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The Broadcaster and the Public Interest: A Proposal to Replace an Unfaithful Servant

Don R. Pember

THE BROADCASTER AND THE PUBLIC INTEREST: A PROPOSAL TO REPLACE AN UNFAITHFUL SERVANT

*By Don R. Pember**

America 1970, some will say, is a nation in the midst of a revolution. Others argue that we face only the greatest social upheaval in our short national history. In addition, an ecological crisis is mounting that, by the year 2050, could render moot the outcome of any social or political revolution. Man will have ceased to exist.

It has only been in the past five years that many Americans have become aware of the crucial period which approaches. Slowly, and in some cases feebly, the country has begun to marshal its tools and strength to survive the decades ahead.

One of the most important tools in the hands of man is his communication system—especially the vast American television network. With such a system there *should* be little difficulty in at least explaining the problems and the means of survival to all citizens. But this may not be possible if we continue to use television inefficiently. A few hours per week, at the most, are grudgingly devoted to these extremely important matters. Moreover, the American people presently have little power to replace the continual flow of pap, broadcast nearly 24 hours each day, with meaningful programming despite the fact that the public supposedly owns the channels used by the broadcast industry. Theoretically this situation should not exist since the Federal Communications Commission (FCC), a seemingly powerful regulatory agency, was established to protect listener and viewer interests by insuring that broadcast facilities are used in the "public interest, convenience or necessity".[1]

This article is an attempt to show that this system of regulation has not worked and to briefly suggest other means for the regulation of American broadcasting. The article has three points of emphasis. The first is a look at the past. Historian David A. Shannon has observed that the present is only the cutting edge of the recent past. This is particularly true when one examines the regulatory policies of the FCC. Additionally, one of the all-time low-water marks of Commission protec-

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1 47 U.S.C. § 307(a) (1964). *See also* 47 U.S.C. §§ 307(d), 309(a) (1964).

tion of the public interest—the WLBT case of 1968[2]—will be considered. This controversy will be used to spotlight the basic weaknesses in the present system of regulation. Finally, in the backwash of indignation generated by the WLBT case, a plan to reform broadcast regulation—far-fetched and utopian as it may seem—is outlined. It is suggested that only through a major realignment of broadcast ownership, a realignment which ignores the vested interest pressures, can television ever reach its potential as a medium of communication.

I. THE PROBLEMS REVISITED

The history of broadcasting prior to federal regulation has been recounted many times.[3] Readers need only be reminded that in the early and middle 1920's the radio industry was one of chaos. All commercial stations broadcasting news, lectures and entertainment were initially on one frequency—360 meters. This channel was allocated by the Department of Commerce (the first "regulatory" agency in the broadcast industry).[4]

The 1912 Radio Act required broadcasters to have licenses before going on the air but any qualified person could obtain one. Additionally, the Government assigned the same frequency to all commercial broadcasters but refused to allocate time periods for the use of the frequency within geographic areas. Stations within a city, for example, were told to resolve this problem themselves. In some areas this worked —in most areas there was a good deal of confusion. Moreover, the fact that the Secretary of Commerce had no discretion in granting these licenses[5] intensified the problem. Since there was only a limited amount of space in the air—a limited amount of ether as broadcasters call it—on which to transmit radio signals, broadcasters began to interfere with each other.[6] Francis Chase, Jr., in *Sound and Fury*, described the situation at that time as one where "chaos rode the airwaves, pandemonium

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2 Lamar Life Broadcasting Co., 14 F.C.C.2d 431 (1968). It should be noted that the Commission's decision begins at 431, the dissenting opinion begins at 442, and the hearing examiner's report, rendered prior to the Commission's decision, begins at 495. It should also be noted that although the case name appears in various forms throughout the cited material, the same case is being discussed.

3 *See, e.g.*, W. EMERY, BROADCASTING AND GOVERNMENT 10-19 (1961).

4 The history of broadcasting and its inherent legal problems is best explored in Erik Barnouw's two volume work, A HISTORY OF BROADCASTING IN THE UNITED STATES (vol. I, A TOWER OF BABEL, 1966 and vol. II, THE GOLDEN WEB, 1968). *See also* S. HEAD, BROADCASTING IN AMERICA 127 (1956).

5 Act of Aug. 13, 1912, ch. 287, § 1, 37 Stat. 302.

6 W. EMERY, *supra* note 3, at 13.

filled every loudspeaker and the twentieth century Tower of Babel was made in the image of the antenna towers of some thousand broadcasters who, like the Kilkenny cats, were about to eat each other up."[7]

In addition, the public was being victimized by peddlers of the air like John Romulus Brinkley, the famous Dr. Brinkley who made himself wealthy by selling patent medicine and revitalizing goat-gland operations from his radio station in Milford, Kansas.

Broadcasters and the listening public began to demand some sort of regulation by the federal government and Commerce Secretary Herbert Hoover. Hoover began to take a stronger, albeit unauthorized, position. At the Fourth National Radio Conference in 1925 he said:

> We hear a great deal about freedom of the air, but there are two parties to freedom of the air, and to freedom of speech, for that matter. Certainly in radio I believe in freedom for the listener . . . . Freedom cannot mean a license to every person or corporation who wishes to broadcast his name or his wares, and thus monopolize the listener's set.
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> [W]e do not get much freedom of speech if 150 people speak at the same time at the same place.[8]

Largely due to Secretary Hoover's efforts, the regulatory powers of the Government over the radio industry were extended, existing frequencies were reallocated and additional frequencies were made available.[9]

The broadcast picture was beginning to clear up when Hoover's power was challenged in 1926 by Eugene F. McDonald, the president of Zenith Radio which owned station WJAZ in Chicago. This challenge resulted in a federal court ruling that Hoover had exceeded his statutory authority.[10] Acting Attorney General William J. Donovan supported the decision of the court in an opinion written for Hoover, suggesting that new legislation was the only means of curbing excesses in broadcasting.[11]

In 1927 Congress, which had failed to deal with this problem for several years, passed a new broadcasting law which created the Federal Radio Commission and gave the federal government the needed power

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[7] *Id.* at 13-14, *quoting* F. CHASE, JR., SOUND AND FURY 21 (1942).

[8] FOURTH NATIONAL RADIO CONFERENCE, PROCEEDINGS AND RECOMMENDATIONS FOR REGULATION OF RADIO AT 7 (November 9-11, 1925) *quoted in* W. EMERY, *supra* note 3, at 19.

[9] *See* W. EMERY, *supra* note 3, at 17-18.

[10] United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926).

[11] 35 OP. ATT'Y GEN. 126 (1926).

to regulate the broadcast industry.[12] Predictably there were cries that this was censorship and thus a violation of the First Amendment guarantees of free speech and press. But proponents of the new law said the traditional notions of free speech and press could not be applied to broadcasting. Libertarian press ideas, they said, depended upon unrestricted entry into the field. But since there were physical limitations on the number of persons who could use available facilities at any one time, entry into broadcasting justifiably could be restricted.

However, Congress did not give the Federal Radio Commission carte blanche. Congress stipulated that regulation must be with the "public interest, convenience or necessity" in mind.[13] This concept was initially applied to broadcasting in the 1927 Radio Act, the nation's first real attempt to regulate broadcasting.[14] When, in the early 1930's, it became clear that it was difficult to regulate the broadcast industry without concurrent regulation of the telephone and telegraph industry, Congress re-adopted much of the language of the 1927 measure in the broader Communications Act of 1934.[15] Sections 307(a) and (d) and 309(a) of the 1934 Act prescribe clearly that the FCC should allocate or renew broadcast licenses only if the public interest, convenience or necessity will be served.[16] These are the key sections of the law which provide the

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12 Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162 (repealed June 19, 1934, ch. 652, § 602(a), 48 Stat. 1102). This Act created the Federal Radio Commission.

13 *Id.* § 4 at 1163 (repealed June 19, 1934, ch. 652, § 602(a), 48 Stat. 1102).

14 *Id.* *See* W. EMERY, *supra* note 3, at 19-20. It should be remembered that when the 1927 law was framed the Congress was primarily interested in solving a serious technical problem—alleviation of the confusion and chaos which jammed the air-waves. Both legal and communications scholars frequently attempt to read into the Radio Act of 1927 a greater social purpose than really existed. In 1938 one scholar accurately noted:

> The principal problem facing the newly created Federal Radio Commission [created by the 1927 law] was primarily a technical one: bringing order out of the chaos which existed in the American portion of the broadcasting band. Moreover radio was new and lusty. No precedents existed and too little was known of its technical, social and economic characteristics to make possible the establishment of a philosophy or criterion of public interest except in a sporadic and haphazard fashion. Hettinger, *The Economic Factor in Radio Regulation*, 9 AIR L. REV. 115 (1938).

In fact, many attempts to put something of a social standard into the law were defeated. For example, attempts to write a fairness doctrine into both the 1927 and the 1934 laws were beaten down in Congress. *See* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, THE FAIRNESS DOCTRINE AND RELATED ISSUES [Appendix B: HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, LEGISLATIVE HISTORY OF THE FAIRNESS DOCTRINE, 90th Cong., 2d Sess. (1968)], H.R. REP. No. 91-257, 91st Cong., 1st Sess. 71, 85, 90 (1969). The fairness doctrine, today an integral part of broadcast regulation, requires broadcasters who air controversial issues to present all sides of these issues. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10416 (1964).

15 47 U.S.C. § 151 *et seq.* (1964).

16 47 U.S.C. § 307(a) (1964) provides:

basis for the well-established doctrine that the government may regulate broadcasting in the public interest.

Of course the words "public interest, convenience or necessity" and the ideas now embodied in that phrase had appeared earlier in various combinations in a wide variety of legislation and judicial decisions. For example, in the area of public utilities regulation, states frequently used the similar phrase "public convenience and necessity" as a standard for the exercise of administrative discretion.[17]

The notion of public interest, on the other hand, achieved its importance from a handful of United States Supreme Court decisions in which the constitutionality of regulatory legislation was at issue. In instances when the Supreme Court attempted to justify a high degree of regulation of a particular business, while avoiding the argument that such regulation was an infringement upon the businessman's constitutional rights to use his private property, the Court found certain businesses to be "affected" or "cloaked" with a public interest.[18]

Use of this phrase, then, had a special meaning in the area of broadcasting. But such words still provided a very indefinite standard. Congress made no attempt, in 1927 or 1934, either in the definitions section or in the legislative history of the statute, to clarify or establish guidelines for the construction of the phrase.

During the past 43 years it has been left to the FCC and the courts to define the meaning of the phrase "public interest". And the courts frequently have been of little help. For example, in *McClatchy Broadcasting Company v. FCC*[19] the Court of Appeals for the District of

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The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

47 U.S.C. § 307(d) (1964) provides in part:

> . . . Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, . . . if the Commission finds that public interest, convenience, and necessity would be served thereby.

47 U.S.C. § 309(a) (1964) provides:

> Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

[17] For a discussion of the evolution of this standard see Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295 (1930).

[18] *See, e.g.*, Brass v. North Dakota *ex rel.* Stoeser, 153 U.S. 391 (1894); Budd v. New York, 143 U.S. 517 (1892); Munn v. Illinois, 94 U.S. 113 (1876).

[19] 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 952 (1957).

Columbia ruled that the standard of public interest, convenience or necessity meant that the Commission must not act arbitrarily or capriciously and that it must act within its statutory and constitutional bounds. This construction added little to the precision which was sought.

On other occasions courts have been more specific, but still have not offered solid guidelines. The Supreme Court of the United States, in *FCC v. Sanders Brothers Radio Station*,[20] stated that public interest, convenience or necessity requires a license applicant to have the ability to render the best practicable service to the community reached by his broadcasts. In the famous "Network Case", *National Broadcasting Company v. United States*,[21] the Supreme Court reaffirmed the standard announced in *Sanders Brothers* and added: "The 'public interest' to be served under the [1934] Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio'."[22] This is hardly a precise standard.

In its attempts to define "public interest" the Commission has issued various documents and handed down many decisions. The rulings have approached the problem operationally by telling broadcasters what they must do and what they cannot do. The FCC's 1960 Programming Policy Statement,[23] for example, attempted to help broadcasters define service of the public interest in local areas. The statement lists fourteen major kinds of programs which the Commission says are usually necessary to meet the needs and desires of the community. The Fairness Doctrine,[24] the personal attack rules,[25] and other policies developed by the FCC—but not a part of the 1934 Communications Act—are other examples of operational definitions of the public interest.

In spite of these attempts the standard of public interest remains vague and thus may easily be disregarded by many irresponsible broadcasters. This has led many critics of the broadcasting industry and the FCC to argue that much of the Commission's rule-making is merely rhetoric, just paper policies which have little meaning in the real world. As one author has recently written:

> The statutory mandate is honored more in its breach than its observance; effective surveillance of broadcast stations is inhibited by the in-

20 309 U.S. 470, 475 (1940).

21 319 U.S. 190 (1943).

22 *Id.* at 216, *quoting* 47 U.S.C. § 303(g) (1964).

23 *Network Programming Inquiry*, 25 Fed. Reg. 7291 (1960).

24 *See Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10416 (1964).

25 47 C.F.R. §§ 73.123, 73.300, 73.598, and 73.679 (1970) which are identical.

> sufficiency of the staff and by the Commission's hostility to local groups and competing applicants [for broadcast licenses]; licensees lack incentive to improve their programming and public service above the minimal levels sufficient to avoid minor inquiries and deferral status. . . . The result is mediocre and, occasionally, just plain bad programming which gives a nod to the FCC and the public, but bows low to the advertiser's dollar.[26]

II. RENEWAL PROCEDURES

The right to renew broadcast licenses is potentially one of the greatest powers held by the FCC. Every three years[27] each of the nearly 8,000 television and radio licensees must reapply for the right to the "free and exclusive use of a limited and valuable part of the public domain."[28] Theoretically, the license renewal procedure is the perfect device to measure the broadcaster's devotion to the public interest. A license applicant is required to state in his initial application, and in each renewal application, that he has surveyed his community and is prepared to present programming which meets its needs and interests. At renewal time the Commission supposedly compares the licensee's past programming proposals to a record of his performance during the previous three years. Has he lived up to his promises? Did he serve the public interest?

While no set formulas exist, the FCC does insist on diversity in programming to meet the needs of the various groups within a community. If a broadcaster cannot sell the kind of programming required to meet a specific need he must present it without sponsorship on a sustaining basis. In all cases, however, licenses can be renewed only if the public interest will be served.[29]

Because of this outwardly rigorous procedure, an individual with knowledge of the questionable state of American broadcasting might suspect that licensees are faced with a serious challenge every three years and that scores of broadcasters lose their licenses each year.

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[26] Comment, *The Aftermath of WHDH: Regulation by Competition or Protection of Mediocrity?*, 118 U. PA. L. REV. 368, 379 (1970). Anyone who has studied the FCC finds much truth in the author's comments. His assertions can be most easily demonstrated to the reader by recounting how the public interest was served in Jackson, Mississippi, during the Commission's renewal hearings for television station WLBT. *See* Lamar Life Broadcasting Co., 14 F.C.C.2d 431 (1968).

[27] 47 U.S.C. § 307(d) (1964).

[28] Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

[29] 47 U.S.C. § 307(d) (1964).

This is not so. The only challenge the broadcaster faces is to fill out correctly the plethora of forms required by the Commission. From 1934, the year the Communications Act was adopted, to the summer of 1969, only 43 license renewals were denied out of an estimated 50,000 renewal applications. In addition, 32 licenses were revoked prior to renewal time during the 35-year period.[30]

With nearly 8,000 licenses up for renewal during each three-year period it is unrealistic to expect the FCC, badly understaffed and underfunded, to police stations adequately. The processing, analysis and investigation of roughly 2,400 renewal applications each year is the responsibility of the renewal branch of the broadcast bureau, staffed by only seven lawyers, five broadcast analysts, three engineers, two accountants and a clerical staff.[31] One author has described the television renewal application as "voluminous compilations in which substance is often lost in a deluge of trivia."[32] In the absence of major complaints, rule violations or serious misconduct on the part of the licensee the renewal will be granted. Apparently no license has ever been revoked by the FCC solely on the basis of improper programming.[33]

The situation exists, then, in which both the FCC staff and the broadcaster scrupulously follow a procedural ritual—almost a litany—while the spirit of the procedure is left behind. As Commissioner Nicholas Johnson and former Commissioner Kenneth Cox reported, the process is one in which no actual review of past performance takes place.

> Every two months, a geographical block of broadcast license renewal applications are presented to the Commission's staff. Each batch of renewals contains all the licenses within an area of up to three States. The licensees file their answers in lengthy forms. . . . They specify the percentage of their programming which will be devoted to news, to public affairs, and to other matters. . . . They submit [program] logs. . . . The licensees describe the more-or-less unscientific method they have employed to divine the needs of their community. . . . When specified, they often have little relation to the programming decisions the licensee has made. This entire ritual . . . is a sham.[34]

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30 For a list of these licenses see *Hearings on S. 2004 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 91st Cong., 1st Sess., ser. 91-18, pt. 1, at 30 (1969).

31 *Inside the FCC*, TELEVISION AGE, Aug. 25, 1969, at 72.

32 Comment, *supra* note 26, at 374.

33 *Hearings, supra* note 30, at 122.

34 *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C.2d 1, 9 (1968).

The difference between theory and reality in the renewal process is easy to explain. In the first place, the broadcaster is in business to make a profit and the responsibility to serve the public interest is rarely his main concern, particularly when it interferes with his income. And the broadcasting business is very profitable these days. The television industry, for example, "averages about 100 percent return on depreciated tangible investment and about 40 percent on gross revenues."[35]

> In 1966, the television industry earned about $493 million on depreciated investment in tangible broadcast properties of $550 million. . . . [T]he average television station recovers its full investment twice over and earns a reasonable return in addition in one 3-year renewal term.[36]

The net income of the industry increased every year from 1959 to 1966 by percentages from 8.1 to 33.3 percent.[37] In 1969 the three major television networks recorded a 65.4 percent increase in income (before taxes), according to the FCC. At the same time, expenses increased only 9.5 percent. The same report noted that 489 VHF television stations reported income after expenses at $370.7 million in 1969 —a rise of 8.2 percent over 1968.[38] In gaining use of public airwaves, most television broadcasters receive what the British call "a license to print money".

In an industry in which performance is measured by the amount of income earned each year, it is easy to see that broadcasters find it difficult to believe that their success could be challenged.

In the few instances when actual review is undertaken the Commission (or at least some of its members) is astounded. In 1967 the FCC approved the application for a new FM radio station in Tasley, Virginia, in which the owner frankly proposed to devote up to 33 minutes per hour to commercials. Commissioners Cox and Johnson disagreed.[39] In their 1967 case study of renewal applications from broadcasters in Oklahoma, they discovered that of the 10 commercial television stations in the state which submitted renewal applications (which together grossed $16 million annually):[40] only one devoted as

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35 *Id.* at 9-10.

36 *Hearings, supra* note 30, at 114.

37 *Id.* at 113.

38 *Webs' Pre-Tax Net Up 64%, O & O's 9% in '69; VHF's Rise 8%, U's Set Back,* VARIETY, July 29, 1970, at 28.

39 *The Tuned-Out, Turned-Off FCC,* CONSUMER REPORTS, Oct. 1968, at 534.

40 *Broadcasting in America, supra* note 34, at 12-13.

much as two hours per week to "local public affairs"[41] programs, two stations devoted between one and two hours each week, six stations carried less than one hour each week, two stations presented no such programs, and there was not a single regularly scheduled prime time program devoted to the discussion or presentation of public affairs or controversial issues.

The Commission rejected the suggestion of Commissioners Cox and Johnson that the FCC deny renewal of any license in which the owner proposed to use less than five percent of his air time for news and one percent for public affairs.[42] In addition, the investigation of the Oklahoma licensees by Commissioners Cox and Johnson evoked the wrath of Senators Fred R. Harris and Mike Monroney, as well as scores of station owners.[43]

In light of these FCC procedures and attitudes the reader should not be shocked at the license renewal saga of WLBT-TV.

III. THE WLBT CASE—CHALLENGE TO RENEWAL

In Jackson, Mississippi, WLBT-TV serves an area which includes nearly 40 Mississippi counties and at least six Louisiana parishes. The population of this area is almost 900,000 persons, nearly half of whom are black. When the station's renewal application came before the Commission in 1964 it was accompanied by a petition requesting that the FCC deny renewal because the licensee had failed to serve the interests of the Black community.

Among the petitioners, or intervenors as they were called by the Commission, was the Office of Communication of the United Church of Christ, one of the largest Protestant denominations in the United States. The Office of Communication was established by the church to protect the public interest in broadcasting.[44] Other intervenors included the Reverend Robert L. T. Smith of Jackson, who had been active in the Mississippi civil rights movement and the State's Freedom Democratic Party, and Aaron Henry of Clarksdale, formerly a leader in the NAACP, a leader of the Freedom Democratic Party delegation at the 1964 Democratic Convention and candidate for governor of Mississippi on the

41 Public affairs programming is defined by the FCC as talks, commentaries, documentaries, and similar programs concerning local, national and international affairs.

42 *Broadcasting in America, supra* note 34, at 2.

43 *The Tuned-Out, Turned-Off FCC, supra* note 39, at 535.

44 The organization has published a small but informative pamphlet entitled HOW TO PROTECT CITIZEN RIGHTS IN TELEVISION AND RADIO.

Freedom Democratic Party ticket in 1963.

The intervenors' petition was the result of nearly a decade of complaints by Jackson Blacks against WLBT. The petition alleged that the station had consistently supported and promoted segregation while refusing to explore or discuss opposing views. Petitioners also charged that the station had systematically excluded Blacks from the use of its facilities and had misrepresented many events in which they were involved.

The intervenors were not seeking the WLBT license for themselves; they merely wanted the FCC to deny Lamar Life Broadcasting Company the continued use of the channel. The FCC said that since the intervenors were not seeking the license for themselves, they lacked a direct and substantial interest in the outcome of the hearing and therefore lacked "standing". Status as television viewers of Mississippi did not, in and of itself, give them a direct and substantial interest in the outcome of the hearing.[45]

Based on the charges in the petition, as well as FCC staff reports, the Commission concluded that the station had failed to live up to the requirements imposed by the fairness doctrine and had been guilty of discriminatory programming. Although the FCC denied petitioners the right to plead their case, it nevertheless disciplined WLBT by granting the station a one-year probationary renewal rather than the usual three-year extension.[46] Unsatisfied with this outcome, the intervenors appealed the Commission's ruling to the Court of Appeals for the District of Columbia.[47]

On March 25, 1966, Judge Warren Burger reversed the ruling, ordered a full evidentiary hearing on the license renewal and held that the petitioners did indeed have standing in the matter.[48] The full impact of this revolutionary decision will be felt in the years to come as listening and viewing groups petition their representatives in Washington for better service from local stations.

The language in Judge Burger's decision left little room for interpretation by the Commission:

> The Commission's rigid adherence to a requirement of direct economic injury in the commercial sense . . . denies standing to spokesmen for

[45] Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 999 (D.C. Cir. 1966).

[46] Lamar Life Broadcasting Co., 38 F.C.C. 1143, 1154 (1965).

[47] Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

[48] *Id.* at 1009.

> the listeners, who are most directly concerned with and intimately affected by the performance of a licensee. Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience.[49]
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> * * * * *
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> The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives . . . is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it.[50]

Judge Burger then declared that the petitioners' allegations were sufficiently serious to require the FCC to hold a hearing on the requested renewal, stating, "We agree that a history of programming misconduct of the kind alleged would preclude, as a matter of law, the required finding that renewal of the license would serve the public interest."[51]

A. Hearing on Renewal

The Commission had to decide the issue to be considered before a hearing could be held. It decided that four broad areas would be examined:[52]

(a) Whether station WLBT . . . afforded reasonable opportunity for the discussion of conflicting views on issues of public importance;
(b) Whether station WLBT . . . afforded reasonable opportunity for the use of its broadcasting facilities by the significant groups comprising the community of its service area;
(c) Whether station WLBT . . . acted in good faith with respect to the presentation of programs dealing with the issue of racial discrimination, and, particularly, whether it . . . misrepresented to the public or the Commission with respect to the presentation of such programming; and
(d) *Whether in light of all the evidence a grant of the application for* renewal of license of station WLBT would serve the public interest, convenience, or necessity.

After outlining the issues the Commission was then faced with the

[49] *Id.* at 1002.
[50] *Id.* at 1003-04.
[51] *Id.* at 1007.
[52] Lamar Life Broadcasting Co., 14 F.C.C.2d 431, 496 (1968) (hearing examiner's report).

task of assigning the burden of proof. The intervenors were given the responsibility of bringing forward evidence on (a) and (b), the Commission (its broadcast bureau) on (c), and WLBT on (d).[53]

The intervenors were then given the almost impossible chore of attempting to prove that the station had failed both to serve the public interest (by adhering to the requirements of the fairness doctrine) and to open its facilities to all members of the community. Commissioners Johnson and Cox argued that the burden of proof as to these matters should be on the *licensee*.[54] But the majority of the Commission maintained its position.

This, however, was not the only obstacle the petitioners encountered. The hearing examiner managed to put the station in the best possible light when he misinterpreted the FCC's instructions.

WLBT originally sought renewal in 1964 on the basis of its record from 1961 to 1964, and it was the 1964 renewal for which the 1967 hearing was held. The FCC told the examiner that the "*ultimate issue . . . is the probable future performance of the applicant* with respect to serving the public interest."[55] But the Commission also told the examiner that the past record of the licensee, especially during 1961-1964, would be the greatest source of information on which to make such an evaluation.[56] In this case, however, the hearing examiner chose to consider programming changes made *after* 1964 in making his decision. This was a clear violation of FCC policy that very little weight be given to changes made *after* the licensee falls under the scrutiny of the Commission.[57]

These were the obstacles facing the intervenors when the hearing began. For all practical purposes they were out of the ball game before the first pitch was thrown.

B. The Evidence

While much of the evidence was of a controversial nature, most of the charges made by the petitioners seem to have had substance.[58]

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[53] *Id.*

[54] *Id.* at 447 (dissenting opinion).

[55] *Id.* at 496 (hearing examiner's report).

[56] *Id.* at 445-46 (dissenting opinion).

[57] *Cf.* Kord, Inc., 31 F.C.C. 85, 87 (1961).

[58] The record in this case is less than complete. However, one is able to determine the charges against the station and the foundation for those charges by using the hearing examiner's report, the Commission's decision and the dissent of Commissioners Johnson and Cox.

1. Violations of the Fairness Doctrine

Petitioners noted violations of basic tenets of the fairness doctrine—the affirmative responsibility on the part of the broadcaster to present all sides of important controversial questions—as far back as 1957. In that year, during the integration crisis in Little Rock, Arkansas, WLBT presented a panel discussion by Governor James P. Coleman, Senator James O. Eastland, and Congressman John Bell Williams—Mississippi public officials who blamed the outbreak of violence in Little Rock on the Blacks. When the late Medgar Evers requested time on the station to present the Blacks' side of the issue, his request was refused. Evers complained to the FCC and demanded "equal time". The Commission informed Evers that the "equal time" doctrine only applied to appearances by political candidates during elections.[59] They failed to inform him that what he sought was relief under the fairness doctrine.

During the period when James Meredith was attempting to integrate the University of Mississippi, WLBT ran a series of spot announcements for the local White Citizens Council in the fall of 1962 which stated that Communists were behind the civil rights movement and the efforts to integrate the State's public facilities. The other side was not presented. Also, the station editorialized several times during this period that James Meredith's admission to the University of Mississippi would be a mistake. No spokesman *for* his admission appeared.

During 1962 and 1963 WLBT ran a series of editorial broadcasts entitled "Comment". The segregation issue was frequently discussed, but usually only one side was argued. While the station offered time to individuals who wished to respond, it did not independently attempt to discuss both sides of the question, as required by the fairness doctrine.

In 1963 during a "Meet the Candidates" program one of the participants, Mrs. Charles Hill, who was running for a local office, gave this description of a local Black school, Tougaloo College:

> One word describes it—horrible. We are nursing a viper to our breast. One man has said that there is not a Communist in the whole State of Mississippi and they are teaming up there at Tougaloo [College]. They are working full force, day and night, and some of our most solid citizens sit back and say, "Oh no, we don't have any Communists". . . .[60]

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59 47 U.S.C. § 315 (1964).

60 This description appeared in the transcript of the broadcast and was included in the hearing examiner's report. 14 F.C.C.2d 431, 517-18 (1968) (hearing examiner's report).

There is controversy over what the station representatives told the college president when he called to complain. But it is a fact that the station made no attempt to set the record straight on the matter, or even to substantiate Mrs. Hill's charges. The college president, Dr. A. D. Beittel, understood that station manager Fred Beard told him that if the college wanted to sue the station, to go ahead and sue. Beard denied this.[61]

Finally, during a three-month period in 1963, the Office of Communication conducted a survey concerning the kind of "public affairs programming" the station carried. Programs like the Dan Smoot Report, Life Line, and material presented by the John Birch Society comprised the bulk of the fare. Nearly all of it represented the extreme right wing of the political spectrum.

2. Service to the Black Community

No policy of the Communications Act is more fundamental than the requirement that broadcasters serve the particular needs and interests of their communities. However a look at the record reveals a failure on the part of the licensee to comply with this requirement.

Between 1961 and 1964 there were no appearances by Blacks on the general-interest, locally-originated programs such as Teen Tempo, Romper Room and Youth Speaks. There was one religious broadcast, The Voice of Goodwill, presented for 15 minutes each Sunday morning at 6:45 which featured Blacks and was broadcast for the Black community. The United Church of Christ monitored the station for an entire week in an attempt to show that participation by Blacks was minimal. The FCC refused to accept the study on the grounds that the program categories used by the church organization were not the same as those used by the FCC in its own monitoring studies, and that it was only for one-week—apparently too short a period. However, Commissioner Johnson pointed out that in the past the Commission had accepted studies using different program categories and that the FCC's own monitoring studies are based on a composite week, which is only seven days in length.[62]

The petitioners contended that WLBT frequently flashed a "Sorry Cable Trouble" sign whenever it wanted to censor integration material coming directly from the network. They cited two examples. The first

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[61] *Id.* at 516-17.

[62] *Id.* at 456-57 (dissenting opinion).

occurred in 1963 when the National Broadcasting Company was about to show films of a lunch counter sit-in demonstration in Jackson. In that case the station produced a telegram from Southern Bell Telephone apologizing for "cable trouble" during the broadcast. In the second case the petitioners asserted that in 1955 the station used a "Sorry Cable Trouble" sign to block the appearance of Associate Supreme Court Justice Thurgood Marshall, then a noted attorney. To substantiate their statements the petitioners presented a newspaper article which quoted station manager Beard bragging about the use of the sign. Beard contended that he had not used the Cable Trouble sign, that the station had not carried the broadcast and that he had been misquoted. Reverend Wendell P. Taylor testified that the Cable Trouble sign was used frequently to block network appearances by Blacks but, since he could not give specific dates and times, his testimony was disregarded by the hearing examiner.[63]

Witnesses testified that station manager Beard was a member of Jackson's White Citizens Council. Reverend R. Edwin King, a white faculty member at Tougaloo College who observed the Council meetings for the Black community, testified that in the late 1950's he attended a Council meeting at which Beard was honored for his outstanding work and contributions for the cause of segregation. Beard denied the charges and, after having observed the demeanor of both witnesses, the hearing examined chose to accept Beard's version of the story.[64]

Charges were substantiated that at least one WLBT announcer used the terms "negra" and "nigger" on the air and that, prior to 1964, announcers used the titles "Mr." and "Mrs." when referring to white men and women but did not use them when referring to Blacks.

3. Misrepresentations to the Commission and the Public

Material misrepresentations knowingly made to the Commission by a broadcaster are sufficient grounds for denial of renewal, regardless of past programming or program proposals.[65] Commissioners Cox and Johnson, in their dissent to the approval of the WLBT renewal application, noted these misrepresentations by the Lamar Life Broadcasting Company:[66]

1. In 1955, 1958 and 1963 the station told the Commission that

63 *Id.* at 524 (hearing examiner's report).
64 *Id.* at 520-22.
65 47 U.S.C. § 312 (1964).
66 14 F.C.C.2d at 459-60 (dissenting opinion).

as a matter of policy it did not permit the issue of racial integration to be aired. This was not true. For example, the 1957 program noted earlier on the Little Rock crisis dealt specifically with this topic.

2. In February, 1962, after Reverend Robert Smith complained to the FCC that WLBT refused to sell him time to promote his congressional campaign, the station manager Fred Beard *denied refusing to sell* Smith time.

   Two months later WLBT wrote the Commission that its *decision not to sell* Smith time was based on the fact there was no local interest in the campaign.

3. On November 21, 1962, Beard wrote the Commission that "We temporarily discontinued broadcasting editorials on September 21, 1962." A check of the station log, however, revealed that editorials were broadcast immediately after September 21. Beard said he thought the logs were wrong.

4. When the FCC inquired in July, 1963, why WLBT was only broadcasting one side of the integration issue in its programming, the station reported it was still policy not to air the issue at all. This was false.

With regard to misrepresentations to the public there was testimony by witnesses for the petitioners of several instances in which news about Blacks was distorted. For example, during a demonstration in Jackson after the death of Medgar Evers, witnesses reported that a Black was beaten by police after being pulled off the steps of the city hall. The same witnesses testified that when the incident was shown on WLBT-TV news the film suddenly stopped after showing police rushing the city hall porch. The studio commentator appeared on the screen and informed viewers that the Black had fallen off the porch and injured himself. Then the film returned to depict another scene.

This was not all the evidence presented by the intervenors in their attempt to prove their allegations. Much was excluded from the record by the hearing examiner because witnesses either could not remember exact dates and times, or failed to make a good impression on the witness stand. WLBT representatives did little other than deny the charges. Since they did not share the burden of proof on these matters they were required to contribute little to the record.

4. Renewal Granted

On June 27, 1968, the FCC, in a 5-2 vote, followed the recommenda-

tion of the hearing examiner and granted a three-year renewal to Lamar Life Broadcasting Company for WLBT-TV.[67] Commissioner Hyde, for the majority, stated:

> [A]fter our review of all of the evidence of record in this proceeding, we can reach no conclusion other than that the preponderance of the evidence of record firmly establishes that Station WLBT has been, and continues to be, satisfactorily . . . [taking] "the necessary steps to inform themselves of the real needs and interests of the areas they serve, and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests," including . . . service to minority groups.[68]

Hyde said the Commission had concluded that the intervenors had failed to prove their charges, and the preponderance of the evidence established that WLBT afforded the Black community a reasonable opportunity to use station facilities. The Commission found no evidence in the record that WLBT had misrepresented its programming on the issues of racial discrimination either to the public or to the FCC.[69] Dissenting Commissioners Cox and Johnson protested:

> Public concern is rising about the growing tendency of protest movements to take to the streets, and even the techniques of civil disobedience, to compensate for their inability to find expression for their views on the mass media. How does this Commission respond? It responds by leaving the doctrine of broadcast fairness lifeless on the shelf. It responds by blithely renewing the license of an owner who systematically used one of two television stations in the capital of Mississippi to suppress the expression of views favorable to integration.[70]

They also said the decision was the direct result of a misconception of the nature of the broadcaster's responsibility to the public:

> [T]he broadcaster is, in effect, an elected public official, using the property of his audience (the public's airwaves) to make private profit. He holds a 3-year trust—not a property right—to operate a local station. The burden is upon him to demonstrate, at every 3-year license renewal, that he has been a faithful trustee. The burden is not upon the protesting public to prove that his "rights" should be denied.[71]

The petitioners immediately appealed the FCC ruling to the Court of Appeals for the District of Columbia,[72] where Judge Warren Burger

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67 14 F.C.C.2d 431, 438 (1968).

68 *Id.* at 437.

69 *Id.* at 438.

70 *Id.* at 464 (dissenting opinion).

71 *Id.* at 465 (dissenting opinion) (footnote omitted).

72 Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

and the court demonstrated an unusual sensitivity to the problem.[73] The Court of Appeals reversed the Commission's decision and vacated the ruling of the FCC.[74]

The decision was based primarily on the Commission's error in allocating the burden of proof. Judge Burger said that the hearing examiner appeared to have regarded the intervenors as plaintiffs and the station owners as defendants, allocating the burden of proof accordingly. He stated:

> This tack, though possibly fostered by the Commission's own action, was a grave misreading of our holding on this question. [Referring to the court's 1966 ruling noted earlier which ordered the evidentiary hearing.] We did not intend that intervenors representing a public interest be treated as interlopers. Rather, if analogues can be useful, a "Public Intervenor" who is seeking no license or private right is, in this context, more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation to all the facts. . . .
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> [T]he Commission's duties did not end by allowing Appellants to intervene; its duties began at that stage.[75]

Judge Burger expressed great concern that the Commission's grant of a full three-year renewal had ignored the prior one-year probationary renewal (granted on the basis of a preliminary investigation which established a disregard for the public interest), stating: "The Commission itself, with more specific documentation of the licensee's shortcomings than it had in 1965 has now found virtues in the licensee which it was unable to perceive in 1965. . . ."[76] Judge Burger also mentioned that the hearing examiner had exhibited a "curious neutrality-in-favor-

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[73] Generally, courts have supported the FCC in favoring license holders. In 1930 the D.C. Circuit ruled in Chicago Fed'n of Labor v. Fed. Radio Comm'n, 41 F.2d 422 (D.C. Cir. 1930), that "It is not consistent with true public convenience, interest, or necessity, that meritorious stations . . . should be deprived of broadcasting privileges when once granted to them . . . unless clear and sound reasons of public policy demand such action." *Id.* at 423.

The following year the same court ruled in Journal Co. v. Fed. Radio Comm'n, 48 F.2d 461 (D.C. Cir. 1931), that the interest of the public and of common justice prevented the Commission from injuriously affecting the status of a broadcast station operated in good faith, in the absence of compelling reasons. *Id.* at 463.

Rulings like this are common in the history of broadcast law. The courts, following unwritten tradition in dealing with administrative agencies, refused to interfere with FCC decisions unless there was little or no evidence to support the ruling.

[74] 425 F.2d 543, 550 (D.C. Cir. 1969).

[75] *Id.* at 546-47 (footnotes omitted).

[76] *Id.* at 550.

of-the-licensee".[77] He added:

> [T]he record now before us leaves us with a profound concern over the entire handling of this case. . . . The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider . . . its own Decision and Order. . . .
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> For this reason the grant of the license must be vacated forthwith and the Commission is directed to invite applications to be filed for the license.[78]

On December 3, 1969, the FCC vacated the ruling granting the renewal application to Lamar Life Broadcasting Company.[79] On January 29, 1970, the Commission rejected Lamar's petition for reconsideration.[80] Five applications for the frequency have been filed[81] and the FCC has not yet decided what to do with the license during the period preceding the comparative hearing to select the new licensee.

The most unique suggestion has come from a black and white citizens' group, financed by the United Church of Christ Communications Office, which is seeking to operate the station until a new licensee is chosen. The group proposes that the profits from the operation of the television station be divided between two non-profit organizations engaged in broadcasting activities in Mississippi—educational television and a predominantly Negro College for the training of Blacks in communication techniques.[82] An FCC decision on this request is pending.

The WLBT-TV case leaves many questions unanswered. For example, how often does a licensee with this kind of record receive renewal merely because there are no intervenors to protest? The Commission's "automatic" renewal policy has never encouraged intervention by the public in these matters. The holding in the Court of Appeals' first opinion, that citizens' groups seeking better service from local broadcasters have standing to intervene in FCC license renewal hearings, has opened a major channel for public participation in the renewal process.[83] This could reshape the entire ritual but is a channel

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77 *Id.* at 547.

78 *Id.* at 550.

79 Lamar Life Broadcasting Co., 20 F.C.C.2d 635 (1969).

80 Lamar Life Broadcasting Co., 21 F.C.C.2d 277 (1970).

81 Shayon, *Mephisto and the F.C.C.*, SATURDAY REV., Mar. 14, 1970, at 102.

82 *Id.*

83 Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

which few, unfortunately, can afford to use. Earle K. Moore, general counsel for the National Citizens Committee for Broadcasting and an attorney for the intervenors in the WLBT case, estimates the cost to challenge Lamar Broadcasting was in "six figures", nearly a quarter of a million dollars.[84]

In an attempt to correct these abuses many persons have called for stronger action by the FCC. Suggestions have been made that the government should take a firmer hand in the regulation of the broadcast media. Even the Libertarian, long a foe of governmental involvement in the affairs of the press, seems to find solutions to more problems in increased action by the government. Energetic young lawyers such as Ralph Nader and John Banzhaf have pushed for stronger governmental protection of the consumer through the regulation of advertising. Law professor Jerome Barron has suggested that the courts or the Legislature could force newspapers and magazines to open their news columns to those who have been denied access to these publications.[85] This proposal was even seriously considered by the American Civil Liberties Union.[86]

Of course these proposals and others like them rest on the assumption that government remains a kind of benevolent patriarch. The history of governmental suppression of dissent in this country suggests a different conclusion. John Adams' Federalist judges undoubtedly would have had great fun with the Barron proposal in 1798. The Republican press suffered enough without it. The problem is that we do not know what kind of government this country will have in ten years, especially if the level of protest and dissent remains as high as it is today.

Actions by the FCC against broadcasters have not yet begun directly to abridge First Amendment rights. We still seem to have seven benevolent (albeit inefficient) godfathers in Washington. But in recent days we have seen broadcasters attacked by the government for analyzing the President's televised speeches, for giving time to Democrats to respond to the President's numerous prime time Vietnam messages, and perhaps more seriously, for their coverage of the war. Mysterious White House spokesmen and Defense Department employees, for example, charged that CBS had doctored a filmed report involving the brutal stabbing of an enemy soldier by a South Vietnamese sergeant.

84 *Hearings, supra* note 30, at 119-21.

85 Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

86 Cranberg, *Is "Right of Access" Coming?*, SATURDAY REV., Aug. 8, 1970, at 48.

The mere fact that these undocumented charges were made by such high sources caused them to be treated as credible assertions by responsible newspapers. Only when the network demonstrated, through an interview with the South Vietnamese sergeant, that the event actually occurred did government pressure ease off.[87]

Although these governmental pressures were not direct FCC actions, Commission Chairman Dean Burch still requested copies of station editorials about President Nixon's policies for Southeast Asia.[88] Today the agency seems to be taking more action, albeit oftentimes in the public interest, which is establishing precedent. However, such precedent could be used in the future to support Commission actions which are *not* in the public interest. Economist Herbert Schiller has written, "[I]n America, governmental control . . . of the communications media could produce a more sophisticated expertise in audience control than the commercial subliminators ever have managed to contruct."[89]

In August of 1970 the FCC *ordered* television stations to broadcast, during prime time, programs dealing with the nation's ecological crisis.[90] There is no doubt that television stations should broadcast such programs. As was noted in the introduction, our survival could well depend on the public receiving information about the ecological crisis. But is it not dangerous to give an agency of the government the power to order television stations to broadcast certain kinds of programs? What about next August? What orders will be given then? Justice Douglas wrote in 1952:

> Once a man is forced to submit to one type of radio program he can be forced to submit to another. It may be but a short step from a cultural program [or an ecological program] to a political program.[91]

The parallel to the problem at hand is apparent. The standard of public interest, convenience or necessity could easily be molded to fit political situations as well as nonpolitical ones.

Attorney and scholar Harry Kalven looked at the problem of government regulation of broadcasting for CBS in 1967.[92] The network provided Kalven with access to its file of 35 FCC complaints from 1960

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87 Diamond, *The Atrocity Papers,* 3 CHICAGO JOURNALISM REV. 8 (1970).

88 *Agnew's Complaint: The Trouble with TV,* NEWSWEEK, Nov. 24, 1969, at 89-90.

89 H. SCHILLER, MASS COMMUNICATIONS AND AMERICAN EMPIRE 152 (1969).

90 The Washington Evening Star, Aug. 18, 1970, at A-9.

91 Public Util. Comm'n v. Pollak, 343 U.S. 451, 469 (1952) (dissenting opinion).

92 Kalven, *Broadcasting, Public Policy and the First Amendment,* 10 J. LAW & ECON. 15 (1967).

to 1964. Many of these were listener complaints, much like letters to the editor of a newspaper. But Kalven points out there is one significant difference in this comparison. "Each time", he writes, "the Government of the United States has acted as intermediary to pass along the complaint. . . ."[93] And, Kalven adds, each time the government wants a reply.

Though many of the complaints were trivial, some were not. In 1961 the network received FCC inquiries about its broadcast interview with Walter Lippman. The absence of balance or a "counter-view" was the basis for the FCC's complaint. As Kalven notes, "Think of the outcry if some great daily newspaper were requested by government, and so peremptorily requested, to furnish a justification for printing the views of Walter Lippman!"[94]

Advocates of increased governmental regulation of broadcasting quickly point to the so-called "scarcity" theory noted earlier; namely, that there are a limited number of channels available and hence the government must regulate them to insure that they are used in the best interests of the public. Such a limitation, they point out, does not theoretically apply to the newspaper press.[95]

But as Kalven argues, the necessity for regulation imposed by the physical limitations of the broadcast system does not mean that the traditional mandates of the First Amendment should be excluded from the substantive aspects of broadcasting. A policeman may be needed to regulate the traffic, but does this give him the right to tell motorists what kind of car they must drive or specify their destinations?

IV. SOLUTIONS

Who should prevail—the advocates of more regulation or the spokesmen for preservation of our Constitutional guarantees of freedom of speech and press? Paradoxically, perhaps they both should prevail. Broadcasting should be more responsive to local needs and interests, but at the same time government should not be the agency to force the response. The problem, then, is how to make broadcasting more responsive to the public interest, convenience or necessity with a minimum of government regulation.

The solution to the problem lies in a major readjustment of the distribution of broadcast licenses. This means taking these valuable

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93 *Id.* at 21.

94 *Id.* at 23.

95 *Cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-89 (1969).

franchises out of the hands of private enterprise and giving them to local public corporations or community groups. A utopian idea? Undoubtedly. A drastic solution? Clearly—to meet a drastic problem. A feasible plan? It could be accomplished rather easily if the viewers and listeners of the nation make their demands heard. Success lies with the people and the strength of their desire to regain control over what is rightfully theirs—the broadcast spectrum. If the people do not care enough about this problem to move into action, the plan will fail as it undoubtedly should. In that case Americans would continue to receive mediocre broadcast service—service which they would deserve.

This proposal would do nothing to disturb the present broadcast network structure since the problems of broadcasting lie mainly with the local stations. The large networks merely sell programs and purchase time. But local stations have complete freedom to reject anything which is offered by the networks. Responsible operation of these stations would soon force networks to upgrade the product they offer or go out of business. News, coverage of special events, and public affairs and entertainment specials usually provide viewers with a few worthwhile hours each week, but this is not enough.

The real wasteland,[96] then, exists at the local level. Some stations simply do not bother with such responsibilities as local public affairs programming.[97] At most stations such programming is poorly-funded fat in the budget which is trimmed when profits dip. The spirit which motivates any work in this area is more often the FCC requirement than responsibility to the community or creativity.

The proposed modification of the present broadcast structure would take the local channels out of the hands of businessmen and give them back to the viewers and listeners. Certainly Congress has the power to remove these frequencies from private interests and allocate them for public use. But when Congress approved a privately-operated broadcast system in 1927, it did not make a gift of the valuable broadcast spectrum. On the contrary, before an applicant is granted a three-year license he must sign a waiver of any claim to the use of a particular frequency.[98]

Once removed from private hands, the channels would then be assigned to locally-controlled public corporations or television authorities. The various authorities would represent various cities. These authorities would be independent from municipal or local governments and would be

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[96] *See* N. MINOW, EQUAL TIME 52 (1964).

[97] *See Broadcasting in America, supra* note 34.

[98] 47 U.S.C. § 304 (1964).

created and governed by charters clearly defining such broadcast standards as public interest, convenience or necessity. In addition, these charters would outline both the powers and the responsibilities of the broadcast authorities.

Day-to-day management of stations would continue much as it has in the past with station managers or general managers operating the broadcast facilities. Then the people would be represented by their television authority, instead of private investors. A board of directors could be elected annually to supervise station management and formulate policy. All possible political, economic and social segments of the community should be represented on such a board, which, among its other duties, would be responsible for hearing both citizen complaints and citizen programming suggestions.

Every six months the board would attempt to survey the community to determine programming desires and other aspects of the public interest, convenience or necessity. Such surveys should not be designed to find out solely what the majority of the audience prefers, a standard approach in audience surveys. The interests of all major segments of the community should be satisfied.

Finally, for a community to achieve the maximum use of its broadcast facilities, the greatest share of broadcast time should be devoted to locally-originated programming. Such a requirement should be included in all charters for the television authorities.

How does this proposal differ from what is currently undertaken in the name of educational television? There is one significant difference. The television authorities would support their broadcasting with advertising, just as the commercial franchises today are financed.

Too many critics[99] blame the poor quality of television on advertising without realizing that it is not the source but the use of the money that is the problem. The culprit is the station owner or the network executive whom the advertiser intimidates. Simply because a medium is supported by advertising does not necessarily mean that it must shun quality programming, succumb to social pressure or seek to satisfy the lowest common denominator in its programming. Newspapers have been supported primarily by advertising for more than 100 years. The *New York Times*, the *Washington Post* and the *Wall Street Journal* have succeeded nicely without being corrupted by the advertising dollar. It is the man in charge who determines the character of a newspaper or broadcast station and most good newspaper edi-

[99] *See, e.g.*, H. SCHILLER, *supra* 89, at 154.

tors learned long ago that advertisers need their paper as much or more than the paper needs the advertisers. This observation has not yet found its way into the paneled offices of most broadcasting executives.

There is no reason why an efficient, publicly-owned broadcast facility which seeks to serve the public interest would not be an attractive and effective medium through which to sell toothpaste or used cars. The fact that advertising money is needed does not mean that a television station, newspaper or magazine must be gutless, bland and inoffensive. Manufacturers still want to sell their wares in media which are popular with readers and viewers. But merely because a station exhibits aggressiveness, social concern, and fighting spirit, does not mean it will be unpopular.

Most persons involved in educational television have sadly discovered that good television programming costs a great deal of money. Most educational television today is impoverished and depends upon local school funds, university budgets or state allocations. A handful of well-run stations do receive large grants each year from various foundations and corporations. But the vast majority of educational stations are sinking in the mire of increased programming and equipment costs.

Some educational television, such as National Educational Television, is funded by the government through the Corporation for Public Broadcasting. Government financing is often suggested as a solution to the nation's television woes. While this kind of scheme offers a workable (and perhaps more feasible) solution, it is fraught with dangers as well. Herbert Schiller persuasively argues:

> It is difficult to imagine a public corporation, with its directors appointed by the President and its money raised through annual congressional authorization, independently criticizing, for any length of time, established sentiments.[100]

Additionally, the cost of financing all television in this fashion would probably be prohibitive. In 1969 almost $2.3 billion was spent on television advertising. This money would have to be replaced if government financing was utilized and it is likely that politics would play a part in such a large expenditure.

Some persons might ask, "Won't advertisers leave a television system that rejects the lowest common denominator theory of programming and tries to serve community interests?" Initially some sponsors would probably be reluctant to use such a medium. But when advertisers realize that quality television—television which in fact serves the

[100] *Id.* at 154.

needs of all its viewers—can be popular and provide large audiences for commercial messages, there should be no reason to fear an advertiser boycott. Public control of television does not necessarily imply poor quality programming. The medium will still provide entertainment for those seeking to escape from the realities of everyday life. More importantly, if all television is operated as this proposal implies, the advertiser would be compelled to use the media as programmed or not at all. It is unlikely he would give up such a pervasive medium as television merely because he personally believed the programming was unappealing.

Cable television is often held out to today's viewers as the solution to the nation's broadcast problems. In such a system the picture and sound is transmitted into the home through a cable rather than through the airwaves. The viewer pays a fee for the installation of the cable and a monthly service charge. Wouldn't it be easier to wait until cable television becomes a reality rather than to radically restructure station ownership?

The short answer is no. There is no doubt that cable is an improvement in the means of carrying the message from the source to the home. It can provide viewers with a clearer picture and also supply more channels. More channels mean more diversity and therefore more segments of the community will find their interests represented on television. But this is all speculation.

There is nothing about cable transmission which insures or even suggests that television will be more responsive to public needs. There is nothing about cable television that guarantees that owners will not present the same fare which viewers have been receiving for the past twenty years. The same ownership patterns which now exist in commercial over-the-air broadcasting are beginning to appear in cable systems; the objective of both is to earn a profit. Even though cable television is an important new communication device it is only a technological improvement, still subject to the deficiencies existing in present broadcast programming.

V. CONCLUSIONS

To put the suggested proposal into effect, Congress would first have to establish the framework for the local television authorities. The FCC could guide the Congress in such a task.

After enacting such legislation the FCC would move into communities and aid the formation of television authorities and supervise

the drafting of charters and the election of boards of directors. After the FCC had laid the initial groundwork it would revert to the role of a policeman, regulating the technical aspects of the broadcasting medium. The Commission could also act as a mediator. However, since the local television authorities would be continually regulating broadcasts, the three-year renewal procedure would be unnecessary and there would be far less for the Commission to do.

Initial funding for the television authorities to purchase the equity of private broadcasters could come from government grants, foundations or special local levies. After that, however, the stations would be self-supporting, plowing the profit now pocketed by broadcasters into local programming budgets. Such a change of ownership would take many months to complete.

A drastic proposal as this is necessarily fraught with problems. It is intended as a general suggestion to make American broadcasting operate truly in the public interest. But many questions remain. For example, in most cities there are several television frequencies. Should there be separate authorities or should one authority control all? How much of a role would the FCC play within the definition of "minimal status"? Would the transfer of a franchise take place at once or a few stations at a time? Should licenses be granted permanently or should there be a challenge procedure for citizens who wish to begin their own television authority and seek a license?

Certainly taking the broadcasting business out of the hands of private enterprise will not be a popular action in many segments of the community. There will be strong opposition and the proposal will undoubtedly be labelled socialistic or communistic. But Congress has not hesitated in the past to withdraw support from the private sector if it was not serving the best interests of the people. Private enterprise has been given an opportunity to create a broadcasting system which meets the public interest, convenience or necessity and it has failed. Why should this sector be permitted continued use of the public airwaves, while remaining unresponsive to public needs, when others might put such public property to better use? . . . .

While attempting to make broadcasting more responsive, this plan would largely remove the current problem of increased government control. The people would have direct control over their own broadcast systems. The various television authorities would be independent of any branch of local government and would be capable of maintaining the role as a watchdog. These authorities would have a governmental

function, but their role would be a limited one. And it is likely that the various independent television authorities would act as watchdogs over each other.

In *Freedom and Communications,* Dan Lacy wrote:

> The values of a free society by and large lie on the side of the values of the individual consumer of communication rather than on the side of the values of the producers of communication. What we need is a communications system that gives the individual consumer the greatest resources to satisfy his needs for information and enrichment, and that strengthens his capacity to achieve personal development and autonomy of judgment.[101]

The interests of individual consumers of the broadcast media today are far too diverse and too changeable to be understood, protected and represented by a seven-man commission in Washington. When recently confronted with the question of whether or not the FCC was obsolete, former Commissioner Kenneth Cox responded that it was not. He said all that was needed was seven good commissioners.[102] Cox's comments suggest the hopelessness of it all. There haven't been seven good commissioners since the FCC was created in 1934. If the most effective defender of the public interest (although less in the public eye than the more flamboyant Nicholas Johnson) has nothing more to offer than this, effective regulation and innovative change by the FCC may, at most, be diaphanous dreams.

101 D. LACY, FREEDOM AND COMMUNICATIONS 78 (2d ed. 1965).

102 Panel discussion at the 1970 Association for Education in Journalism Convention, American University, Washington, D.C., Aug. 16-20, 1970.