Charles C. Carlson, 12 F.C.C. 902 (1948).

84. WILCOX, PUBLIC POLICY TOWARD BUSINESS 667 (1955). There has been some complaint with respect to the Commission's dilatory procedures in authorizing the broadcasting of television in color. 13 FCC ANN. REP. 24 (1947); 20 FCC ANN. REP. 5 (1954); *Network Broadcasting* 18.

85. The Commission does indeed decline to act in matters clearly within the competence of the courts, *e.g.*, assignment of call letters KMGH, 14 P & F RADIO REG. 573 (1956); Buffalo Broadcasting Corp., 9 F.C.C. 31, 32 (1941).

86. See Southern Tier Radio Serv., Inc., 11 P & F RADIO REG. 143, 210 (1954) (*dictum*); *Network Broadcasting* 149.

87. *Volliva v. WCBD, Inc.*, 313 Ill. App. 177, 39 N.E.2d 685 (1942); WHITE, THE AMERICAN RADIO 193 (1947); HEAD, BROADCASTING IN AMERICA 360 (1956); FRIEDRICH & STERNBERG, CONGRESS AND THE CONTROL OF RADIO BROADCASTING 817-18 (Studies in the Control of Radio No. 5, 1944); NATIONAL ASS'N OF BROAD-

render advisory opinions,<sup>88</sup> the Commission appears actually to be engaged in that practice.<sup>89</sup>

Specific statutes prohibit the broadcasting of lottery information and the use of obscene language.<sup>90</sup> The Commission has been quick to enforce those statutes<sup>91</sup> and to expand their content as far as possible. Indeed, it has gone considerably beyond the statutes and sought to prohibit the broadcasting of "quack" medical advice, horse racing data, astrological predictions, advertisements by professional men and the like.<sup>92</sup> The courts called a halt to the Commission's moral endeavors, however, when the Commission attempted to prohibit so-called "give-away" programs, determining that such attention attracting devices were not "lotteries" within the meaning of the statute.<sup>93</sup>

With respect to discussion of political matters there is also a specific statutory injunction: if a licensee permits one candidate for public office to use its facilities it must afford equal opportunities to all other candidates.<sup>94</sup> This provision has given rise to some unique problems with respect to the law of defamation<sup>95</sup> but it is not in the

CASTERS, BROADCASTING AND THE BILL OF RIGHTS 191 (1947); Hugin, *Radio Broadcasting Under Governmental Regulation*, 4 OKLA. L. REV. 417, 428 (1951); Note, *Government Control of the Content of Radio Programs*, 47 COLUM. L. REV. 1041, 1044 (1947). The technique of renewing licenses with admonitions, of course, avoids any judicial review of Commission policy. NATIONAL ASS'N OF BROADCASTERS, *op. cit. supra* at 31. In this connection it is perhaps noteworthy that the Commission has rarely exercised its power to revoke a license. *Network Broadcasting* 163.

88. Cross-Out Advertising Co., 14 F.C.C. 4 (1949).

89. Leonard H. Marks, 14 P & F RADIO REG. 65 (1956); Station WRLD, 7 P & F RADIO REG. 66 (1951); Capital Broadcasting Co., 12 F.C.C. 648 (1948); see California Comm. Opposed to Oil Monopoly, 14 P & F RADIO REG. 631, 634 (1956) (dictum).

90. 18 U.S.C. § 1304 (1952) (lotteries); 48 Stat. 1082 (1934), as amended, 47 U.S.C. § 303(m)(1)(D) (1952). State statutes purport to control broadcasting of obscene language, lottery data, race hatred, liquor advertisements and the like. Note, *Governmental Regulation of the Program Content of Television Broadcasting*, 19 GEO. WASH. L. REV. 312, 321 (1951). They have been held invalid. *Allen B. Dumont Labs., Inc. v. Carroll*, 184 F.2d 153, 155 (3d Cir. 1950). The Commission's organic act also requires that the sponsors of commercial announcements be identified. 48 Stat. 1089 (1934), 47 U.S.C. § 317 (1952); 47 C.F.R. §§ 3.652, 3.654 (1958).

91. 47 C.F.R. §§ 3.122, 3.656 (1958).

92. *KFKB Broadcasting Ass'n v. Federal Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931); Capital Broadcasting Co., 12 F.C.C. 648, 650 (1948); see Note, *Governmental Regulation of the Program Content of Television Broadcasting*, 19 GEO. WASH. L. REV. 312, 317 n.27 (1951); Hugin, *Radio Broadcasting Under Governmental Regulation*, 4 OKLA. L. REV. 417, 441 (1951); Note, *Government Control of the Content of Radio Programs*, 47 COLUM. L. REV. 1041, 1045 (1947).

93. *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296-97 (1954). The broadcasting industry has made attempts at self-regulation and adopted "codes" of decency and good behavior in order to forestall additional regulation. CHESTER & GARRISON, *TELEVISION AND RADIO* ch. 10 (2d ed. 1956); WHITE, *THE AMERICAN RADIO* ch. 4 (1947); HEAD, *BROADCASTING IN AMERICA* 392-93 (1956); Kennedy, *Programming Content and Quality*, 22 LAW & CONTEMP. PROB. 541, 545 (1957).

94. 48 Stat. 1088 (1934), as amended, 47 U.S.C. § 315(a) (1952); California Comm. Opposed to Oil Monopoly, 14 P & F RADIO REG. 631, 633 (1956).

95. *Farmers Educ. & Co-op. Union v. WDAY, Inc.*, 89 N.W.2d 102, 105 (N.D.), *cert. granted*, 358 U.S. 810 (1958) (No. 699); *Charles Parker Co. v. Silver City*

main sweep of Commission interest. What the Commission desires above all are "balanced" programs including discussion of current political and social issues.<sup>96</sup> Bias in the presentation of news is frowned upon<sup>97</sup> and the Commission has vacillated with respect to the power of licensees to broadcast editorial opinion. While the broadcasting of management views is not specifically prohibited most licensees are fearful lest they be accused of bias and hence refrain from editorial comment.<sup>98</sup> And while recognizing that broadcasting in the United States has always been supported by advertisers and that licensees must remain solvent<sup>99</sup> the Commission has also placed persistent pressure upon broadcasters to limit "commercials" and to carry a larger proportion of "sustaining" programs.<sup>100</sup> In addition, the Commission has

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Crystal Co., 142 Conn. 605, 610, 116 A.2d 440, 446 (1955); see WDSU Broadcasting Co., 7 P & F RADIO REG. 769, 773 (1951) (dictum). Compare *Rose v. Brown*, 186 Misc. 553, 58 N.Y.S.2d 654 (Sup. Ct. 1945) (specific performance granted with respect to delivery of political broadcast when nothing defamatory in proposed script).

96. WJR, 9 P & F RADIO REG. 227, 260h (1954); Foulkrod, Radio Eng'r Co., 14 F.C.C. 180, 200 (1949); Bay State Beacon, Inc., 12 F.C.C. 567, 574, *aff'd*, 171 F.2d 826 (D.C. Cir. 1948); Johnston Broadcasting Co., 12 F.C.C. 517, 524 (1947), *rev'd on other grounds*, 175 F.2d 351, 358 (D.C. Cir. 1951); see Tampa Times Co., 10 P & F RADIO REG. 77, 133, 140c (1955) (dictum); Eugene J. Roth, 12 F.C.C. 102, 108-09 (1947) (dictum); FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 3-4 (1946); Hugin, *Radio Broadcasting Under Governmental Regulations*, 4 OKLA. L. REV. 417, 424 (1951). The Commission's attitude towards sponsorship of public affairs programs has drawn adverse criticism from those who believe that such programs would be better if more money were spent upon them and that such funds can only be derived from advertising. Kennedy, *Programming Content and Quality*, 22 LAW & CONTEMP. PROB. 541, 547 (1957). Note also the somewhat naive approach of the Commission shown in Pilgrim Broadcasting Co., 14 F.C.C. 1308 (1950). In that case an applicant for an AM broadcasting station represented that he would donate time for the discussion of public issues but that his programs would not involve expression of viewpoints offensive to local citizens. *Id.* at 1324.

97. KMPC, 7 P & F RADIO REG. 788 (1951) (*semble*); see WBNX Broadcasting Co., 12 F.C.C. 837, 841 (1948) (dictum).

98. *Voliva v. WCBD, Inc.*, 313 Ill. App. 177, 179, 184, 39 N.E.2d 685, 687-88 (1942); Alabama Broadcasting, Inc., 17 P & F RADIO REG. 273, 274-75 (1958). Compare Key Broadcasting Sys., Inc., 13 P & F RADIO REG. 159, 175, *rev'd on other grounds*, 13 P & F RADIO REG. 176a (1956), wherein the Commission approved editorials in support of worthy causes such as slum clearance, improved school facilities, and the like. See Gruber, *Radio and Television and Ethical Standards*, 280 ANNALS 116, 120 (1952); Note, *Government Control of the Content of Radio Programs*, 47 COLUM. L. REV. 1041, 1046 (1947); Note, *Radio Program Controls: A Network of Inadequacy*, 57 YALE L.J. 275, 288-89 (1947). Similar results have been observed under monopoly conditions. Coatman, *The BBC, Government and Politics*, 15 PUBLIC OPINION Q. 287, 293, 295 (1951).

99. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 47 (1946).

100. Biscayne Television Corp., 11 P & F RADIO REG. 1113, 1153 (1956); Foulkrod, Radio Eng'r Co., 14 F.C.C. 180, 202 (1949); Bay State Beacon, Inc., 12 F.C.C. 567, 575, *aff'd*, 171 F.2d 826 (D.C. Cir. 1948); see Eugene J. Roth, 12 F.C.C. 102, 108-09 (1947) (dictum); FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 12, 13 (1946); NATIONAL ASS'N OF BROADCASTERS, BROADCASTING AND THE BILL OF RIGHTS 65-66 (1947); HEAD, BROADCASTING IN AMERICA 197 (1956); Hugin, *Radio Broadcasting Under Governmental Regulation*, 4 OKLA. L. REV. 417, 425 (1951). At times the observer cannot help thinking that some of the Commission rules, otherwise rigidly enforced, are warped in favor of licensees who provide a wholly non-commercial service. *E.g.*, Municipal Broadcasting Sys., 15 P & F RADIO REG. 565 (1957). *But see* City of New York, 9 F.C.C. 169, 173, 174 (1942). In Great

recorded a marked preference for "local live" programs as opposed to those furnished by networks or recording devices.<sup>101</sup>

By way of contrast the Federal Communications Commission has stood aloof from the controversy with respect to the desirability of placing more religious programs on the air. It has refused to discriminate against applicants who proposed religious programs solely on a commercial basis<sup>102</sup> and it has not required licensees to make time available to particular denominations,<sup>103</sup> although on one occasion it did refuse to renew the license of a broadcaster who had made bitter attacks upon a rival sect.<sup>104</sup> Broadcasters generally are free to disseminate such religious programs, if any, as they may desire. On the other hand, the Commission pays great attention to "balanced" programs both in its licensing and renewal proceedings. It looks at the promise or performance of an applicant or licensee to determine whether the program is "well-rounded."<sup>105</sup> Its organic statute specifically provides that the Commission is to have no power of censorship<sup>106</sup> and it is true that on many occasions the Commission passes by an opportunity to control program content. Thus, it has given no demerits to a TV applicant whose AM station was allegedly broadcasting too much "hill-billy" music and it has dealt similarly with an applicant who rejected a

Britain the proponents of a competitive television network suggested an arrangement whereby advertisers would have no control over the content of the programs. Coase, *The Development of the British Television Service*, 30 *LAND ECON.* 207, 220-21 (1954). Here there has been some complaint to the effect that advertising agencies, as opposed to advertisers themselves, control large proportions of broadcasting time. ANTITRUST SUBCOMMITTEE REPORT 4179.

101. Southland Television Co., 10 P & F RADIO REG. 699, 745 (1955); Tampa Times Co., 10 P & F RADIO REG. 77, 127 (1955); Rossmoynne Corp., 7 P & F RADIO REG. 117, 143 (1952). Compare the problem with respect to the location of studios as opposed to transmitters, e.g., 14 FCC ANN. REP. 29 (1949); 17 FCC ANN. REP. 111-12 (1952).

102. Southland Television Co., 10 P & F RADIO REG. 699, 740 (1955); Tampa Times Co., 10 P & F RADIO REG. 77, 134 (1955); see WJR, 9 P & F RADIO REG. 227, 260g (1954) (dictum).

103. J. Richard Sneed, 15 P & F RADIO REG. 158, 160 (1957); KTBS, Inc., 10 P & F RADIO REG. 811, 868 (1955). Compare *McIntire v. William Penn Broadcasting Co.*, 151 F.2d 597, 601 (3d Cir. 1945), cert. denied, 327 U.S. 779 (1946); *Evangelical Lutheran Synod v. FCC*, 105 F.2d 793, 795 (D.C. Cir. 1939); *Great Lakes Broadcasting Co. v. Federal Radio Comm'n*, 37 F.2d 993, 995 (D.C. Cir. 1930); *New Jersey Council of Christian Churches*, 14 F.C.C. 365, 369 (1949).

104. *Trinity Methodist Church v. Federal Radio Comm'n*, 62 F.2d 850, 852 (D.C. Cir. 1932).

105. See, e.g., Tampa Times Co., 10 P & F RADIO REG. 77, 127 (1955) (dictum); FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 12, 13 (1946); 15 FCC ANN. REP. 32 (1950); 21 FCC ANN. REP. 94 (1956). The foregoing policy has the effect of eliminating programs provided for special groups such as negroes. *WSAV, Inc.*, 10 P & F RADIO REG. 402, 430r (1955); *Southland Television Co.*, 10 P & F RADIO REG. 699, 741 (1955). But see *Nashville Broadcasting Co.*, 7 P & F RADIO REG. 387, 423 (1951).

106. 48 Stat. 1091 (1934), as amended, 47 U.S.C. § 326 (1952).

program offered by a labor union.<sup>107</sup> There is, however, much complaint to the effect that the Commission exercises a considerable degree of censorship over programming and while the Commission itself disclaims any such intervention the evidence indicates that licensees are far from enjoying unlimited discretion with respect to their production.<sup>108</sup> The Commission has sought to reconcile its action with the prohibition against censorship on the theory that it considers programs as a whole and not specific broadcasts.<sup>109</sup> Touching as it does on the sensitive topic of freedom of speech, the Commission's activities have led to apprehension in many quarters by reason of the political implications involved. At the same time it has failed to please some of its critics who demand greater Commission intervention into the programming process.<sup>110</sup> On the whole, licensees appear to enjoy considerable latitude in day-to-day adjustments of their schedules, at least from a commercial point of view.<sup>111</sup>

#### THE NETWORK CONTROVERSY

Despite the fact that the Commission exercises no direct control over chain broadcasting under existing legislation, it has attempted to

107. Richmond Newspapers, Inc., 11 P & F RADIO REG. 1234, 1278a (1955); W. H. Greenhow Co., 8 P & F RADIO REG. 730, 759-60 (1952); see Hi-Line Broadcasting Co., 13 P & F RADIO REG. 1017, 1043 (1957) (dictum). Compare The Good Music Station, Inc., 15 P & F RADIO REG. 197, 207 (1957).

108. WHITE, THE AMERICAN RADIO 127 (1947); NATIONAL ASS'N OF BROADCASTERS, BROADCASTING AND THE BILL OF RIGHTS 149, 154, 177 (1947); ROSE, NATIONAL POLICY FOR RADIO BROADCASTING 209 (1940); FCC ANN. REP. 17 (1949); *Network Broadcasting* 150; Note, *Government Control of the Content of Radio Programs*, 47 COLUM. L. REV. 1041, 1049-50 (1947); Comment, *Old Standards in New Context: A Comparative Analysis of FCC Regulations*, 18 U. CHI. L. REV. 78, 83 (1950). A description of foreign experience will be found in Coatman, *The BBC, Government & Politics*, 15 PUBLIC OPINION Q. 287, 293-94 (1951). Compare Lloyd, *Some Comments on the British Television Act*, 23 LAW & CONTEMP. PROB. 165 (1958); Coase, *The Development of British Television Service*, 30 LAND ECON. 207, 209-10 (1954).

109. Comment, *Radio Program Control*, 57 YALE L.J. 275, 279 (1947). Compare WHITE, THE AMERICAN RADIO at x (1947), wherein the Commission recommends vigilance against radio censorship but finds no hazard in FCC consideration of the "public interest" in the renewal of licenses.

110. STEPMANN, RADIO'S SECOND CHANCE 212 (1946); *Television Inquiry* 1693; Kennedy, *Programming Content and Quality*, 22 LAW & CONTEMP. PROB. 541, 543 (1957).

111. Southland Television Co., 10 P & F RADIO REG. 699, 741 (1955). Note the interesting description of the detailed operations of a licensee in *WNEW New York*, Fortune, Oct. 1952, p. 132. But see below with respect to regulations controlling a prominent source of supply, namely network broadcasting.

Broadcasters have been involved in a vigorous controversy with an association of composers and publishers known as ASCAP. As a "countervailing force" the broadcasters organized BMI and the stock of the latter organization has been owned by network operators and other broadcasters. This situation has given rise to considerable controversy, none of which, however, appears to bear directly upon the issues examined in this study. ANTITRUST SUBCOMMITTEE REPORT 4221, 4230, 4232, 4437, 4471, 4472-73, 4474, 5002; HEAD, BROADCASTING IN AMERICA 137-38 (1956). Note also § 506 of the Communications Act of 1934 (added by 60 Stat. 89 (1946), 47 U.S.C. § 506 (1952)), whereby it was made unlawful to coerce a broadcast licensee to hire unnecessary personnel, not to use transcriptions and the like.

limit the networks and been urged to take more drastic action.<sup>112</sup> Indeed, some observers would like to have the Commission or the Congress destroy them.

Networking is chiefly a contractual arrangement whereby many broadcasting stations are linked together for the simultaneous transmission of the same program. The operators of the network sell the time of the affiliated station on the national market and remit a portion thereof to the individual licensees.<sup>113</sup> From modest beginnings in 1923 radio networking grew rapidly during the ensuing two decades. By 1941, 221 AM stations were affiliated with the National Broadcasting Company and two other major chains were of almost comparable size.<sup>114</sup> In addition there has existed from time to time a number of regional and smaller networks in the radio field.<sup>115</sup> In radio, networking is now of diminished importance; and somewhat more than half the AM stations in the country are not affiliated with chain broadcasting organizations.<sup>116</sup> In television, however, there has been recent rapid growth in linked service with the result that only some thirty-five broadcasters are not affiliated with at least one network.<sup>117</sup> The chain broadcasters are given credit for improvements both in transmission techniques and in programming; and it is apparent that, without the backing of the companies which operated the radio chains, commercial television on a large scale would have never come into being or, at least, would have been postponed for many years.<sup>118</sup>

While without direct authority over the networks as such, the Commission has published a series of regulations designed to curb their power by prohibiting licensees from entering into contractual relationships of specified types.<sup>119</sup> The validity of those regulations has been sustained<sup>120</sup> and the prohibitions laid down by the Commission some years ago are still in effect. By their terms the licensee may not agree

112. Compare FRIEDRICH & STERNBERG, *COMMERCE AND THE CONTROL OF RADIO BROADCASTING* 809 (Studies in the Control of Radio No. 5, 1944).

113. HEAD, *BROADCASTING IN AMERICA* 140 (1956); Salant, Fisher & Brooks, *The Functions and Practices of the Television Network*, 22 *LAW & CONTEMP. PROB.* 584, 585-97 (1957).

114. CLEMENS, *ECONOMICS AND PUBLIC UTILITIES* 376, 379 (1950); FCC, *REPORT ON CHAIN BROADCASTING* 15, 23, 27 (1941).

115. FCC, *REPORT ON CHAIN BROADCASTING* 26, 28, 29 (1941); 13 *FCC ANN. REP.* 22 (1947); 14 *FCC ANN. REP.* 36 (1949).

116. HEAD, *BROADCASTING IN AMERICA* 147 (1956).

117. ANTITRUST SUBCOMMITTEE REPORT 3110, 3258; *Network Broadcasting* 29, 214.

118. FCC, *REPORT ON CHAIN BROADCASTING* 4, 21 (1941); ANTITRUST SUBCOMMITTEE REPORT 5113, 6065; *Television Inquiry* 2282-90; Kennedy, *Programming Content and Quality*, 22 *LAW & CONTEMP. PROB.* 541, 543 (1957).

119. Compare 48 Stat. 1082 (1934), as amended, 47 U.S.C. § 303(i) (1952). See also ANTITRUST SUBCOMMITTEE REPORT ch. iv.

120. *National Broadcasting Co. v. United States*, 319 U.S. 190, 198-209 (1943).



to deal exclusively with a single network.<sup>121</sup> He may grant "option time" only to the extent of a specified number of hours in each of three segments of the broadcast day<sup>122</sup> and must remain free to reject network programs which he believes unsuitable or unsatisfactory.<sup>123</sup> The licensee cannot be the beneficiary of an agreement that he is to have an exclusive right to broadcast network programs in his area; he may, however, be granted a "first call" upon such programs.<sup>124</sup> The term of any contract with a network is limited to a period of two years.<sup>125</sup> In addition, the largest existing network was broken into two parts and, as we have seen above,<sup>126</sup> multiple ownership of stations was limited—this provision again being aimed principally at the networks. Despite the stringency of the rules some observers profess to see little change in the broadcasting picture since imposition of the network regulations.<sup>127</sup>

It is apparent that the Commission, in promulgating regulations, was activated in part by a desire to apply antitrust principles.<sup>128</sup> Indeed, the validity of the regulations was challenged on the ground that the Commission was attempting to engage in enforcement activity reserved to the Attorney General. In sustaining the position of the Commission the Court said that it might consider the content of the antitrust laws in the promulgation of regulations with respect to licensing of stations notwithstanding a specific statutory requirement that licenses be withheld from those adjudged violators of anti-monopoly legislation.<sup>129</sup> In part the objective of the regulations has been to encourage competition among networks, among stations, and between the two. On the other hand the fact that the networks were each geographically dispersed makes it apparent that something more than competition must have been the goal of the Commission.<sup>130</sup>

121. 47 C.F.R. § 3.131 (1958).

122. 47 C.F.R. § 3.134 (1958). Compare the multiple ownership regulations discussed in text accompanying notes 14-34 *supra* under "Licensing."

123. 47 C.F.R. § 3.135 (1958).

124. 47 C.F.R. § 3.132 (1958); *Network Broadcasting* 266.

125. 47 C.F.R. § 3.133 (1958). Substantially similar restrictions exist as to licenses of television broadcasting stations. *E.g.*, 47 C.F.R. § 3.658 (1958).

126. See text at p. 598 *supra*; Note, *FCC Regulation of Competition Among Radio Networks*, 51 *YALE L.J.* 448, 450 (1942).

127. SIEPMANN, *RADIO'S SECOND CHANCE* 225 (1946); Note, *The Impact of the FCC Chain Broadcasting Rules*, 60 *YALE L.J.* 78, 79, 94, 104 (1951); *Network Broadcasting* 142-45. *But see* Goldin, *Economic and Regulatory Problems in the Broadcast Field*, 30 *LAND ECON.* 223, 229 (1954).

128. FCC, *REPORT ON CHAIN BROADCASTING* 47, 50 (1941).

129. *National Broadcasting Co. v. United States*, 319 U.S. 190, 222-23 (1943). A complaint on the subject is recorded in *NATIONAL ASS'N OF BROADCASTERS, BROADCASTING AND THE BILL OF RIGHTS* 155 (1947).

130. In part the Commission has been motivated by a desire to foster "local" programs. A comment on the results achieved will be found in WHITE, *THE AMERICAN RADIO* 173-74 (1947).

Networking reflects indivisibility in the broadcasting business. Popular programs are expensive and a network is a device for spreading the cost over a multitude of licensees who could not otherwise afford the expense involved in presenting various types of entertainment.<sup>131</sup> Furthermore, the network constitutes a ready market for the broadcasters' time and produces a steady revenue from national advertisers eager to hawk their wares on a country-wide basis. So important are these factors that it is considered difficult to operate a television station without network affiliation and the two larger chain organizations have gone to some pains to make their services available to marginal licensees at nominal rates.<sup>132</sup> In the future technological developments may make networking less important but there is some doubt whether the number of networks itself can be significantly increased.<sup>133</sup>

As indicated above, the relationship between the network and the licensee necessarily involves network control of the licensee's program during a portion of each broadcast day. For its part the licensee has first call on the network programs available to it.<sup>134</sup> Usually the network remits to the licensee about thirty per cent of the gross receipts from the sale of time, bearing the expenses of production and transmission.<sup>135</sup> Some stations, however, enjoy greater bargaining power by reason of their popularity or the scarcity of outlets in their areas and drive more advantageous bargains with the chain organizations.<sup>136</sup>

Most of the leading networks own and operate several (important) broadcasting stations. Revenues from those stations were important in financing early network operation, particularly those in the television field.<sup>137</sup> Furthermore, and particularly with the advent of television, the networks have taken to producing their own programs rather than purchasing them from outside interests such as advertising agencies. In

131. MORRIS, *NOT SO LONG AGO* 450 (1949); HEAD, *BROADCASTING IN AMERICA* 136 (1956); ROSE, *NATIONAL POLICY FOR RADIO BROADCASTING* 89-90 (1940); ANTI-TRUST SUBCOMMITTEE REPORT 4432, 4500, 4705, 5139-57; Klaw, *ABC-Paramount Moves In*, *Fortune*, April 1957, pp. 132, 134.

132. ANTI-TRUST SUBCOMMITTEE REPORT 82, 516, 5072, 5083-92, 5181, 5182, 5202, 5261; Levin, *Economic Structure and the Regulation of Television*, 72 Q.J. ECON. 424, 427 (1958). One advantage of network affiliation is that the "spot" commercial between popular network programs commands good prices for the licensee. HEAD, *BROADCASTING IN AMERICA* 200 (1956).

133. ANTI-TRUST SUBCOMMITTEE REPORT 4499, 4703, 4773, 5199, 5211 n.1, 5268; *Television Inquiry* 1477, 2477; *Network Broadcasting* 47, 176.

134. *Id.* at 279.

135. *Id.* at 645; House Comm. on the Judiciary, Antitrust Subcomm., *Report on Television Broadcasting*, H.R. REP. No. 607, 85th Cong., 1st Sess. 21 (1957) (hereinafter cited as *Report on TV Broadcasting*); HEAD, *BROADCASTING IN AMERICA* 234 (1956). As to the cost of programming, see Salant, Fisher & Brooks, *The Functions and Practices of a Television Network*, 22 LAW & CONTEMP. PROB. 584, 598 (1957).

136. ANTI-TRUST SUBCOMMITTEE REPORT 4384, 4731, 4743, 4746-47, 4752, 4785-86, 5024.

137. *Report on TV Broadcasting* 22-23, 24; *Network Broadcasting* 582, 583.

so doing they have, of course, supplanted "independent" producers.<sup>138</sup> In addition, the networks have diversified into other fields of activity. They represent affiliated stations in the sale of "spot" time to national advertisers.<sup>139</sup> At various times they have been interested in the manufacture of phonograph records, the operation of talent bureaus for concerts and the like, the manufacture of broadcasting and receiving apparatus and the operation of wireless telephone services.<sup>140</sup> In the television field today there are only two major networks and one minor one. A fourth network failed a few years ago and the reasons for its demise are not wholly clear.<sup>141</sup> Obviously the small number of television stations, particularly in medium-sized cities, constitutes an important handicap to the entry of new enterprise into the chain broadcasting field. There is also a serious factor of indivisibility since, as mentioned above, the cost of producing programs can be greatly reduced if spread over a large number of stations.<sup>142</sup> Some observers profess to see important anti-competitive effects stemming from the vertical integration and diversification of the major chains outlined above. On the other hand the Commission expressly permitted the weaker of the three networks to merge with a corporation owning a chain of theatres on the ground that it was thereby strengthening competition with its two leading rivals.<sup>143</sup>

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138. ANTITRUST SUBCOMMITTEE REPORT 4705, 4708-09, 5082, 5191, 5192, 6065-66; HEAD, BROADCASTING IN AMERICA 260, 263 (1956); *Report on TV Broadcasting* 41, 50; Kennedy, *Programming Contents and Quality*, 22 LAW & CONTEMP. PROB. 541 (1957). A vigorous argument has been waged as to the merits of network as opposed to advertising agency origination of programs.

139. *Network Broadcasting* 179, 531-32.

140. FCC, REPORT ON CHAIN BROADCASTING 11, 13, 17, 24, 25 (1941); ANTITRUST SUBCOMMITTEE REPORT 5119-20; HEAD, BROADCASTING IN AMERICA 142, 146, 163 (1956).

141. *Network Broadcasting* 204, 441-45; ANTITRUST SUBCOMMITTEE REPORT 3256, 5197; Levin, *Economic Structure and the Regulation of Television*, 72 Q.J. ECON. 424, 434 (1958); Klaw, *ABC-Paramount Moves In*, Fortune, April 1957, p. 132.

142. *Network Broadcasting* 44, 195, 198, 199, 201, 203, 204, 329-30; *Report on TV Broadcasting* 8; Levin, *Economic Structure and the Regulation of Television*, 72 Q.J. ECON. 424, 428 (1958); Salant, Fisher & Brooks, *The Functions and Practices of a Television Network*, 22 LAW & CONTEMP. PROB. 584, 598 n.40 (1957).

Another reason sometimes given for the difficulty of entry into networking is the rate schedule for inter-city relays of television programs. Those rates appear to incorporate a considerable "demand" charge with the result that they increase little with the amount of time consumed.

143. Paramount Television Prods., 8 P & F RADIO REG. 541, 624-25 (1953). The Commission considered the impact on competition for the acquisition of motion picture film from producers and found that the effects would be insubstantial. *Id.* at 626. There was, however, a dissent in which it was argued that the merger of the network and the theatre chain would enhance the buying power of the resulting corporation and that such power would hurt its rival. *Id.* at 631. See *Network Broadcasting* 79-82. The Commission has also considered deshuffling its allocation of channels in order to favor a third network and provide an outlet to the big cities where it lacked affiliated stations. Klaw, *ABC-Paramount Moves In*, Fortune, April 1957, pp. 132, 133.

Opponents of the networks would either destroy them altogether or eliminate what they regard as objectionable features. Among the latter elements are vertical integration and diversification, which are said to "foreclose" rivals from various markets such as the peddling of film directly to stations.<sup>144</sup> "Option time," in their view, should be abolished;<sup>145</sup> and they favor requiring networks to split up their "package" by offering to sell time to advertisers on individual stations.<sup>146</sup> Whether controls of the type proposed are consistent with the maintenance of any networking may be open to question and there is also an active issue as to whether the vices of the chains are as deleterious as alleged and hence whether change of any kind is now desirable.<sup>147</sup>

### PRICES AND PROFITS

Neither the prices charged advertisers nor the profits earned by licensees are subject to the control of the Federal Communications Commission. Nothing in the Commission's organic statute permits

144. WHITE, *THE AMERICAN RADIO* at vii-viii (1947); Hansen, *Broadcasting and the Antitrust Laws*, 22 LAW & CONTEMP. PROB. 572, 578 (1957); FCC, REPORT ON CHAIN BROADCASTING 18 (1941); *Network Broadcasting*, 355, 536, 540, 606-07; Levin, *Economic Structure and the Regulation of Television*, 72 Q.J. ECON. 424, 428 (1958); ANTITRUST SUBCOMMITTEE REPORT 3989-4016, 4126. *But see* Gruber, *Radio and Television and Ethical Standards*, 280 ANNALS 116, 119 (1952) (recommendation that networks prepare "package shows" for sale to sponsors in effort to raise standards with respect to commercial announcements and the like).

145. *Network Broadcasting* 181-82, 190, 326-27, 345-46, 348, 398-400, 611; Levin, *Workable Competition and Regulatory Policy in Television Broadcasting*, 34 LAND ECON. 101, 107-08 (1958); Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 LAW & CONTEMP. PROB. 549, 564 (1957). Compare the rule against delegating control of the licensed broadcasting facilities. Conrad, *Economic Aspects of Radio Regulation*, 34 VA. L. REV. 283, 294 (1948). Perhaps inconsistently, opponents of option time have argued that the options are not essential to maintenance of the networks. Barrow, *Network Broadcasting—The Report of the FCC Network Study Staff*, 22 LAW & CONTEMP. PROB. 611, 617 (1957). It has also been argued that the network practice of setting rates so as to obtain clearance (without option) is contrary to the public interest because clearance should be based on the licensee's judgment as to the quality and suitability of competing programs (and not on the rates). *Id.* at 618. The latter suggestion would appear to involve putting all broadcasting on a non-commercial basis.

146. Hansen, *Broadcasting and the Antitrust Laws*, 22 LAW & CONTEMP. PROB. 572, 579 (1957); ANTITRUST SUBCOMMITTEE REPORT 4138, 5092, 5229, 6330; *Network Broadcasting* 472, 502. It has been argued, however, that the "package" sales are compelled by the nature of the rates for network interconnection and that advertisers and others do not feel injured by the "package" policy. ANTITRUST SUBCOMMITTEE REPORT 4753; Salant, Fisher & Brooks, *The Functions and Practices of a Television Network*, 22 LAW & CONTEMP. PROB. 584, 600 (1957); *Network Broadcasting* 482-83. Perhaps inconsistently, it has also been argued that the "must-buy" policy of the networks is not necessary to their continued existence. *Id.* at 522-27.

There has also been complaint that the networks have tried to equalize their rates with the national "spot" rates charged by individual licensees in an effort to reduce competition for the business of national advertisers. *Id.* at 440; ANTITRUST SUBCOMMITTEE REPORT 4140.

147. NATIONAL ASS'N OF BROADCASTERS, *BROADCASTING AND THE BILL OF RIGHTS* 97, 129 (1947). Note the interesting account of an independent radio station making more money in New York City than rivals owned by the networks. *WNEW, New York*, *Fortune*, Oct. 1952, p. 132.

such regulation and it is well understood that broadcasters are free to charge such prices as they may deem best. As one court put the matter:

"We have often said that radio communication as contemplated by the Act constitutes interstate commerce and involves the public interest and that in this aspect Congress could exercise its power to regulate it. We have said also that the regulatory provisions of the Act are a reasonable exercise by Congress of its powers and that one who applies for and obtains a license receives it subject to the right of the government and the public interest to withdraw it without compensation. . . . But the power of Congress has not yet been extended to the point of fixing and regulating the rates to be charged by the licensee or the establishment of rules requiring it to serve alike the entire public in its use of its facilities. Nor has Congress assumed the right to limit the profits on the basis of its investment or otherwise. The licensee of a radio station chooses its own advertisers and its own programs, and generally speaking the only requirement for a renewal of the license is that it has not failed to function and will not fail to function in the public interest."<sup>148</sup>

As a matter of fact the licensees adjust their rates in several important manners which may make it fortunate for the industry that the Robinson-Patman Act<sup>149</sup> is not applicable thereto. Basic rates are set for time periods<sup>150</sup> and published in a form available to everyone.<sup>151</sup> Each station has a schedule of rates which are independently determined although perhaps influenced by network connections. Area coverage, population density, and affiliation appear to be dominant factors in such rate making.<sup>152</sup> Some licensees, however, deviate from their published rates and many of them offer discounts based on the type of advertisement, the broadcast area, the program, the time of year, the time of day involved and the like.<sup>153</sup>

148. *Pulitzer Publishing Co. v. FCC*, 94 F.2d 249, 251 (D.C. Cir. 1937). See Conrad, *Economic Aspects of Radio Regulation*, 34 VA. L. REV. 283, 289 (1948); Note, *The "Fringe Area" of Public Utilities*, 58 W. VA. L. REV. 390, 391 (1956). If the Commission were to abandon its policy of renewing almost all licenses, it could have a considerable effect on rates because in that event licensees would be compelled to recover their entire capital cost during the term of the original license.

149. 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1952).

150. It is customary to charge separately for the time and for the expense of producing programs. Salant, Fisher & Brooks, *The Functions and Practices of the Television Networks*, 22 LAW & CONTEMP. PROB. 584, 590 (1957).

151. HEAD, BROADCASTING IN AMERICA 214 (1956).

152. *Id.* at 209.

153. ANTITRUST SUBCOMMITTEE REPORT 4678, 4767, 4768, 4770, 5771, 5772, 6321, 6326, 6327, 6330, 6331-38; HEAD, BROADCASTING IN AMERICA 201, 209, 212 (1956); *Network Broadcasting* 416.

Rates for less than a full hour are greater than a proportional amount. ANTITRUST SUBCOMMITTEE REPORT 4768, 6330; HEAD, BROADCASTING IN AMERICA 212 (1956). Discounts are offered when two advertisers will jointly sponsor a single program. ANTITRUST SUBCOMMITTEE REPORT 6321. Lower rates are offered to local

As stated above, the Commission does not attempt to control rates. Occasionally it has remarked that the revenues of a station would permit reduction in what it regards as an excessive number of "commercials,"<sup>154</sup> and it has frowned on "combination" rates whereby a licensee quotes a single price for an advertisement in both of two media.<sup>155</sup> Furthermore, it has yet to authorize licensees to charge a fee for the programs offered. This is the "pay television" controversy which has raged before the Commission and congressional committees for years.<sup>156</sup>

#### TRANSFER OF LICENSES

The statute of course contemplates that the licensee will himself operate the authorized broadcasting facilities. Accordingly it has been repeatedly held that the licensee may not delegate his power to control programs. Thus, a religious leader named Voliva owned a radio station and attempted to convey it to a corporation with an agreement whereby certain broadcasting hours were available free to Voliva. The Communications Commission refused to approve the transfer until the contract was amended so as to provide that the broadcasts were all to be under the control of the transferee corporation. After such amendment and approval Voliva sought to use the free time available to him under the contract to deliver speeches against the reelection of President Franklin Roosevelt. The transferee, fearful of the revocation of its license, demanded that Voliva's scripts be submitted in advance for censorship. Voliva sought to enjoin the corporation from censoring the scripts. Relief was denied, the court saying:

"The business of broadcasting by radio is impressed with a public interest. Licensees have a positive unqualified responsibility

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than to national advertisers. *Network Broadcasting* 45. Quantity discounts are widely available and based on weekly and longer periods of purchase. ANTITRUST SUBCOMMITTEE REPORT 4724, 4769, 6320, 6321, 6329. Finally, rates are sometimes placed on a piecework basis so that the licensee receives remuneration based on the number of inquiries which he turns over to the advertiser. HEAD, BROADCASTING IN AMERICA 216 (1956).

154. Eugene J. Roth, 12 F.C.C. 102, 108 (1947). The Commission has ordered that when time is to be made available to rival candidates under the specific statutory provision relating to political campaigns, no higher rates may be charged than those made available to commercial sponsors. 47 C.F.R. § 3.657(c) (1958).

155. Radio Fort Wayne, 9 P & F RADIO REG. 1221, 1222k, 1222m (1955). Compare WJR, 9 P & F RADIO REG. 227, 260(c) (1954).

156. 16 FCC ANN. REP. 103-04 (1950); *Television Inquiry* 1073. One of the arguments against "pay television" is that the airwaves are "owned" by the "public" and hence it would be illegal to compel viewers to pay for the privilege of observing broadcasts. This argument, however, overlooks the fact that newspapers are commonly peddled in "public" streets. A serious suggestion has been made to the effect that broadcasting licenses should be auctioned off to the highest bidder rather than given away free, sometimes in circumstances of dubious propriety. There may, however, be good objections to the auctioning suggestion. See Smythe, *Facing Facts About the Broadcast Business*, 20 U. CHI. L. REV. 96, 100-01 (1952).

of serving that interest as a matter of law. . . . They must necessarily be held responsible for all program service and may not delegate their ultimate responsibility for such to others."<sup>157</sup>

It follows, and the statute expressly so provides, that transfer of a license may only be accomplished with Commission approval.<sup>158</sup> The Commission is directed to consider whether the public interest, convenience and necessity will be served by the assignment of the license.<sup>159</sup> In the performance of that duty the Commission has from time to time denied applications for transfers. It has denied, for example, an application in which the transferee had been convicted of frauds a half-dozen times.<sup>160</sup> On the whole, however, the Commission approves transfers if the transferee meets the requirements of a general licensee; and the mere fact that he proposes to change the programs or that he is engaged in some allied business has not proven an insuperable obstacle.<sup>161</sup>

157. *Voliva v. WCBD, Inc.*, 313 Ill. App. 177, 183, 39 N.E.2d 685, 688-89 (1942). *Accord*, *Regents of New Mex. College v. Albuquerque Broadcasting Co.*, 158 F.2d 900 906 (10th Cir. 1947); *Massachusetts Universalist Convention v. Hildredth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950); *Station WRLD*, 7 P & F RADIO REG. 66, 67 (1951); see *Federated Publications, Inc.*, 9 F.C.C. 150, 156 (1942) (dictum). *But see Churchill Tabernacle v. FCC*, 160 F.2d 244 (D.C. Cir. 1947); *Day Stores, Inc. v. Southern Broadcasting Corp.*, 1 So. 2d 99 (La. 1941). In *Churchill Tabernacle v. FCC*, *supra*, the church had an AM license. On insistence of the Commission it assigned the license to an affiliated corporation for broadcasting of more general programs reserving rent to the church and time on Sundays for 100 years. Furthermore, the church had a reversion of title to the facilities and the license. The transfer was approved by the Federal Communications Commission. On a renewal application, however, the Commission disapproved, and said that it would entertain the application again once the corporation had divested itself of its contractual obligations to the church. The court held that the Commission should reconsider its order and see if some less drastic remedy would not suffice. In its opinion the court said, 160 F.2d at 247: "[I]n our own decisions we have often said that valuable rights and investments made in reliance on a license of the Federal Communications Commission should not be destroyed except for the most compelling reasons." Note however that in *Regents of New Mex. College v. Albuquerque Co.*, *supra*, a transfer of a similar type had been approved by the Federal Communications Commission and the reservation of free time was still held invalid.

158. 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 310(b) (1952); see *Warner, Transfers of Broadcasting Licenses Under the Communications Act of 1934*, 21 B.U.L. REV. 585, 588-600 (1941). In 1952 the statute was amended so as to prevent the Commission from considering possible transferees other than the one proposed by the licensee. *Wall & Jacob, Communications Act Amendments, 1952—Clarity or Ambiguity*, 41 GEO. L.J. 135, 152 (1953).

159. *Ibid.*

160. *Mester v. United States*, 70 F. Supp. 118 (E.D.N.Y. 1947). Compare *Liberty Life Ins. Co.*, 9 F.C.C. 104, 106 (1942).

161. *United Television, Inc.*, 16 P & F RADIO REG. 259 (1957); *Day Radio, Inc.*, 15 P & F RADIO REG. 211, 226 (1957); *William E. Walker*, 15 P & F RADIO REG. 177, 183 (1957); *Lebanon Broadcasting Co.*, 14 P & F RADIO REG. 297, 327 (1957); *Universal Broadcasting Co.*, 14 P & F RADIO REG. 570 (1956). In the first and last of the above cited cases Commissioner Bartley dissented vigorously, apparently on the ground that the vertical integration or diversification of the licensee would permit it to compete unfairly with other broadcasters. Compare *HALE & HALE, MARKET POWER* chs. 5, 6 (1958). See Note, *Radio and Television Station Transfers*, 30 IND. L.J. 351, 359 (1955). Note that an AM licensee has standing to protest transfer of a rival AM license to one holding other licenses on the ground that economy of scale enjoyed by a multiple station owner may hurt the protestant. *O. R. Mitchell Motors*, 14 P & F RADIO REG. 85, 88 (1956).

An interesting recent case involved an exchange of television and radio stations between Radio Corporation of America and Westinghouse Broadcasting Company which was approved by the Federal Communications Commission in December 1955. The transaction was closed early in 1956. In December 1956 the Attorney General filed a bill in equity to set aside the transfer as in violation of section 1 of the Sherman Act.<sup>162</sup> It appeared that the Attorney General had been fully apprised of the Communications Commission hearing and taken no appeal therefrom. No explanation was offered for the delay in filing the bill. The complaint was dismissed on three grounds. The court first referred to the doctrine of primary jurisdiction and the failure of the Attorney General to appeal the decision of the Communications Commission. As a second ground, it referred to the doctrine of *res judicata*, saying that the Communications Commission was under a duty to pass upon the issues presented and had done so. In that connection the court said:

"The F.C.C. was under a duty to pass upon the issues presented by this evidence. The parties have stipulated that the F.C.C. decided all issues relating to the exchange which it could lawfully decide. There is no doubt that, in finding that the exchange was in the public interest, it necessarily decided (whether it now agrees that it did or not) that the exchange did not involve a violation of the law which declares and implements the basic economic policy of the United States."<sup>163</sup>

Laches constituted the third ground for the holding. It thus appears that the Commission, in addition to finding that the transferee is qualified to conduct a broadcasting station, must determine that the transfer is not tainted with a violation of the antitrust laws.

At one time the Commission took the position that it was entitled to pass upon the price paid for the transfer of the broadcasting facilities and the license. In most instances the transferee pays considerably more than the value of the tangible assets, the sale thus reflecting a value in the license.<sup>164</sup> Later, however, the Commission abandoned that position and now permits the transfer of licenses without analysis of the element of "good will."<sup>165</sup>

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162. *United States v. Radio Corp. of America*, 158 F. Supp. 333 (E.D. Pa.), *prob. juris. noted*, 357 U.S. 918 (1958).

163. *Id.* at 336.

164. See *Regents of the Univ. v. Carroll*, 338 U.S. 586, 591, 596 (1950) (*dictum*); *White, The American Radio* 169 (1947). Note, *Radio and Television Station Transfers*, 30 *IND. L.J.* 351, 354-58 (1955).

165. *Ohio Valley Broadcasting Corp.*, 15 P & F RADIO REG. 41, 45 (1957) (*semble*); *O. R. Mitchell Motors*, 14 P & F RADIO REG. 85, 87 (1956) (*semble*); *Warner, Transfers of Broadcasting Licenses Under the Communications Act of 1934*, 21 *B.U.L. REV.* 585, 601 (1941).



Another area in which the Commission has occasionally shown an interest in the amounts paid is that involving the withdrawal of applicants for licenses. In a comparative proceeding, if one applicant withdraws no hearing is held by the Commission with respect to the other and the license issues if he is found to be qualified.<sup>166</sup> It frequently happens that when several persons have made application for a license one or more will withdraw and be paid a considerable sum by the remaining applicant. The Commission usually approves such transactions, sometimes on the theory that payment to the withdrawing party merely constitutes reimbursement for out-of-pocket expenses already incurred.<sup>167</sup> On other occasions the payment has simply been approved without reference to expenses.<sup>168</sup> This practice has been the subject of bitter adverse comment with respect to "pay-offs"<sup>169</sup> and may not always be approved by the courts.<sup>170</sup>

#### CONCLUSIONS

Under most regulatory schemes a commission applies interventionist principles. In broadcasting, however, the Federal Communications Commission conceives of itself as applying antitrust principles. This unusual situation may give rise to confusion because it is odd to think of the doctrine of primary jurisdiction as failing to relieve the regulated industry from the impact of antitrust principles. The cases nevertheless are clear that, to the extent the Commission has jurisdiction to pass upon a transaction, the matter may not be adjudicated in the courts. We have already adverted to the transfer of broadcasting facilities between the Radio Corporation of America and Westinghouse Broadcasting Company, which, having been approved by the Commission, could not be questioned by the Attorney General.<sup>171</sup> In another case the court spoke even more clearly:

166. Wichita Beacon Broadcasting Co., 8 P & F RADIO REG. 527, 531 (1953).

167. Texas Technological College, 17 P & F RADIO REG. 31, 46-47 (1958); Television City, Inc., 14 P & F RADIO REG. 333, 466i (1957); Independent Television, Inc., 12 P & F RADIO REG. 685 (1955). Compare Arkansas Television Co., 11 P & F RADIO REG. 359 (1954).

168. Cherry & Webb Broadcasting Co., 11 P & F RADIO REG. 859, 907-08 (1955); KM.YR Broadcasting Co., 9 P & F RADIO REG. 496 (1953); see American Television Co., 12 P & F RADIO REG. 1433, 1440c (1956) (dictum). In Cherry & Webb, *supra*, the Commission found no objectionable "trafficking" when the payment was put in the form of an option to purchase stock. The optionees, however, were to receive \$200,000 if they failed to exercise their option. From a reading of the opinion it would look as if there had been a "pay-off" which had been obscured from the Commission's view. Compare Rollins Broadcasting, Inc., 13 P & F RADIO REG. 138, 139 (1955); Niagara Frontier Amusement Corp., 10 P & F RADIO REG. 293, 318 (1954).

169. Note, *Diversification and the Public Interest: Administrative Responsibility of the FCC*, 66 YALE L.J. 365, 384-86 (1957); *Network Broadcasting* 113.

170. Enterprise Co., 9 P & F RADIO REG. 816, 818u, *rev'd*, 231 F.2d 708 (D.C. Cir. 1955).

171. *United States v. Radio Corp. of America*, 158 F. Supp. 333, 336 (E.D. Pa.), *prob. juris. noted*, 357 U.S. 918 (1958).

"We think it improper to grant a preliminary injunction upon the charge that the networks have unlawful 'exclusive' contracts with their stations where the Federal Communications Commission, after protracted hearings and consideration not only of the general public interest but the Sherman Anti-Trust Act, has specifically sanctioned many of the important terms of affiliation contracts at present in use and the defendants have given reasonable grounds for denying their exclusiveness or illegality. In these circumstances it is not surprising that the Attorney General has conceded the primary jurisdiction of the Commission as to matters which it may control."<sup>172</sup>

The important question is whether, as to matters outside the jurisdiction of the Commission, the essence of its control is such that it would be inappropriate to apply the antitrust laws in judicial proceedings. Because the regulation is mostly noninterventionist in character, the adjective issue engulfs the substantive problem usually encountered in considering the conflict between antitrust and regulatory principles. We may nevertheless review the areas of potential conflict. As we have noticed, the broadcast licensees have almost complete freedom with respect to the price of their services. Antitrust proceedings designed to punish or prevent collusive price fixing would not interfere with the activities of the Commission. Even a decree prohibiting price discrimination would bear only remotely on matters of interest to the regulatory agency (*i.e.*, terms of the network affiliation contracts). True, the technical aspects of production are regulated. And the pace of innovation depends upon Commission willingness to experiment. At the same time the licensees have wide choice of program selection and may, except for the equivocal regulations controlling the networks, obtain their raw materials from a wide variety of sources.<sup>173</sup> And, as we have seen, the field is limited to those licensed by the regulatory authority; but here again licensing would not appear to be in conflict with antitrust principles provided that the number of licenses issued is sufficiently great. The same can be said with respect to the Commis-

172. *Federal Broadcasting Sys. v. American Broadcasting Co.*, 167 F.2d 349, 352 (2d Cir.), *cert. denied*, 335 U.S. 821 (1948). See *Television Inquiry* 1558, 1674; Hansen, *Broadcasting and the Antitrust Laws*, 22 LAW & CONTEMP. PROB. 572, 575 (1957); *Network Broadcasting* 622-23, 624; Note, *The Impact of the FCC's Chain Broadcasting Rules*, 60 YALE L.J. 78, 109 (1951). But see Hansen, *Statement on Antitrust Activities in the Field of Television*, 2 ANTITRUST BULL. 99 (1956).

Attention is invited to § 11 of the Clayton Act. It is there provided: "Authority to enforce compliance with Sections 2, 3, 7 and 8 of this Act . . . is hereby vested . . . in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy. . . ." 38 Stat. 734 (1914), as amended, 15 U.S.C. § 21 (1952). It does not appear that this section has ever been construed as applicable to broadcasting.

173. Compare ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 330 (1955).

sion's policy of renewing licenses; and its willingness to permit alienation of facilities is in accord with free market principles. With one minor exception licensees are not required to deal with would-be customers.<sup>174</sup> There appears to be no reason why section 3 of the Clayton Act<sup>175</sup> should not be enforced against licensees albeit the language of that legislation would require a change to achieve that result.

One may, of course, take a dim view as to the number of licenses issued. Depending on how we define an objectionable oligopoly and the relevant commodity we may find that the number of effective sellers is inadequate.<sup>176</sup> An attempt to enforce section 2 of the Sherman Act<sup>177</sup> in such a "natural monopoly" situation may be futile: the license is indivisible and antitrust decrees may be a poor substitute for that regulation of prices and practices carried on by public utility commissions. To leave power in existence and merely prohibit one particular manner of its exercise may do nothing for the general welfare.<sup>178</sup> Whatever inadequacy may exist, however, is not of the Commission's making. It is clear that the Commission is not attempting to limit numbers any more than it must to permit effective electrical transmission. Particularly significant is its refusal to recognize economic inquiry in licensing cases.

The Commission's attitude toward integration may fly in the face of sound economic analysis. There is, for example, no inevitable law whereby a licensee who publishes a newspaper enjoys a competitive advantage over one who merely operates an AM station; the newspaper may lose more money than the broadcasting station can earn. Anti-trust decrees have sometimes been framed on somewhat similar principles<sup>179</sup> and it is entirely possible that some confusion might develop from the overlap. It is also true that other principles utilized by the Commission arouse echoes of "soft" competition hard to reconcile with the Sherman Act. Nevertheless it seems safe to conclude that

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174. *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). The Commission has no power to require a licensee unilaterally to terminate a contract as condition of renewal of its license; such a condition in a license has no effect upon the rights of a third party under the contract. *Regents of the Univ. v. Carroll*, 338 U.S. 586, 596 (1950).

175. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 14 (1952).

176. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 325, 328 (1955); HALE & HALE, MARKET POWER §§ 3.8, 3.10 (1958).

177. 26 Stat. 209 (1890), 15 U.S.C. § 2 (1952).

178. *Cf. United States v. Griffith*, 334 U.S. 100 (1948).

179. *United States v. New York Great Atl. & Pac. Tea Co.*, 173 F.2d 79 (7th Cir. 1949).

competition may be enforced among the licensees. As the Court wrote in *FCC v. Sanders Bros. Radio Station*:<sup>180</sup>

"In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes the field of broadcasting is one of free competition."<sup>181</sup>

While it must be conceded that the foregoing views are not universally accepted,<sup>182</sup> the real issue is whether the Commission or the courts should enjoy jurisdiction over the licensees; and this question should be resolved by reference to appropriate principles of administration. No great policy problem is faced in determining whether the courts should continue to enforce antitrust legislation: it is simply a question of whether greater efficiency would result if all controls were in the hands of the Commission.

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180. 309 U.S. 470 (1940).

181. 309 U.S. at 474 (footnotes omitted). Compare *NBC v. United States*, 319 U.S. 190, 222-23 (1943); *Package Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708, 709-10 (3d Cir. 1958). See *Television Transmission, Inc. v. Public Util. Comm'n*, 47 Cal. 2d 82, 88, 301 P.2d 862, 865 (1956); Goldin, *Economic and Regulatory Problems in the Broadcast Field*, 30 LAND ECON. 223, 227 (1954). Note also the arresting views presented in Keyes, *The Protective Functions of Commission Regulation*, in 48 PROCEEDINGS OF THE AMERICAN ECONOMICS ASS'N 544 (1958).

182. Thus, in *Yankee Network, Inc. v. FCC*, 107 F.2d 212 (D.C. Cir. 1939), the court said: "In some respects the powers delegated by Congress for the regulation of broadcasters are even more drastic than those possessed by the Interstate Commerce Commission over railroad carriers; notably the power of the Federal Communications Commission to issue licenses for short periods, and to require, each time, a full showing of financial and other qualifications, as a condition of renewal." *Id.* at 222. Note also that various types of antitrust decrees could interfere with the regulation of the Commission. Thus, an antitrust decree affecting the "option time" practice of networks would overlap the Commission's control in a considerable degree. *But see* Hansen, *Statement on Antitrust Activities in the Field of Television*, 2 ANTI-TRUST BULL. 99, 105-07 (1956).