REVIEWS

BROADCASTING AND GOVERNMENT. By Walter B. Emery. East Lansing: Michigan State University Press, 1961. Pp. xxiv, 482. $7.50.

MR. Emery's book is a valuable guide for newcomers to broadcast regulation although, as such, it will undoubtedly be more useful for university courses than for specialists in the field. The major controversies are all reviewed, at least sketchily, along with historical, technical and legal background. Because the author does not set himself the task of analysis or critical evaluation so much as one of descriptive exposition, he necessarily leaves himself open to criticism on that score. Yet anyone familiar with the intricacies and technical mechanics of broadcast regulation can rejoice at having available for general reference still another lucid, well-structured survey of the essential rudiments of governmental policy towards a major communications medium. The extensive Appendix materials are well-chosen and provocative.

Publication of this volume gives us pause to reconsider the long road travelled by broadcast regulation during the past thirty years, and provides a convenient vantage point for doing so at a time when the market for regulatory reform is particularly active. Rather than undertake any perfunctory review of what is basically a straightforward survey of regulatory process and substance, I shall limit my comments to one fundamental issue: the requirements for efficient rationing of scarce broadcast spectrum space by administrative rather than market techniques, and the difficulty of formulating meaningful rationing criteria.

This reviewer could not help but emerge from Mr. Emery's book with a new sense of at least one stark alternative facing broadcast regulation today. Either the criteria by which licenses are awarded and frequencies allocated must be specified more concretely, with more rigorous, systematic research into their underlying premises—by social scientists, lawyers and engineers, or greater use must be made of such alternative techniques as competitive bidding for new grants, transfers and renewals, taxes and subsidies geared to influence broadcast structure and behavior, or public yardstick operations.[1] Mr. Emery does not pose the problem in this way; but the sweep of his book underlines the need to make such hard choices. Indeed, at least part of the endless controversy in this field, between industry and government, may well be due to the failure of both parties to do just that.

Stated otherwise, if direct rationing-allocation techniques are used, the needed political support and public confidence in Commission integrity must

1. Competitive bidding has never been particularly popular in the broadcast field and Emery may have excluded it from his brief catalogue of remedial possibilities on that score (ch. 24). But the stark alternative it poses to existing practice in some ways strikes at the heart of many long-standing sources of conflict between regulator and regulated in this politically sensitive area, and therefore deserved at least cursory attention in so broad a survey as this. See extended discussion of competitive bidding in Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1 (1959); Note, 18 U. CHI. L. REV. 802, 811-16 (1951). Aspects of all three alternatives—bidding, subsidies and public operations—are reviewed in Levin, *Regulatory Efficiency, Reform and the FCC*, 50 GEO. L.J. 1 (1961).

be maintained by demonstrating their equity, reasonableness and validity. Congress and Commission alike must be more willing to authorize and execute studies of the standards which underlie the techniques;[2] and the industry must also be positive and constructive in its attitude toward such studies.[3] If either or both parties are unwilling to accept the full logic of the direct rationing-allocation approach, they must then face up to the implications of alternative arrangements, one of which—competitive bidding—is particularly pertinent here.

The point can be clarified further by reviewing five well-known bones of contention between the FCC and the broadcast industry. First is the *fact* of the Commission's intervention in impersonal market processes through the imposition of standards which afford priorities to broadcast applicants with certain qualifications (including those with certain kinds of program proposals or past performance records), located in communities with certain social-economic characteristics. The major contexts in which these standards have been hammered out are the comparative hearing forum [4] and the major rule-making proceeding.[5] In both cases administrative intervention has altered to varying degrees what would otherwise result from the free play of market forces.

In comparative licensing decisions, small businesses new to broadcasting and unaffiliated with other media are sometimes preferred to strategically placed multiple owners with choice network or newspaper ties in the immediate area or in other markets. In such cases one might say that the rationing of valuable privileges by the FCC alters the distribution of operating rights that might otherwise result from competitive bidding for the licenses.[6] To be sure, the Commission has actually decided in favor of the latter kind of candidate (who would probably win in an open price competition anyway) as often as in favor of the former (who would probably lose).[7] But the fact

2. The FCC's failure to apply a "study technique" in the preparation of its TV Allocation Plan of 1952 is a good case in point. See *Report of the Ad Hoc Advisory Committee on Allocations to the Senate Committee on Interstate and Foreign Commerce,* 1958, 46-47, 78-79, 245-50 [hereafter cited as *Bowles Report*]. This contrasts with notable use of a "study technique" in the Commission's investigation of network broadcasting. House Committee on Interstate and Foreign Commerce, *Network Broadcasting,* H.R. REP. No. 1297, 85th Cong., 2d Sess. (1958) [hereinafter cited as *Report on Network Broadcasting*].

3. Components of the industry are sometimes reluctant to cooperate fully in providing all needed information. See *Report on Network Broadcasting* at 7-8.

4. EMERY, ch. 14. Comparative hearings arise where several applicants, each qualified to serve in the public interest, compete for a single broadcast grant and where the Commission must determine who is the best qualified. Such hearings are said to provide a forum to explore the full range of factors that may add to or detract from a candidate's ability to serve the public. *Report on Network Broadcasting* at 59.

5. EMERY, ch. 9.

6. At least, this is true insofar as large wealthy candidates with readier access to an imperfect capital market could otherwise outbid rival bidders at public auctions.

7. For example, a classification of comparative TV hearings according to whether local residence, integrated ownership or diversified ownership tipped the balance in favor of what is generally a smaller, less wealthy applicant, or were overridden in favor of a larger,

remains that absent any auctioning of new broadcast grants the FCC must in some 10 per cent of all licensing cases interpose *its* judgment and choose between rival applicants with roughly equal qualifications in very close races for choice grants in the most lucrative markets. Likewise, unless it were to utilize a first-come-first-served standard and allow available market support alone to determine the location of broadcast stations, the Commission must also pre-determine the number of outlets allowed to operate in the various size markets.[8] My point is simply that whenever a regulatory authority interferes with impersonal market processes, those who are regulated tend to make such actions a target for otherwise undirected criticism. The broadcast industry is no exception to this tendency. On the contrary, the elusive character of its service standards, its unique technology, and its crucial political-cultural function, combine to render the industry particularly sensitive to such interference.

A second clash arises over the *validity* of the Commission's rationing criteria. It is sometimes contended that the local applicant with no other media connections, knowledgeable in community affairs and active in civic matters, but without broadcast experience, may in fact be far less able to serve his community than an outsider with long experience and greater resources, even though affiliated with other media and other stations. The criticism is not that local, diversified or integrated ownership tips the balance in every contested case, but rather that such factors should play *no* role at all, in view of the absence of convincing evidence that they will in fact guarantee "better service," or even a wider range of program options than otherwise. Criticized also are those allocation policies geared to promote local stations in uneconomic markets at the expense of more numerous high-powered, big-city signals,[9] and still other policies geared to maximize multi-signal areas at the

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wealthier enterprise, reveals that the latter was true in 12 cases out of 23 (for local residence), in 14 cases out of 35 (for integrated ownership), and in 9 cases out of 19 (for diversified ownership). See Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655, 666-89 (1959). Some cases are classified under more than one decisional criterion.

8. This actually *was* done in the Television Allocation Plan of 1952. See FCC, Sixth Report and Order *in re* Docket No. 8736 (April 14, 1952). The Commission sought to assign at least one service to all areas, at least one station to all communities, multiple services and multiple stations to as many areas and communities as possible. *Id.*, ¶¶ 13, 63-68. It also reserved 242 TV channels for non-commercial, education use. *Id.*, ¶¶ 60, 69, 84. But even in the standard broadcast band situation, where *ad hoc* methods interfere less with the strict economic determinants of new station entry than the pre-engineered TV plan does, the designation of clear, regional and local channels has precluded any real first-come-first-served standard. Nor has the absence of a pre-engineered plan in standard broadcasting precluded the development of identical criteria to guide the distribution of operating rights. *Compare* Extended Broadcast Hours for Daytime Stations, 25 F.C.C. 1135 ¶¶ 6-9 (1958), and Clear-Channel Broadcasting in the Standard Broadcast Band, 24 F.C.C. 303, ¶¶ 12-18 (1958), *with* F.C.C., Sixth Report and Order *in re* Docket No. 8736, ¶¶ 13, 63-68 (April 14, 1952).

9. *E.g., Hearings Before the Senate Committee on Interstate and Foreign Commerce* (Television Inquiry), 84th Cong., 2d Sess., pt. 2, at 456-68 (1956), and incisive rebuttal, *id.* at 819-23.

expense of local community stations.[10] Yet, assuming that program diversity, wide geographic service and signal quality are desiderata, the FCC can now hardly afford *not* to intervene in the broadcast industry. The problem, as noted, is to make sure that all its proximate regulatory criteria are sound in fact as well as in appearance.

A third set of factors creating industry discontent is the time-consuming *character* of the Commission's rationing procedures and their costliness—both in terms of the resources dissipated in using or circumventing such procedures and the capitalized value of the income foregone during the long periods of negotiation. These delays have averaged some 14 months between the end of initial screening and the time of final grants of a construction permit in comparative TV licensing cases, and have run as high as 3½ years in the formulation of a final Allocation Plan for television. Futile deliberations over breaking down the clear channels to facilitate new station entry into numerous A.M. radio communities, have occurred, on and off, since 1946.[11] Obviously no candidate anxious to enter a lucrative market relishes such artificial barriers as those described here. And yet, the millions of dollars dissipated through long delays and deliberations, are not *ipso facto* too high a price to pay for a truly judicious distribution of scarce operating rights. The large sum simply underlines once more the vital importance of establishing the desirability of the Commission's ultimate norm (program diversity) and the validity of the proximate criteria used to implement that norm. It underlines also the need to appraise the efficiency of existing regulatory techniques.

A fourth possible source of resentment may well be the broadcasters' reluctance to be placed in a position of having to outpromise each other on paper in vying for the same license grant, or to make exorbitant offers for distinctive program service in tactical maneuvers either to prevent the reservation of valuable frequencies for educational institutions or to ward off impending congressional inroads in the program field, only to slide back to an earlier position of "normalcy" (given the realities of advertiser economics) once the "heat is off." These pressures to widen and enrich program choice might well exist irrespective of the present licensing-allocation apparatus; but that apparatus, and the technical-institutional framework which underlies it, clearly intensify

10. *Id.* at 810-19, 826-28; criticism, *id.* at 859-61, and *id.* at 452-54, and also in *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 84th Cong., 2d Sess., pt. 2, vol. 1, at 3269-70 (1957).

11. "Clear channels" refer to 60 of 107 standard broadcast channels on which one or more dominant stations serve wide areas free of interference in their primary service areas and over most or all of their secondary areas. FCC RULE 3.21(a). Until recently 24 of the 47 United States clear channels were reserved exclusively for a single class I-A station at night, operating fulltime with 50 kilowatts power. It is estimated that more than 150 low-powered local stations could in fact operate on any clear channel were the rules changed to permit this. Signal quality and service to remote rural areas are still cited to justify the continued restrictions on entry, although these restrictions were recently relaxed on 13 of the choicest United States channels. See FCC, Report and Order *in re* Docket No. 6741 (Clear Channel Broadcasting), Sept. 14, 1961, ¶¶ 1-21, 54-62.

the problem. Once more, the solution is either to reconstruct the present rationing apparatus by renewed inquiry into viable rationing criteria, or else to institute a new rationing device based in part on competitive bidding for operating rights.

Finally, even more objectionable to broadcasters than the imposition of rationing criteria under present licensing-allocation practice is the possibility that identical procedures may one day be applied in transfer and renewal cases, notwithstanding the probable impairment of industrial efficiency and growth.[12] For if the Commission's rationing effort is to be consistent and effective, it is the height of folly to impose at the outset and at great cost to taxpayers social priorities in favor of candidates with certain attributes, only to have these priorities completely subverted by the free market for broadcast stations at transfer time.[13] Arguably, the present imposition of direct rationing criteria on *new* grantees must be followed by the imposition of *comparable* criteria in transfer and renewal cases, unless the present free market trading of stations is accompanied by separate bidding for the seller's license.[14]

In short, the industry's continued irritation over existing unverified licensing-allocation criteria and inefficient FCC procedures, is understandable, but quite beside the point. Broadcasters (no less than broadcast regulators) simply cannot have their cake and eat it too. Nor does the fact that *existing* criteria are deficient and often based on no definitive empirical studies change the nature of the problem in any fundamental way, for systematic studies of the costs and benefits of particular criteria in terms of the Commission's several basic standards might help rectify this.

To be sure, even thorough studies may fail to enhance the efficiency of regulatory techniques without a clear mandate from Congress, and continuous public support. This is amply clear from the endless debates over permissible and impermissible network practices, notwithstanding extensive inquiries in 1939-41, and again in 1955-58.[15] But the frequent disputes over the wisdom of breaking down the clear channels have long remained unresolved, and the status quo perpetuated by default for lack of up-to-date social and economic data which the Commission either failed to produce at all, or, having produced, failed to act on quickly enough.[16] The emphasis on local and diversified ownership has continued over the years despite the absence of any really definitive empirical inquiry. Finally, the Commission's inability to implement its several social priorities simultaneously through a comprehensive Television Allocation Plan, notwithstanding 3½ years of preliminary inquiry and testimony, has also been attributed to deficient empirical inquiry at the outset.[17] In brief, so long as the Commission rations scarce broadcast frequencies

12. See notes 21-23 *infra.*

13. EMERY, ch. 20.

14. See discussion in Levin, *Regulatory Efficiency, Reform and the FCC,* 50 GEO. L.J. 1, 22-37 (1961).

15. EMERY, pp. 228-32.

16. *Id.* at 91-93.

17. See note 2 *supra.*

directly, it must use rationing criteria of some sort; and if these criteria are not re-examined and periodically in the light of systematic research into their end effects and their consistency with each other, Commission behavior is likely to become the mere result of *ex parte* pressures, hunches and political expediency.[18]

In this regard, it has been proposed, in recent years, that the Commission adopt a prime time rule,[19] a compulsory political time rule,[20] a rule giving priority to local applicants for new grants (or transfer rights),[21] a rule prohibiting concurrent newspaper ownership in highly concentrated areas,[22] a rule establishing a presumption for diversified ownership in all new licensing and transfer decisions, and, under certain conditions, in renewal cases too,[23] and a new, more stringent multiple ownership rule.[24] Such proposals emerge from long-standing regulatory experience in handling *ad hoc* licensing and transfer cases, especially in the comparative forum. They would obviously reduce elements of unpredictability in the Commission's behavior and conceivably implement its entry control policies more effectively. But before Congress or the Commission can commit itself squarely, systematic inquiries into costs and benefits are badly needed.

By way of undertaking one such inquiry, this reviewer focused extensive attention on the Commission's so-called newspaper policy.[25] Evidence uncovered [26] led to the conclusion that it is now time to reconsider how the

18. A most disconcerting example of this is documented in Schwartz, *supra* note 7, at 685-99. The Commission's contradictory behavior in favoring newspapers over non-newspapers in situations virtually identical with those where it had previously done the opposite, *id.* at 685-89, is shown to be perfectly consistent with overriding *political* considerations. *Id.* at 689-93. Notwithstanding similar qualifications in many cases Schwartz found that during Eisenhower's administration "some nine Democratic newspapers [were] denied television licenses, while eight papers which [were] Republican or Eisenhower Democrats [were] awarded channels. No newspaper which supported Stevenson at the election before its case was decided . . . received a channel, except in one case where such paper was a co-applicant with a leading Eisenhower paper." *Id.* at 693.

19. See H.R. 9549, 86th Cong., 2d Sess., § 8 (1960), and FCC Docket No. 12782 (Study of Radio-TV Network Broadcasting), Jan. 1960, at 295, 631, 2593-95.

20. See S. 3171, 86th Cong. 2d Sess. (1960); S. REP. No. 1539, 86th Cong. 2d Sess. (1960).

21. See H.R. 9549, 86th Cong., 2d Sess., §§ 9, 11 (1960); and H.R. 11893, 85th Cong., 2d Sess., §§ 6, 8 (1959); *Report on Network Broadcasting* at 659-60, especially recommendations 28-30; Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce, *Independent Regulatory Commissions,* H.R. REP. No. 2711, 85th Cong., 2d Sess. 15 (1959).

22. H.R. 9486, 86th Cong., 2d Sess. (1960).

23. *Report on Network Broadcasting* at 659-60, especially recommendations 28-30.

24. *Report on Network Broadcasting* at 584-99; *id.* at 659-60, especially recommendations 31-33.

25. LEVIN, BROADCAST REGULATION AND JOINT OWNERSHIP OF MEDIA (1960).

26. *Ibid.* The major findings are that there is (or has been) an official encouragement of broadcast editorializing by more and more stations, in recent years, notwithstanding the well-known partisanship of newspaper licensees in their printed editorial columns, *id.* at 80 n.12;

Commission's policy may best be tightened in areas of concentrated control, and what the net effect would be on program diversity and balance. The fact that such an inquiry might not have been necessary if the Commission did not have to act as a rationing-allocation board in distributing valuable operating rights is significant, but quite beside the point. There is no alternative to such inquiries under the present system. This does not mean that they are easy to conduct, or free of methodological pitfalls. But to say that social science techniques have no contribution to make, or to write off all FCC licensing-allocation criteria as empty shibboleths, is to reveal a total misunderstanding of the Commission's unavoidable rationing function and of its role in protecting the public interest. Nor can we really shrug off the problem by dismissing licensee control of programming as an empty "legal fiction" in contrast with the admittedly hard realities of the ties between networks, advertisers and station owners. The rationing problem remains, and so does the need for valid criteria.

The improvement of broadcast regulation is at best a joint venture for lawyers, public administrators and social scientists at large. One of the economist's possible contributions is to demonstrate the potential role of the pricing system in allocating scarce spectrum space, and of taxes and subsidies as mechanisms to implement existing regulatory objectives. But short of so sweeping a change in regulatory techniques as would institute outright competitive bidding for broadcast frequencies, and subsidization of public service programming,[27] with or without direct public ownership of key facilities, he must surely aid in periodic joint efforts to overhaul the *existing* licensing-allocation criteria. Above all, he may help by trying to estimate the costs and benefits of bold steps to crystallize these criteria.

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a continued existence of many communities where the only daily newspaper owns the only radio station, and of other communities where a radio station tied to the only newspaper competes for advertising revenue against a second unaffiliated station, *id.* at 77-78, 80-81; no convincing evidence that substantial economies resulted in joint newspaper-radio enterprises, *id.* ch. 4, or that strategic segments of the older media cannot survive effectively in competition with radio-TV by making organizational-product adjustments, *id.* chs. 5-6; at least some evidence that intermedia competitive adjustments will be greater when the media are unaffiliated, and that intermedia competition leads different media to seek out and exploit their distinctive properties and relative advantages and to try to stabilize their incomes by focusing on the needs their rivals tend relatively to neglect, *id.* chs. 5-6.

27. See H.R. 9549, 86th Cong., 2d Sess. (1960), and discussion in Levin, *Regulatory Efficiency, Reform and the FCC,* 50 GEO. L. J. 1 (1961).

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