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Business Regulation Regulation of Radio Broadcasting Competitive Enterprise or Public Utility

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BUSINESS REGULATION

REGULATION OF RADIO BROADCASTING: COMPETITIVE ENTERPRISE OR PUBLIC UTILITY?

The Federal Communications Commission, on May 2, 1941, issued an order in Docket Number 5060, promulgating eight regulations designed to alleviate certain monopolistic tendencies in radio broadcasting. These regulations implemented the Commission's "Report on Chain Broadcasting" (the product of two years' study), which was released two days later.

Although these regulations were to have become effective at the end of July, 1941, their operation has been suspended indefinitely while broadcasters, networks, and the Commission engage in one of the bitterest controversies that has yet beset the Commission. From the Commission's chambers the fight spread to the halls of Congress and is now in the process of adjudication in the federal courts.[1] Chairman Fly of the Commission opines that "the new regulations might properly be called a Magna Carta for American broadcasting stations";[2] President Paley of the Columbia Broadcasting System asserts that they are the "first paralyzing blow at freedom of the air in the United States."[3]

And while this controversy continues, proposed legislation is before Congress to overhaul the applicable provisions of the Communications Act of 1934, under the alleged authority of which these regulations were promulgated.[4]

This is the arena upon which this paper proposes to throw some light, its aim being to present an analysis of the problems arising out of the situation with which the Commission deals, and, upon the basis of that analysis, to make a suggestion.

I. The Facts

A. The Industry

There are at present 890-odd standard broadcast stations in the United States.[5] Approximately three-fourths of these are full-time stations. These

[1]On July 22, 1941, CBS and NBC petitioned the FCC to postpone the application of the regulations to their contracts until September 16. On August 14, Mutual filed its petition that the Commission amend certain of the regulations; and on August 28 the Commission announced that the regulations would not become effective until after disposition of the Mutual petition. Pursuant to that petition the regulations were amended slightly on October 11. At present there are pending suits by CBS and NBC against the FCC for injunctions against putting the regulations into effect. Meanwhile, Senator White, of the Interstate Commerce Committee of the Senate, introduced Senate Resolution 113, calling for a Senate investigation of the FCC's action, pending which the regulations were to be suspended. Hearings were held on this resolution, but no further action has been taken by the Senate Committee. See *Hearings before Committee on Interstate Commerce on S. Res. 113,* 77th Cong., 1st Sess. (1941) (hereafter cited as: *Hearings on S. Res. 113*).

[2]FCC Press Release 49854, May 4, 1941, p. 2.

[3]See pamphlet issued by Mr. Paley, May 5, 1941, under that title, Columbia Broadcasting System, New York.

[4]S. 1806, 77th Cong., 1st Sess. (1941), introduced July 31 (legislative day, July 28) by Senator White, of Maine.

[5]Source: unofficial press reports. The last official data lists 848 stations in operation or under construction as of June 30, 1940. FCC, Sixth Annual Report (1941) 51.

stations are divided into groups corresponding to the classification of broadcasting channels available—clear, regional, and local. Clear channel stations are more powerful, and serve a wider area than the others. Regional stations are more powerful than local and less powerful than clear channel stations, and reach a correspondingly narrowed audience. Local stations render primary service to a city or town and contiguous areas.[6]

Only a limited number of stations can operate on the standard broadcast band without creating mechanical interference which destroys satisfactory reception. Stations are allocated on a geographical basis so as to provide all sections of the country with adequate service. As a result of this policy and the limitation of available channels, there are today 118 cities with populations of more than 50,000 each in which there are only three or less full-time commercial stations. Ninety-one of these cities have but two stations.[7] This situation creates a "bottleneck" as to local station outlets for the national networks.[7a]

Broadcasting stations operate for profit, deriving their revenue from the sale of "time." The rules of the FCC require that a certain percentage of broadcasting time be devoted to sustaining programs consisting of educational, civic, or community interest material. The station operator, therefore, must seek advertisers who will buy time, and must find sustaining programs to fulfill the Commission's requirements of its licensees. Only to a limited extent can the broadcaster find these essentials locally.

Out of this situation the network chains arose. Giants of the industry, their primary function is that of national advertising agencies. Their secondary function is the producing of programs, both sustaining and commercial. Given a program on hand they sell it to an advertiser. But to sell a program, they must "sell time" on stations broadcasting over channels that cover the entire national market, or a desired regional market. To have that time to sell, the networks enter into time option contracts or affiliation agreements with the broadcasters. As part of the consideration for these contracts the networks provide the stations with the necessary sustaining programs.

There are four national networks today. The Columbia Broadcasting System owns 8 stations and has 122 affiliated stations.[8] The National Broadcasting Company formerly operated two national chains, the Red and the Blue networks, at which time it owned 10 stations and listed 233 stations affiliated with the two chains.[9] On January 9, 1942, however, the Blue Network Company was formed as a separate organization, although it, like NBC, is a wholly owned subsidiary of the Radio Corporation of America.[10] This reorganization, in anticipation of a sale of the network, was the result of pressure brought by the Communications Commission upon NBC to dispose of one of its two chains in compliance with the regulations discussed below. It may be partially attributed also to an anti-trust action instituted by the

[6]FCC, Sixth Annual Report (1941) 48 *et seq.*
[7]See *Hearings on S. Res. 113,* pp. 220-223.
[7a]See page 264 *infra.*
[8]See *Hearings on S. Res. 113,* p. 19; and see pamphlet, "What the New Radio Rules Mean," Columbia Broadcasting Company, New York, May 17, 1941.
[9]See *Hearings on S. Res. 113,* p. 465
[10]N. Y. Times, January 15, 1942.

Department of Justice some ten days earlier. For practical purposes, however, there is not as yet an effective separation of the Red and Blue networks. The Mutual Broadcasting System is owned by seven broadcasters; it lists 176 affiliates.[11] As of June, 1941, 503 of the nation's 848 broadcasting stations were affiliated with one of these networks.[12]

Two other ownership-control items should be mentioned. CBS, NBC, and Mutual own all of the highest-powered clear channel stations.[13] And CBS and NBC, being first on the scene, have the more desirable metropolitan stations affiliated with their chains, whereas 104 of Mutual's stations are low-powered local stations in smaller cities.[14]

If these four networks freely bought the broadcasting time of the stations and freely sold their services to the stations, the present problem might not exist. The "bottleneck," and the resultant monopolistic restraint of trade, arises from the affiliation contracts between the networks and the stations.

B. The Contracts

The affiliation contracts[15] in current use have two characteristics which are condemned by the FCC: exclusivity and time option provisions.

The exclusivity provisions are bilateral. The network covenants not to supply its services to any other station in its affiliate's territory; the affiliate covenants not to broadcast the programs of any other network.[16] In the event that the affiliate rejects any program offered by the network the radio audience of that locality is deprived of the benefit of that program.[17] Although these contracts expressly give the affiliate the power to reject any programs offered by the network as not being "in the public interest," this power is

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[11]See *Hearings on S. Res. 113*, pp. 156, 465.

[12]See *id.* at 465.

[13]There are 30 such stations; CBS and NBC own all but two which are the majority stockholders in Mutual. See *id.* at 24.

[14]See *id.* at 167 *et seq.*

[15]For examples of the type of contract used by each of the networks and condemned by the FCC, see *id.* at 107-126.

[16]See paragraph 8 of the CBS contract, *id.* at 113: "Columbia will continue the Station as the exclusive Columbia outlet in the city in which the Station is located . . . and will not furnish its exclusive network programs to any other station in that city, except in case of public emergency. The Station will operate as the exclusive Columbia outlet in such city . . . and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations." NBC's provision reads: "[Y]ou agree not to permit the use of your station's facilities by any radio network, other than ours, with which is permanently or occasionally associated any station serving wholly or partially a city or county of 1,000,000 or more inhabitants." See *id.* at 112. Mutual, until 1940, used merely the following unilateral provision: "Mutual will not, during the life of this contract, purchase time on any other station in, or within a radius of 50 miles of [the city] in the event that the station [named] is able to provide its facilities. . . ." See *id.* at 115.

[17]Two examples of this result of the exclusivity contracts were brought out before the Senate Committee. Several areas were unable to hear broadcasts of the World Series because CBS and NBC stations were not free to take the programs from Mutual. See *id.* at 30, 173, 393-395. In the other instance, station WOR, located in Newark, rejected the Mutual news commentary of Fulton Lewis, Jr. Although New York city has 15 full-time commercial stations, several of which are unaffiliated with any network, WOR's rejection deprived the large New York audience of Lewis' talks. See *id.* at 289-298.

variously circumscribed in relation to commercially sponsored programs,[18] and, perhaps, is virtually non-existent in most cases in view of the economic relationship of the parties.[19]

Time options are provided to assure the network that it will have the broadcasting time of the stations to sell to advertiser-sponsors. Although variously drawn, these provisions give the network first call on a specified amount of the stations' time. The options generally cover all the more desirable hours, and are exercisable by the network on 28 days' notice. Upon the exercise of the option by the network, a station is obligated to clear the time taken, by canceling or moving programs previously scheduled for that time.[20]

Another contract provision is on the condemned list. As used by the National Broadcasting Company this provision is: "If you accept from National advertisers net payments less than those which N.B.C. receives for the sale of your station to network advertisers for corresponding periods of time, then N.B.C. may, at its option, reduce the network rate for your station in like proportion."[21] This provision obviously prevents competition between affiliates and the network.[22]

These contracts run over a term of five years, with the network having an option to cancel without cause on one year's notice.[23]

C. The Regulations

Looking at this situation the Federal Communications Commission found it not in the "public convenience, interest, or necessity" for station licensees

[18]NBC stipulates: "[B]ecause of your public responsibility your station may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity." See *id.* at 109. But NBC also stipulates: "In the event you substitute a program for a network program . . . you agree to pay us as liquidated damages a sum equal to the amount by which the total monies you receive for broadcasting the substituted program . . . exceeds the monies you would have received from us. . . . This provision . . . shall not be deemed to give you the option to refuse to accept such a network program by making the payments specified. . . ." See *id.* at 112. Columbia provides: "Either the Station or Columbia may on special occasions substitute for . . . sponsored programs sustaining programs devoted to education, public service . . . without any obligation to make any payment. . . . In case the Station has reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest the Station may on 3 weeks' prior notice thereof to Columbia, refuse to broadcast such program . . . ." See *id.* at 113.

[19]See *id.* at 90-92.

[20]Thus, the broadcaster cannot make a binding contract with local advertisers or civic groups to broadcast non-network programs. *Quaere* if it is not as important that local programs be broadcast efficiently as that national programs be so handled. See Kadetsky and Kahn, *Legal Problems of Radio Broadcasting Contracts* (1940) AIR L. REV. 154. Associated problems are raised in Pierce v. Puget Sound Broadcasting Co., 170 Wash. 472, 16 P. (2d) 483 (1932), where an advertising agency was allowed to recover damages for the station's breach of contract; Churchill Evangelistic Ass'n v. Columbia Broadcasting Company, 142 Misc. 210, 255 N. Y. Supp. 134 (Sup. Ct. 1931), *affirmed,* 236 App. Div. 624, 260 N. Y. Supp. 451 (4th Dep't 1936).

[21]See *Hearings on S. Res 113,* p. 111.

[22]Note that this provision prevents the station from selling time at *less* than the rate the network offers it for, while the provision quoted at note 18 *supra* prevents the station from selling at a *higher* rate. The net result of these two provisions is to make the network the rate-fixing agency for the stations in the national market.

[23]See *Hearings on S. Res. 113,* p. 89.

to enter into these contracts. The bases of this determination are two in number. First and most obvious is restraint of competition between chains. Once three chains have an exclusive outlet in a three-station city, no other network can compete with the first three in that city.[24] Companion result of this restraint is the fact that the listening public is deprived of the programs thereby kept off the air. The other aspect of the situation incurring the displeasure of the FCC is that of control of program content. The station operator, in the opinion of the Commission, is deprived by the terms of the affiliation contracts of the power to exercise discretion as to what he broadcasts.

To correct the situation the Commission issued regulations providing (as amended) for the non-issuance of a license to any station which has an exclusivity contract with a network,[25] which affiliates with a network for longer than two years,[26] which grants a network more than a limited amount of option time,[27] which gives up the right to reject unsatisfactory network programs,[28] or which is not free to fix its own rates for sale of time other

[24]This is in general the situation that faces Mutual throughout the country. It should be remembered that networks sell to national advertisers, and if any one network cannot acquire an outlet in certain parts of the so-called "national marketing area," it cannot sell its programs at all. "When Mutual can't sell Cleveland, it will frequently, almost regularly, lose prospective national advertisers to competing networks." Testimony of Louis G. Caldwell, counsel for Mutual, before Senate Committee, *Hearings on S. Res. 113*, p. 160-161.

[25]The symbol "‡" in the following regulations indicates the standardized introduction to five of the eight regulations, which is as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization" . . . .

Regulation 3.101. ‡ under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

Regulation 3.102. ‡ which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

[26]Regulation 3.103. ‡ which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

[27]Regulation 3.104. No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcasting day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a.m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

[28]Regulation 3.105. ‡ which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

than the network programs.[29] Still other regulations are directed toward cutting down the ownership control of the networks. The Commission announced that no license will be granted to a network for more than one station covering substantially the same area, or in an area where to so license a station would result in competition being substantially curtailed.[30] No station is to be licensed which is affiliated with a network organization which maintains more than one network.[31] This last regulation is directed toward forcing a complete separation of the two NBC chains, which separation is now in its preliminary stages.[32]

Two members of the Commission dissented from the proposed regulations.[33] Only Mutual, among the networks, approves of them. No unanimity of opinion as to their desirability was forthcoming from the members of the Senate Committee on Interstate Commerce. CBS and NBC have attacked the regulations by means of a suit for an injunction, which was still undecided at the time of writing.[34]

The immediate question raised is whether the Commission has the statutory authority to promulgate the regulations. An underlying question of greater importance is whether, assuming or provided the authority, these regulations should be put into effect, as a matter of public policy.

II. Authority of the FCC

A. Background

There has never been any serious dissent from the proposition that the process of radio broadcasting is interstate commerce. The courts have repeatedly so held.[35] It follows that Congress has plenary power to regulate and

[29]Regulation 3. 108. ‡ under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

[30]Regulation 3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

[31]Regulation 3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided,* That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

[32]See note 10, *supra.* Added to the regulations is a series of provisos intended to postpone the effective dates of those regulations requiring the disposition of properties until arrangements for orderly disposition can be made.

[33]Commissioners Case and Craven. See FCC Press Release 49881, May 4, 1941.

[34]Columbia Broadcasting System, Inc. v. United States, *et al.,* S. D. N. Y., Civil Action No. 16-179; National Broadcasting Company, Inc., *et als.* v. United States, *et al.,* S. D. N. Y., Civil Action No. 16-178.

[35]Federal Radio Comm. v. Nelson Bros. Bond & Mtge. Co., 289 U. S. 266, 53 Sup. Ct. 627 (1933); Fisher's Blend Station v. State Tax Comm., 297 U. S. 650, 56 Sup. Ct. 608 (1936); General Electric Co. v. Federal Radio Comm., 31 F. (2d) 630 (App. D. C. 1929), *cert. denied,* 281 U. S. 464, 50 Sup. Ct. 389 (1930). See generally McCain, *The Medium Through Which a Radio Wave is Transmitted as a Natural Channel of Interstate*

control radio broadcasting under the commerce clause of the Federal Constitution.[36]

The question of jurisdiction, therefore, is purely a matter of statutory interpretation: what jurisdiction did the Congress give the Commission?

The Federal Communications Commission was created by the Communications Act of 1934.[37] Its creation was the culmination of twenty-two years of experimentation in the field of radio regulation.[38] The enacting statute vests in the Commission the complete regulatory power delegated by Congress in the prior acts.[39]

The purpose of the provisions relating to radio broadeasting is stated thus:

> "It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreigu radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority. . . ."[40]

The Commission itself was established.

> "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service. . . ."[41]

To effectuate these two purposes the Commission is empowered to license broadcasting stations "from time to time, as public convenience, interest, or necessity requires";[42] but no license may be granted for a period longer than three years,[43] and "no such license shall be construed to create any right,

Commerce (1940) 11 AIR L. REV. 144; Fletcher, *The Interstate Character of Radio Broadcasting: An Opinion* (1940) 11 AIR L. REV. 345. The latter article presents a searching analysis of the question by the Chairman of the State Corporation Commission of Virginia in an advisory opinion answering the question whether the Columbia Broadcasting System should be fined for doing business in Virginia wthout a license as required by the statute of that state. Finding that CBS was engaged solely in interstate commerce, Chairman Fletcher concluded that it was not subject to the requirement of a license.

[36]U. S. CONST. Art. I, § 8, cl. 3.

[37]48 STAT. 1064 *et seq.*, 47 U. S. C. § 151 *et seq.* (1934).

[38]The first effort to bring radio within the licensing power of the federal government came in 1912. The Radio Act of 1912 (37 STAT. 302 *et. seq.*) gave the Secretary of Commerce a non-discretionary power to license broadcasters. The licenses were revocable for cause, however. See United States v. Zenith Radio Corp., 12 F. (2d) 614 (N. D. Ill. 1926). The Radio Act of 1927 (44 STAT. 1162 *et seq.*) broadened the powers of the regulatory body thereby created (Federal Radio Commission) and gave it the discretionary power to license in the "public convenience, interest, or necessity." See *In re* Sheldon Street Ry., 69 Conn. 626, 38 Atl. 362 (1897) for classic definition of the concept involved.

[39]Under the Mann-Elkins Act [36 STAT. 536, 544 (1910)] and the Radio Act of 1927 (*supra* note 38), the ICC possessed power to regulate common carriers by radio, and the FRC had control over various technical aspects of broadcasting, *e.g.*, assignment of frequencies, limitation of power, etc. These powers were transferred to the FCC in the Act of 1934. See Sablosky v. United States 101 F. (2d) 183 (C. C. A. 3d 1938), in which the jurisdictional limits of the Act are construed.

[40]48 STAT. 1214 (1934), 47 U. S. C. § 301 (1934). Hereafter, citations to the Communications Act of 1934 will be to the appropriate section of 47 U. S. C.

[41]47 U. S. C. § 151.

[42]47 U. S. C. § 303 and subsection (*l*); § 307.

[43]47 U. S. C. § 307 (d).

beyond the terms, conditions, and periods of the license."[44]

In granting these licenses the Commission has the power and is charged with the duty "to prescribe the qualifications of station operators . . . and to issue [licenses] to such citizens . . . as the Commission finds qualified."[45] Licenses are renewable, and in granting renewals the Commission is "limited to and governed by the same considerations and practice which affect the granting of original applications."[46] Finally, the Commission is empowered generally to "encourage the larger and more effective use of radio in the public interest."[47]

The rule-making power of the Commission is couched in broad "catch-all" phraseology, to wit: "[The Commission shall] make such rules and regulations and *prescribe such restrictions and conditions,* not inconsistent with law, as may be necessary to carry out the provisions of this chapter. . . ."[48] Further, the Commission may "make special regulations applicable to radio stations engaged in chain broadcasting."[49]

In promulgating the chain broadcasting rules—regulations 3.101 to 3.108—the Commission purported to exercise these rule making powers in relation to its licensing power and its renewal power. In view of the provisions cited above, the Commission appears to have acted within its jurisdiction if the conditions imposed are reasonable qualifications to be imposed on an applicant for a license, and if the regulations will serve "public convenience, interest, or necessity." Under the doctrine of *Federal Radio Commission v. Nelson Brothers,*[50] the latter question in the circumstances here presented probably would be decided in favor of the Commission, with the court refusing to review the facts as found by the Commission. In the *Nelson* case the Court said:

> "In granting licenses the Commission is required to act 'as public convenience, interest, or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. . . . The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services. . . ."[51]

And again:

> "In the light of the decision in the *General Electric* case, . . . the Congress . . . amended § 16 of the Radio Act of 1927, so as to limit the review by the Court of Appeals. . . . That review is now expressly limited to 'questions of law' and it is provided 'that findings of fact

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[44] 47 U. S. C. § 301.
[45] 47 U. S. C. § 303 (*l*).
[46] 47 U. S. C. § 307 (d); *cf.* § 309.
[47] 47 U. S. C. § 303 (g).
[48] 47 U. S. C. § 303 (r); see also § 154 (i).
[49] 47 U. S. C. § 303 (i).
[50] 289 U. S. 266, 53 Sup. Ct. 627 (1933), 89 A. L. R. 406, 420, 42 YALE L. J. 1274. See also Pottsville Broadcasting Co. v. FCC, 98 F. (2d) 288 (App. D. C. 1938), *reversed,* 309 U. S. 134, 60 Sup. Ct. 693 (1940). The lower court's decision is noted in (1940) 25 CORNELL L. Q. 271.
[51] 289 U. S. at 285.

by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious.' . . . [A]n inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province. . . . Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action."[52]

Some indication that this type of condition is reasonable is to be found in other provisions of the Communications Act itself. Thus a licensee is expressly prohibited from transferring any rights accruing to him under the license by Section 310 (b), unless the Commission consents to the transfer.[53] If the contract provisions outlawed by the chain broadcasting regulations do in fact transfer any of the licensee's rights to the network, it is not unreasonable for the Commission to rule that no renewal will be granted to any licensee who so violates the provisions of Section 310 (b), even though other administrative remedies for violation of the Act are provided.[54] This contention finds further support in the fact that the provisions for revocation of licenses expressly allow the Commission to consider past conduct, including "violation of or failure to observe any of the restrictions and conditions of this chapter or of any regulation of the Commission authorized by this chapter. . . ."[55] Although this provision applies to revocation and not to renewals, it seems that these considerations would apply in renewal hearings by reasonable implication, inasmuch as failure to renew seems to all intents and purposes to necessitate the same findings as would justify a revocation, *i.e.*, that continued operation is not in the "public convenience, interest, or necessity." The Commission has in fact considered past operation and violations of the Act as determinative factors in such hearings; and this action has met with court approval.[56]

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[52]289 U. S. at 275, 277. The provision for limited judicial review commented on by the Court is retained without change in the Act of 1934. 47 U. S. C. § 402 (e). See Warner, *Subjective Judicial Review of the Federal Communications Commission* (1940) 38 MICH. L. REV. 632. The *General Electric* case, cited by the Court [Federal Radio Comm. v. General Electric Co., 281 U. S. 464, 50 Sup. Ct. 389 (1929)], held that no appeal lay from the Court of Appeals of the District of Columbia to the Supreme Court, on the ground that the Court of Appeals was not acting judiciously in reviewing actions taken by the Federal Radio Commission inasmuch as that court could take new evidence and make new findings of fact.

[53]47 U. S. C. § 310 (b): "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

[54]See, *e.g.*, 47 U. S. C. § 401, which provides that the FCC may petition the Attorney General to bring mandamus proceedings against violators of the Act, in the federal district courts.

[55]47 U. S. C. § 312 (a.).

[56]The Greater Kampeska Radio Corp. v. FCC, 108 F. (2d) 5 (App. D. C. 1939), (1940) 11 AIR L. REV. 204; Trinity Methodist Church South v. FCC, 62 F. (2d) 850 (App. D. C. 1932), *cert. denied*, 288 U. S. 599, 53 Sup. Ct. 317 (1932). See also Boston Broadcasting Co. v. Federal Radio Comm., 67 F. (2d) 505 (App. D. C. 1933), *cert. denied*, 290 U. S.

B. Control of Business Practices

1. *Regulations for monopoly control.*—Whence, then, comes the problem concerning the jurisdiction of the Commission? It arises primarily from the fact that the regulations in question were promulgated to curb monopoly and to prevent contracts in restraint of trade. The wails of the networks are predicated on this phase of the situation and on the alleged non-applicability of Section 311 of the Act,[57] which provides:

> "The Commission is hereby directed to refuse a station license . . . to any person . . . whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license . . . to any other person . . . which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting to monopolize, radio communication, directly or indirectly . . . or to have been using unfair methods of competition."

Section 313 expressly makes all anti-trust laws applicable to the Act, and Section 314 provides for the preservation of competition in the industry. But despite all these provisions manifesting the intention of Congress that radio should not become non-competitive, it is reasonably clear that Congress did not intend that the Commission should be empowered directly to enforce the anti-trust laws. If the words of Section 311 do not make that clear, the history of the passage of the Radio Act of 1927 makes it abundantly plain that Congress intended to leave the prosecution of violations of the Sherman Act to the departments of government primarily charged with their enforcement, and that the Commission should act thereon only after a court conviction. The then Secretary of Commerce, Herbert Hoover, withheld his approval of the original act until the equivalent of the present Section 313 so provided.[58]

Whether the FCC may validly oppose the monopolistic characteristics of the networks bids fair to become a moot question in this specific case in view of the anti-trust actions filed by the Department of Justice against CBS and NBC on the last day of 1941.[59] Prepared last summer, the suits had been pigeonholed while the Commission and the networks attempted to reach an understanding.[60] Unofficial opinion was that the entering of the suits was "an almost inadvertent piece of routine," possibly "a case of mixed siguals."

679, 54 Sup. Ct. 103 (1933); Campbell v. Gelano Chem. Co., 281 U. S. 599, 50 Sup. Ct. 412 (1930).

[57]See Briefs and Supplemental Briefs for Columbia Broadcasting System and National Broadcasting Company before the FCC in *Matter of the Investigation of Chain and Network Broadcasting, Monopoly in the Broadcasting Industry and Related Matters,* and the statements submitted to the Senate Interstate Commerce Committee in the hearings on S. Res. 113. Immediately upon the publication of the regulations, CBS and NBC launched a pamphleteering campaigu, during which several booklets desigued for the lay reader were distributed.

[58]See remarks of Senator White, draftsman of the original Radio Act of 1927, in colloquy with Chairman Fly of the FCC, *Hearings on S. Res. 113,* pp. 78-82.

[59]TIME MAG. vol. 39, no. 2, p. 50 (Jan. 12, 1942).

[60]Containing all the points made in the FCC "monopoly" report in the spring of 1941, the suits are not entirely accurate because of changes made by the networks during the controversy with the FCC.

Aside from the question of relevance of the anti-trust laws in the broadcasting text, any possible success for the networks in the FCC controversy would not materially relieve the precariousness of their position.[61]

2. *Regulations which go beyond monopoly control.*—But a broader statement of the network contention is that the Communications Act did not confer jurisdiction on the Commission to regulate the business practices of the broadcasters, but merely to license them. And, it is urged, as these regulations do attempt to regulate business practices by prohibiting certain contracts on penalty of refusal of licenses, the Commission has exceeded its jurisdiction in this regard. Thus stated, the issue takes on larger importance and therefore merits our further attention.

The main support for the contention is found in language of the Supreme Court in the recent case of *Federal Communications Commission v. Sanders Brothers Radio Station.*[62] The question there was whether the Commission must take into consideration, when licensing another station in the same area, the economic consequences on an already licensed station. The Court upheld the Commission's contention that such fact alone neither authorized nor compelled the Commission to refuse the second application, though it might be weighed with other considerations of public convenience, interest, or necessity. Mr. Justice Roberts, speaking arguendo, directed his remarks to the proposition that the Commission owed no duty to the respondent station to protect it from adverse economic effects of competition, and went on to say:

> "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.
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> * * *
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> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public."[63]

Those using the first portion of the quotation do not go on to explain the context. Yet although that quotation is at most dictum, it is a correct exposition of the interpretation placed upon the entire Act by Senator White, who was one of the drafters of the original legislation. In Senator White's revision of the Act of 1934, which is now before the Congress,[64] the quotation above is incorporated as an amendment to Section 326. Concerning the amendment, the Senator writes:

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[61]Further grief may be in prospect for NBC, because Mutual has filed suit against NBC in the Federal District Court for the Northern District of Illinois for triple damages under the Sherman Act. If the government's anti-trust suit is successful, NBC will be hard put to defend against the Mutual suit. TIME MAG., vol. 39, no. 3, p. 75 (Jan. 19, 1942).

[62]309 U. S. 470, 60 Sup. Ct. 693 (1940), 11 AIR L. REV. 177, 8 GEO. WASH. L. REV. 1106, 26 WASH. U. L. Q. 121.

[63]309 U. S. at 475.

[64]S. 1806, 77th Cong., 1st Sess., introduced July 31, 1941.

"Notwithstanding this pronouncement of the Supreme Court, notwithstanding the fact that no language can be found in the Act which confers any right upon the Commission to concern itself with the business phases of the operation of radio broadcast stations and notwithstanding the further fact that Section 3 (h) of the Act provides that a person engaged in radio broadcasting should not be regarded as a common carrier, the Commission has nevertheless concerned itself more and more with such matters. The charge is made that the Commission is attempting to control both the character and source of program material and the contractual and other arrangements made by the licensee for the acquisition of such material.

"The amendment spells out in black and white what it is believed was not only the original intention of Congress but is its present intention, with respect to this subject, in the hope that confusion and controversy can be eliminated. The amendment preserves the prohibition now contained in the Act against interference with the right of free speech and that against utterance of obscene, indecent or profane language by means of radio communication."[65]

With due respect for those urging that the chain broadcasting regulations represent an assertion of control over the business management of licensees, it is submitted that the regulations do not so operate. It is true that the Commission is attempting to rid the industry of tying affiliation contracts, but that is not affirmative control of management. Inasmuch as no affirmative control is asserted and these regulations are within the letter and the spirit of Section 310 (b), the argument against their validity on this score does not impress.[66]

B. Program Control

The second point made by Senator White raises the final problem of jurisdiction. The regulations were promulgated to improve programs offered to the public and to free the licensee from the contractual inhibitions against the exercise of his own discretion in program selection. The alternative basis for the validity of the regulations, then, is stated to be the policy against permitting the licensee to fetter or transfer that discretion. But inasmuch as the regulations affect programs, they touch freedom of speech. The problem thereby raised is distinctly different from those discussed earlier. It is the problem of censorship.

The First Amendment to the United States Constitution provides that:

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[65]This language was employed by Senator White in the explanatory material which accompanied his bill when it was introduced in the Senate. A close reading of *Hearings on S. Res. 113* indicates that Senator White is held in high esteem by his colleagues as one well qualified to write radio legislation; but one cannot but be impressed by the fact that other members of the Committee were apparently in accord with the FCC's interpretation of the Act.

[66]See generally Note, *FCC Regulation of Competition Among Radio Networks* (1942) 51 YALE L. J. 448; Miller, *Legal Aspects of the Chain Broadcasting Regulations* (1941) 12 AIR L. REV. 293; (1941) 12 AIR L. REV. 301. The latter note presents both sides of the argument on the question of the Commission's jurisdiction.

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

While the founding fathers could not, of course, have had radio in mind when this provision was framed, and although radio broadcasting has not been handled as gently in any other country,[67] Congress, when it enacted the Communications Act, expressly provided that it should not contravene the First Amendment:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall pe promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."[68]

By this provision the Commission is stripped of all control over programs offered by broadcasters. The Act prescribes certain minimum standards to the broadcaster in relation to what he cannot broadcast,[69] and provides affirmatively that if he allows time to one candidate for public office he must allow an equal amount to that candidate's opponents.[70] No power of censorship is given the licensee. Yet the Commission is to regulate in the public convenience, interest, or necessity, and the licensee is to broadcast under the same standard.

If the broadcaster has no power of censorship and the Commission has neither control over program material nor power to prevent the licensee's entering into contracts which give to persons beyond regulation by the federal government the power to determine what will be broadcast, who, then, will determine what programs are conducive to the "public convenience, interest, or necessity"?

The Constitution of the United States, and that of each of the states of the Union, provides that "freedom of the press" shall not be impaired. Just what is "freedom of the press"? What does the concept involve? Freedom is given by constitutional franchise not without some purpose. What is the purpose for which the press is left "free"?

Chancellor Kent, in the celebrated case of *People v. Croswell*,[71] discussed the reasons for the constitutional freedom of the "fourth estate" in the following words:

"The first American congress, in 1774, in one of their public addresses, (Journals, vol. 1, p. 57,) enumerated five invaluable rights, without which

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[67] See Brown, *The Constitutional Law and History of Broadcasting in Great Britain* (1937) 8 AIR L. REV. 177.

[68] 47 U. S. C. § 326. See 67 CONG. REC. 5480 (1934).

[69] 47 U. S. C. § 316 prohibits material concerning lotteries; § 317 provides that advertising must be announced as such. See also the provisions of § 326.

[70] 47 U. S. C. § 315.

[71] 3 Johns. 336 (N. Y. 1804). This was the famous libel suit against Croswell for items published in *The Wasp* concerning President Jefferson, the primary question being whether truth was a defense to an action for libel on the government.

a people cannot be free and happy. . . . One of these rights was the *freedom of the press,* and the importance of this right consisted, as they observed, 'besides the advancement of truth, science, morality, and arts in general in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.'

* * *

"I am far from intending that these authorities mean, by freedom of the press, a press wholly beyond the reach of the law, for that would be emphatically *Pandora's Box, the source of every evil.*"[72]

Times have changed since Chancellor Kent wrote these words. The pamphleteer has been replaced by powerful newspapers and chains of newspapers. Has the purpose for which the press is free likewise changed? The *Wall Street Journal* in 1925 gave the version of the concept that has been announced again and again by American editors:

"A newspaper is a private enterprise, owing nothing whatever to the public, which grants it no franchise. It is therefore 'affected' with no public interest. It is emphatically the property of its owner who is selling a manufactured product at his own risk. . . ."[73]

The radio broadcasting industry today is a component part of the nation's press. It differs from the newspaper press only in that it is dependent on the federal franchise for its operation. Just as certainly as there is censorship in newspaper editing, there is censorship in radio broadcasting; and in addition, there always remains the possibility that additional censorship may be exercised by the Federal Communications Commission. In the publication of a newspaper the editor makes the decisions that determine what shall and what shall not be printed. The process is called "editing," but its effect is censorship. When many newspapers are combined in a chain, a single editor at a central office may decide what shall or shall not be printed in all the papers. This too is called "editing." But if a public official took the place of the central editor and made the same determinations, his action would be considered and labeled "censorship." So far as the reading public is concerned, the effect is the same.

As a practical matter such central editing in the newspaper field is almost impossible for technical reasons. But it is distinctly possible in the radio industry and in the case of network programs is actually the process employed. The only discretion left to the licensee is whether to switch the network program on for broadcast; and if he fails to broadcast, he subjects himself to a

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[72] 3 Johns. at 390, 392. See HALE AND BENSON, LAW OF THE PRESS (2d ed. 1933).

[73] Jan. 20, 1925, p. 8. On January 16, 1939, publisher Frank Gannett and Secretary of Interior Ickes engaged in a radio debate on the topic "Do We Have a Free Press." See TOWN MEETING BULL., vol. 4, no. 10 (Jan. 16, 1939). The editorial discussion of this affair during the ensuing weeks brought forth repeated assertions of the sentiments expressed by the *Journal, supra.*

loss of revenue. Thus it appears that the networks have rather complete control of what the American radio audience will hear. As long as the present limited number of stations is available and the exclusive features of the affiliation contracts remain effective, this control apparently will remain vested in CBS, NBC, and to a limited extent in Mutual Broadcasting Company.

It should be pointed out that thus far no serious complaint has been registered concerning the manner in which the networks have exercised this control. Their programs have been of generally high calibre. But the danger of vesting this control in the hands of a few is obvious; and that danger is not lessened by the fact that the few is comprised of a group not "the government."

On the other hand, the difficulties facing the individual broadcaster who has no network affiliation as a source of worthwhile material are serious. The listening public has been remarkably well educated to artistry; and, it is claimed, networks are required to provide the necessary talent to all parts of the country. So the program choice of the unaffiliated broadcaster is of little benefit to the public. But there are those who believe talent is available in other places beside New York, Chicago, and Hollywood, and that an altered radio industry would draw out that talent. An example is Denver's Rocky Mountain Radio Council, a co-operative organization of regional stations and colleges, which was recently honored by the trade journal *Variety* for progress toward "freeing the local station from its inert attitude of reliance on either network programs or transcriptions. . . ."[74]

It may be argued that the FCC has a control (*i.e.*, censorship) over program material comparable to that which it objects to in the hands of the networks. Program control by means of the power of life and death over the technical existence of the licensee is analogous to that by means of termination of network affiliation. In the abstract, not only is that kind of control legitimate and of the type contemplated by the authority creating the Commission, but further, it is not within the statutory prohibition against censorship by the Commission. The requirement that the Commission make regulations in the public convenience, interest, and necessity implies a degree of control over what is broadcast, regardless of the language of Section 326. Only if the FCC's power in this regard is diverted into illegitimate channels should it be decried. The present practice of exercising its power in renewal proceedings, however, instead of by hearings as provided for in revocation cases is not salutary and is conducive to suspicion.

But the present regulations do not necessarily hold the solution to the problem under discussion. Studies by the FCC show that stations affiliated with newspapers sell nearly half the total time sold on the nation's stations.[75] With chain control broken, there might arise in its place local monopolies, created by the newspaper-radio tie-up, of these two important media of communication—a situation hardly preferable to the present one.

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[74]TIME MAG., vol. 38, no. 26, p. 36 (Dec. 29, 1941).

[75]Newspaper affiliated stations sold in 1940 42% of the total time and received therefor 45.8% of the total broadcast service income of all outlets, excluding 31 network managed and operated stations. Source: table prepared by FCC from 1940 reports to the Commission by licensees of standard broadcast stations.

III. Radio: Public Utility?

Radio has come of age; it is now big business. With receiving sets in almost every home and automobile, radio is acutely affected with the public interest and thus must be subject to the public will. Regulation is not new in the field. As Mark Ethridge has said: "Here is an industry that was born of regulation. The government was its midwife; . . ."[76]

The question facing radio and the people, then, is what organizational method is most in the public interest. This is quite apart from the possible invalidity of the impending Commission rulings or the outcome of the anti-trust proceedings. The loss of either controversy will result in the same situation for the networks.

It is submitted that to the presently proposed correctives a public utility status for radio is to be preferred.[77]

The problems which have prompted governmental action stem in large part from the "bottleneck" situation—the inequality of opportunity occasioned by a station shortage in certain metropolitan areas. Of three possible solutions, *i.e.,* fewer networks, more stations, or non-exclusive network affiliations, the FCC has seized upon the third. It would appear, however, that the technical advancements being made in the broadcasting science render such solution—if solution it be—only temporary. Most pertinent of these changes is the development of frequency modulation broadcasting which is destined to supplant present methods.[77a] FM gives greater fidelity and less interference than AM (amplitude modulation), now in general use. Allocation of AM stations has a technical limit which has been reached under standard methods of transmission. But with frequency modulation, stations can be operated on the same frequency with much less mileage separation than is possible with amplitude modulation, since FM excludes all but the strongest signal.[78] Through increased distribution of new sets capable of receiving FM broadcasts, it is rapidly becoming economically feasible to have many more outlets in every community, with the following implications:

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[76]See address of Mr. Ethridge before 19th Annual Convention of Nat'l Ass'n of Broadcasters, St. Louis, Mo., May 14, 1941, entitled "A Fair Deal for Radio."

[77]Quite evidently Congress has the power to denominate radio a public utility if it so desires. See note 36 *supra* and text thereto. See also Heinl, *Is a Broadcasting Station a Public Utility?* (1930) 6 P. U. Fort. 344, 345, where Judge Ira Robinson, formerly chairman of the Federal Radio Commission, says: "Whether you look at it from the listening end or the transmitting end, it is concededly a public utility." And as regards the position of the networks on the question, Judge Robinson says: "It seems that every time the broadcasters have a meeting, they resolve that their stations are not public utilities. The wish is merely father to the thought." *Cf.* (1938) 23 Cornell L. Q. 491. A similar view is attributed to former FCC Chairman McNinch, in Bratter, *Radio Power and Air-Channel Regulatory Headaches* (1939) 23 P. U. Fort. 643, 644. "Like a public utility, a broadcasting enterprise is a licensed monopoly on a given frequency and in a given area, in return for which license the enterprise submits to government regulation." *Id.* at 644, 645.

It is true that Section 3 (h) of the Communications Act of 1934 [47 U. S. C. § 153 (h)] provides that a broadcaster is not a common carrier (with stated exceptions); but many public utilities are not common carriers: *e.g.,* electric light and power plants. It does not follow from the fact that a service is a public utility that is also a common carrier.

[77a]See note 78 *infra.*

[78]See comment on FCC action in allocating a portion of the radio spectrum to FM broadcasting (May 20, 1940) in (1940) 11 Air L. Rev. 316. See also Time Mag., vol 38, no. 23, p. 48 (Dec. 8, 1941).

With four or five stations in every metropolitan area,[79] each free of exclusivity obligations, the four existing networks would always have an outlet available. If profitable, another network or two could be developed.[79a] The network in this projected situation would serve primarily as an advertising agency with programs for sale to advertisers. Sustaining programs which the station needs to comply with the requirement of programs in the public interest would be produced by the network and sold to individual stations. A more extensive use of transcribed programs would likewise aid the fulfilling of that requirement. The federal government, through the appropriate body,[80] would regulate rates as between the network and the individual station, but not between the network and the advertiser.[81]

Classification as a public utility does not necessarily imply monopoly. Indeed, a public utility status implies control in the public interest; and if it appears that the public interest requires a form of regulated competition which may best be accomplished through treatment as a utility, then that status is desirable.[82] Here, it would be in the public interest to have a type of controlled competition which will insure a sufficient number of stations to provide each national network (limited in number by economic considerations) with a local outlet. Neither must a public utility be a distributor to the ultimate consumer; it may be a producer or intermediate dealer.[83] Applied to

[79]Present FM transmission does not carry long distances; rural areas might thus be deprived of radio service unless arrangements are made for transmitters to be placed in non-metropolitan areas also. The evident commercial difficulties are not insuperable. See note 78 *supra.*

[79a]Chairman Fly believes the optimum number is six. See his testimony in *Hearings on S. Res. 113.*

[80]Logically, the present or a reconstituted FCC.

[81]See note 83 *infra.*

[82]See Note (1920) 33 HARV. L. REV. 576, which clearly demonstrates that regulated monopoly and regulated competition differ only in degree, not in kind. A public utility may be either, depending on the public convenience, interest, and necessity at any particular time.

[83]See *e.g.,* the electric power industry, where there are producers, intermediate dealers (wholesalers), and retailers (local utility companies). Each of these may be classed as a public utility, even though only the last sells to the ultimate consumer. See City of St. Louis v. Mississippi River Fuel Corp., 97 F. (2d) 726, 730 (C. C. A. 8th 1938): ". . . [I]f a corporation is chartered as a public utility . . . , it may be held to be a distributor of either gas or electricity for public use even though it engages in wholesale and not retail distribution. [Citing North Carolina Pub. Serv. Co. v. Southern Power Co., 282 Fed. 837 (C. C. A. 4th 1922), *cert. denied,* 263 U. S. 508, 44 Sup. Ct. 164 (1924); Salisbury & Spencer Ry. v. Southern Power Co., 79 N. C. 18, 101 S. E. 593 (1919).]" *Accord*: Main Realty Co. v. Blackstone Valley Gas & Elec. Co., 59 R. I. 29, 193 Atl. 879 (1937), (1938) 112 A. L. R. 744, 773.

The coming importance of the process of transmission of energy by radio is pertinent to the need for classification as a public utility, because power for industrial and domestic use so transmitted would more than ever affect radio with the public interest. The Communications Act of 1934 anticipates such development. Section 2 (a) of the Act provides: "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign *transmission of energy by radio.* . . ." (Italics added.)

Under the plan herein envisioned, the "public" of the radio utility would be the broadcasting stations; hence regulation of rates as to stations and not as to advertisers. See text to note 81 *supra. Cf.* Editorial (1937) 19 P. U. FORT. 509, as an example of the common misconception that the "public" here involved is the listening audience, which leads to statements that radio is not conceived of as a public utility because the service is free.

radio, these considerations point to the feasibility of placing the broadcasting industry in the utility category.

Much of the "freedom of the press" argument could be avoided by leaving the news reporting function to the Associated Press, the United Press, and the International News Service, to which the chains would sell time.[83a] And a system of equal grants of time for political candidates and controversial subjects would eliminate any question as to the fairness or propriety of a "public forum."

A more effective mode of regulating advertising is sorely needed, for much sales patter on the air today could never appear on the label of the article being advertised, first, because print would reveal its twaddlish character, and second, because it might even be illegal. The Federal Trade Commission has a special board which examines alleged misrepresentations or fraud in advertising by radio; but its method has been only that of seeking the co-operation of the radio medium and of the suspected advertiser.[84] Positive regulation of advertising by air in the public interest, convenience, and necessity (all three!) would no more be an abridgment of freedom of the press than is a similar control over newspaper advertising of and labels on mercantile goods and the like.[85]

The traditional concept of radio as an advertising business in its own right is being questioned by a type of broadcasting following close on the heels of FM development. A station transmits with its program a "pig squeal" which can be eliminated only by the use of a special receiving set which the station leases to its "subscribers."[86] Program service is then unimpaired by "soap operas," "scare advertising," or pure puff. It seems unlikely, however, that such a plan can substantially replace the present methods of securing revenues. This is true particularly since the listener does not at present directly bear the cost of producing programs; and advertising funds would be poured into other channels by advertisers, thus resulting in no saving to the consumer.

There appears no immediate reason why all the above considerations are not applicable to television as and when it finds its place in the commercial picture.[87]

While the approach taken by the Communications Commission may furnish at present the only possible answer to the problems, and while it may represent improvement over the former laissez-faire attitude, it seems destined to become outmoded as rapidly as technical developments make possible a more nearly satisfactory service to the American public through the controlled multiplication of local stations. Then, and only then, will the FCC ideal of orderly competition[88] be realized.

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[83a] See Shapiro, *The Press, the Radio and the Law* (1935) 6 AIR L. REV. 128.

[84] JONES, LAW OF JOURNALISM (1940) 309.

[85] The chains have self-administered limits upon the amount of advertising in any network program; but this does not affect contents.

[86] See Note (1941) 12 AIR L. REV. 299.

[87] See Editorial, *Television As the Utility of the Future* (1937) 20 P. U. FORT. 239.

[88] Although the Commission appears to favor "free" competition, in reality it is proposing limited competition. See Comment, *FCC Regulation of Competition Among Radio Networks* (1942) 51 YALE L. J. 448, 463.