meritorious his disability claim, the less likely he will be able to do those things necessary to prosecute his case effectively. His inability to work will often prevent him from hiring counsel, and that same difficulty will make his search for witnesses and other evidence a very difficult task. However, the courts may be able to avoid a rigorous rule requiring counsel if they are careful, as was the Sixth Circuit in *Webb*, not to deny routinely a request for a remand for the taking of additional evidence. A claimant, finally desperate enough to secure representation, should not be denied a proper hearing where he was initially beset by age, disability, lack of education, or lack of intelligence. Additionally, the examiner's duty of fair inquiry into the issues before him might be broadly construed to demand that the relative complexity of the issues before him be examined with a view toward discerning whether counsel is necessary in a given case. At least the claimant could then be encouraged to seek help from the private bar or an appropriate legal aid agency if the examiner so recommended.

Right to Hearing in License Renewal Proceeding when Allegation is the Subject of Concurrent Rule-making Proceeding

In *Hale v. FCC*[56] the Court of Appeals for the District of Columbia Circuit held that section 309(e) of the Communications Act[57] does not require the FCC to grant a hearing in a license renewal proceeding to petitioners whose allegations of the licensee's violations of the "fairness doctrine" and of excess concentration of media ownership were not supported by the required specific factual instances of harm to the public. Private citizens challenging the proposed renewal of the license of KSL-AM radio station, held by the Church of Jesus Christ of Latter Day Saints (Mormon Church) through KSL, Inc., alleged that the licensee had violated the FCC's "fairness doctrine"[58] and that the church's extensive holdings of other communications media in the area gave it a concentration of power

56. 425 F.2d 556 (D.C. Cir. 1970).

57. 47 U.S.C. § 309(e) (1964). Section 309(e) reads in relevant part:

> If, in the case of any application to which subsection (a) of this section applies [to authorize renewal of licenses], a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding [that the public interest would be served], it shall formally designate the application for hearing . . . .

58. FCC, *Application of the Fairness Doctrine in the Handling of Controversial Issues of Public Information*, 29 Fed. Reg. 10415 (1964).

harmful to the public.[59] The allegations of violations of the "fairness doctrine," however, were not supported by any showing of specific instances of refusal on the part of the licensee to grant time for the presentation of contrasting viewpoints after programming an issue of a controversial nature. Absent such a showing, the petitioners failed to meet the FCC standard for raising material questions of fact that would entitle them to a hearing under section 309(e) of the Communications Act.[60] Although the petitioners' allegation of excess media concentration resulting from the conglomerate holdings[61] of the Mormon Church in the KSL-AM listening area was uncontested, it failed to raise the specific factual instances of harm to the public as required by FCC hearing standards. Thus, because of the insufficient evidence offered by the petitioners on both issues, the FCC refused to grant a hearing.[62] After a subsequent denial of a petition for reconsideration,[63] petitioners brought this action to compel a hearing; the court of appeals affirmed the Commission decision.

The present requirements for obtaining a formal hearing to protest license renewals are fashioned to prevent abuse of the protest process and to insure consideration of the public interest.[64] Because of abuses,[65] the FCC has tended to restrict access to hearings by

59. See 47 C.F.R. §§ 73.35, .240, .636 (1970), for the FCC's rules concerning multiple ownership. These rules limit a licensee's ownership to seven stations in a broadcast category. The three broadcast categories are television, AM radio, and FM radio. In addition, no two stations in any category may have overlapping broadcast areas. Joint ownership of newspapers and stations, however, is not limited.

60. When a complaint is filed on the basis of the fairness doctrine, the Commission expects the complainant to submit specific information indicating:

> (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station has afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints.

FCC, *supra* note 58, at 10416.

61. The church, in addition to the AM radio license being challenged, owns television and FM broadcast licenses in Salt Lake City. One of Salt Lake City's two daily newspapers is controlled by the Church. Also, through its ownership of Brigham Young University, the Church controls an educational TV-FM Complex in Provo, Utah. 425 F.2d at 559 n.7.

62. KSL, Inc., 15 P & F RADIO REG. 2D 458, 460, 464-65 (FCC 1969).

63. *Id.* at 460.

64. For an example of what considerations might constitute the public interest, see Citizens Comm. v. FCC, No. 23,515 (D.C. Cir. Oct. 30, 1970), which held that an application for the transfer of a radio station license in which the proposed transferee would change the station's programming, thereby leaving the broadcast area without classical music, presented substantial material questions of fact regarding the public interest and thereby required a formal hearing on the application under section 309(e) of the Communications Act.

65. *See* Fisher, *Communications Act Amendments, 1952—An Attempt to Legislate Administrative Fairness*, 22 LAW & CONTEMP. PROB. 672, 682 (1957).

imposing strict standing[66] and pleading[67] standards, and the 1960 amendments to the Communications Act,[68] the latest attempt at enacting an efficient and equitable protest procedure, retained most of these earlier standards. Traditionally, standing was limited to parties in interest or competitors[69] who could demonstrate that the grant of the license in question would cause electrical interference[70] or economic injury.[71] After a protestant demonstrated his standing, he then had to plead a *prima facie*[72] case based on facts known by him to be true[73] that tended to show that the grant of the license would not serve the public interest.[74] Only if these rigorous standing and pleading requirements were met would a material question of fact be presented, entitling the protestant to a hearing as a matter of right.[75]

The appellants in the *Hale* case, having been accorded standing under *Office of Communication of the United Church of Christ v. FCC*,[76] which broadened standing rules to include responsible members of the public as "parties in interest," sought to challenge the renewal of the KSL license on two grounds: that such renewal would violate the FCC's "fairness doctrine" and that the concentration of media ownership by the Mormon Church in the immediate geographical area was in and of itself harmful to the public interest. The first ground was futile because of insufficient facts alleged to establish an infraction of the "fairness doctrine."[77] The excess concentration allegations, however, by showing a media

66. *See* Hazelwood, Inc., 7 F.C.C. 443, 444-45 (1939); Fischer, *supra* note 65, at 683.

67. Fischer, *supra* note 65, at 687.

68. 74 Stat. 889, *codified at* 47 U.S.C. § 309 (1964).

69. 47 U.S.C. § 309(d)(1) (1964).

70. *See* NBC v. FCC, 132 F.2d 545 (D.C. Cir. 1942), *aff'd*, 319 U.S. 239 (1943); S. REP. No. 44, 82nd Cong., 1st Sess. 8 (1951).

71. *See, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

72. Missouri-Illinois Broadcasting Co., 1 P & F RADIO REG. 2D 1, 3-4 (FCC 1963).

73. 47 U.S.C. § 309(d)(1) (1964); WFTL Broadcasting Co., 5 P & F RADIO REG. 2D 710, 712 (FCC 1965); WGRY, Inc., 2 P & F RADIO REG. 2D 718, 720 (FCC 1964).

74. Missouri-Illinois Broadcasting Co., 1 P & F RADIO REG. 2D 1, 4 (FCC 1963).

75. *See* Folkways Broadcasting Co. v. FCC, 375 F.2d 299, 302-03 (D.C. Cir. 1967); Clarksburg Publishing Co. v. FCC, 225 F.2d 511, 514-15 (D.C. Cir. 1955).

76. 359 F.2d 994 (D.C. Cir. 1966). *See Project, Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 243-44.

77. See note 60 *supra* and accompanying text. There is a distressing side-light to the court's determination that insufficient facts had been alleged to justify an FCC hearing on the "fairness doctrine" issue. From their initial correspondence with the Commission, petitioners Hale and Wharton—a waitress and a taxicab driver, respectively—persistently expressed their uncertainty over the procedures they should follow in opposing the renewal of the KSL license. Letter from Ethel C. Hale & W. Paul Wharton to Mr. Ben Waple, July 29, 1968, in FCC File BR-4081.

conglomeration, yet failing to plead specific instances of harm to the public, would force a consideration of the propriety and wisdom of the agency's multiple ownership rules in light of antitrust issues. The FCC declined the requested hearing because no basis for *ad hoc* action against the licensee was set forth in the pleadings and because a challenge to the ownership rule[78] would be better handled in a rule-making proceeding currently underway.[79] Appellants, thus, were essentially asking the court to hold that the fact of concentration, without more, is enough to require a hearing to determine whether the license renewal would serve the public interest. In effect, they wanted to use the hearing as a device to challenge present FCC ownership rules at a time when the agency was conducting a comprehensive review of those policies in a rule-making proceeding.

By affirming the decision of the FCC and accepting the validity of the rules upon which that decision was based, the *Hale* court determined that a rule-making proceeding was a more desirable

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Shortly after the FCC renewed KSL's license, Mrs. Hale and Mr. Wharton petitioned for reconsideration, saying:

> [W]e are unsure, now as before, about proper procedure, and do not know whether response from us is appropriate. . . .
>
> . . . We reiterate that we are without counsel, but emphasize that we have stated we are poor, without counsel, and not trained in law. . . . Letter from Ethel C. Hale & W. Paul Wharton to Mr. Ben Waple, Dec. 7, 1968, in FCC File BR-4081.

The court of appeals displayed a lack of sensitivity to the realities of trying to participate in agency's activities. While noting appellants' claimed inability to monitor KSL's programs because no daily logs were published in local newspapers, the court pointed out that the logs would have been available on request under 47 C.F.R. §§ 73.111-.116 (1970). Just how appellants were supposed to know this fact, the court failed to mention—the FCC certainly did not volunteer the information. Only Judge Tamm, in his concurring opinion, recognized the appellants' predicament. 425 F.2d at 563. Yet, in its haste to handle the monopolistic aspects of the case, the court seemingly ignored the statement by Mrs. Hale and Mr. Wharton that they had "no means to solicit local help, although we have substantial reason to believe that large numbers of persons would approve our stand . . . if economic reprisal could be avoided." Letter from Ethel C. Hale & W. Paul Wharton to Mr. Ben Waple, Oct. 15, 1968, in FCC File BR-4081.

78. For a discussion of the criteria necessary to challenge agency rules in court, see United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

79. 425 F.2d at 560. Since the instant decision the Commission has announced changes in the ownership concentration rules. Ownership of one station in a broadcast area will now bar acquisition of additional stations of any type; however, divestment of present overlapping stations is not required, and the numerical limits on total holdings remain unchanged. Renewal of present licenses is allowed, and favoritism to the licensee in competitive renewals is continued. Joint ownership of broadcast facilities and newspapers remains unregulated by the FCC. However, notice was given of possible future changes in the policies on divestment and newspaper ownership. 1970 Rules on Multiple Ownership of Broadcast Stations, 18 P & F RADIO REG. 2D 1735 (FCC 1970).

forum for challenging these agency standards than an agency hearing or trial. The majority agreed that the FCC's policy[80] of changing rules through rule-making proceedings rather than *ad hoc* hearings or adjudication was rational, in that the rule-making proceeding allows all interested parties to be present, permits a more thorough investigation into the subject, and allows the agency, rather than a court, to set policy.[81] It also noted that an inquiry into the subject of conglomerate media holdings was currently underway although there was no intimation as to the effect an absence of such inquiry would have had on the decision.[82] In a concurring opinion, however, Judge Tamm conditioned his vote with the majority on the fact that the FCC was undertaking a review of its policy towards media concentration.[83] He felt that the threat against first amendment rights and dissemination of information afforded by the common ownership of the news media in any geographical area represented sufficient potential danger to the public to warrant a hearing without specific showing of harm. Also, citing the second *Church of Christ* decision,[84] Judge Tamm asserted that if that case gave a reasonable right of intervention in agency hearings to members of the public, possible intervenors, who are generally neither skilled in legal matters nor well financed, ought not be required to meet the substantial barriers erected by the FCC rules. His perception of the first amendment and public intervention issues was sufficiently strong to warrant requiring the agency to reconsider certain of its rules in an *ad hoc* hearing if the FCC had not already been reviewing those rules in a separate proceeding.[85]

The *Hale* court's recognition of the need for an FCC policy decision on the problems of ownership concentration was well founded. When the ramifications to the broadcast industry of possible changes in the ownership rules are taken into account, the necessity of permitting other industry members to present their views in a rule-

80. *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 487 (1970).

81. 425 F.2d at 560.

82. A subsequent decision adopted a similar approach of judicial abstention in light of the rule-making proceedings that were underway. *See* Martin-Trigona v. FCC, 432 F.2d 682 (D.C. Cir. 1970).

83. 425 F.2d at 560 (Tamm, J., concurring).

84. Office of Communications of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969). See note 74 *supra* and accompanying text.

85. *See* 425 F.2d at 560 (Tamm, J., concurring).

making hearing becomes apparent. In addition, agency rule making has other advantages over adjudication.[86] First, the agencies are generally staffed with experts in the field of regulation in which they operate, an expertise seldom enjoyed by the courts.[87] Second, the agencies, because of the wide discretion given to them as regulatory bodies, have a more comprehensive range of remedies available at their disposal.[88] Third, judicial intervention could severely limit the discretion needed by the agencies to provide supervisory and managerial functions. And, finally, the ability of the agency to act informally makes it a more suitable forum for eliciting the information needed to formulate broad policy judgments, such as the degree of conglomerate media ownership that should be permitted.[89] Judge Tamm's observations as to the need for judicial scrutiny of agency rules, however, are not without merit. If representatives of the public are to have a meaningful right of intervention on matters of excess concentration of ownership, their right should not depend on the FCC changing its own pleading rules but rather should be guaranteed by the courts.[90] The *Hale* court, then, by balancing the competing interests of agency discretion and individual rights found in this instance that the practical effects and inherent advantages of rulemaking, especially at a time when the rules were being reviewed, would better resolve the issues of ownership concentration of broadcast media than would agency adjudication.

V. ANCILLARY MATTERS

Intervention in Agency Proceedings

In *Firestone Tire & Rubber Co.*[1] the Federal Trade Commission permitted a consumer-interest organization to intervene in forma pauperis in an adjudicatory proceeding involving charges of deceptive advertising with respect to the price and safety of Firestone tires. The

86. *See generally* Fuchs, *The New Administrative State: Judicial Sanction for Agency Self-Determination in the Regulation of Industry*, 69 COLUM. L. REV. 216 (1969) (discussion of the various advantages of agency determination over court adjudication).

87. *See* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 382 (1968).

88. *See id.* at 380.

89. *See id.* at 387.

90. 425 F.2d at 565-66; Fuchs, *supra* note 86.

1. 27 AD. L.2d 877 (FTC 1970).