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GROWING PAINS IN BROADCAST REGULATION

ROBERT R. HUNTLEY*

Introduction

The growing importance of the broadcast media in the life of the nation is receiving recognition not only from business interests but also government authorities. Total broadcast revenues for the year 1954 amounted to more than one billion dollars; in 1955 broadcast authorizations collectively exceeded 6,000 for the first time.¹ But vastly more significant is the fact that radio and television are constant invaders into virtually every home. The pervasive influence of broadcasting on men's minds cannot be estimated, but it seems safe to assume that it either is or will soon become the single most important factor in guiding the thinking of the nation.² Justice Frankfurter in 1950 in a special *dubitante* opinion expressed inchoate misgivings in this connection: "No doubt the radio enlarges man's horizon. But by making him a captive listener it may make for spiritual impoverishment. . . . It is an uncritical assumption that every form of reporting or communication is equally adaptable to every situation. Thus, there may be a mode of what is called reporting which may defeat the pursuit of justice."³ And later in the opinion he suggests that the impact of television is the most powerful—and potentially the most dangerous—of all forms of communication. "Man forgets at terrible cost that the environment in which an event is placed may powerfully determine its effect. Disclosure conveyed by the limitations and power of the camera does not convey the same things to the mind as disclosure by the limitations and power of pen or voice. The range of presentation, the opportunities for distortion, the impact on reason, the effect on the looker-on as against the reader-hearer, vary; and the differences may be vital. Judgment may be confused instead of enlightened. Feeling may be agitated, not guided; reason deflected not enlisted. Reason—the deliberative process—has its own requirements,

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¹See more detailed statistics in 21 F. C. C. Ann. Rep. 112 et seq. (1955).

²It is estimated that there are more than 120 million radio receivers in use, and further that of the 48 million households in the country, two-thirds have one or more television sets, six times the number in 1950. 21 F. C. C. Ann. Rep. 119 (1955).

³Radio Corporation of America v. United States, 341 U. S. 412, 425, 71 S. Ct. 806, 812, 95 L. ed. 1062, 1073 (1951).

met by one method and frustrated by another."⁴ In this sense broadcasting is unique in the field of federal regulations. In no other field is the public interest to be safeguarded so vitally related to the basic commodity of our governmental system—the opinions of the people.

The Scope of Government Regulation

Broad authority to exercise regulatory and licensing powers over the nation's broadcast facilities was conferred on the Federal Communications Commission at its creation in the Communications Act of 1934.⁵ The essence of the statutory criterion to which the Commission is ordered to pay heed in making its quasi-judicial and quasi-legislative determinations is contained in the oft repeated phrase "public interest, convenience, or necessity."⁶

The chaotic conditions extant in the early days of radio provided the Commission with ample testimony that the physical facts related to radio and television broadcasting demand that there be centralized allocation and regulation. "From July, 1926 to February 23, 1927, when Congress enacted the Radio Act of 1927... almost 200 new stations went on the air. These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be hear."⁷

Congress was spurred by this obvious necessity for prompt action

⁴Radio Corporation of America v. United States, 341 U. S. 412, 425, 71 S. Ct. 806, 813, 95 L. ed. 1062, 1074 (1951). The case involved an order of the F. C. C. adopting color television standards proposed by CBS and rejecting those proposed by RCA-NBC. 15 Fed. Reg. 7013 (1950). The system adopted was "incompatible"—i.e., programs broadcast in color could not be received in black and white on existing receivers; the RCA proposal was "compatible" but was otherwise imperfect. See 18 U. of Chi. L. Rev. 802. RCA appealed from the Commission's order on grounds that it was arbitrary and against the public interest, alleging that if allowed time it could develop a satisfactory compatible system. The majority of the Supreme Court held that the determination was within the permissible bounds of the Commission's discretion. 341 U. S. 412, 71 S. Ct. 806, 95 L. ed. 1062 (1951). In December, 1953, the F. C. C. recognized that the incompatible system had not taken hold and adopted in its stead a compatible system. 18 Fed. Reg. 8649 (1953).

⁵48 Stat. 1064 (1934), 47 U. S. C. A. § 151 ff (1955 Supp.). The 1934 legislation was based on the Radio Act of 1927, 44 Stat. 1162 (1927).

⁶E.g., 47 U. S. C. A. §§ 309(a), 307(d) (1955 Supp.). In several sections the phrase is worded "public convenience, interest, or necessity." E.g., 47 U. S. C. A. §§ 303, 307(a) (1955 Supp.). Apparently no significance has been attached to this variation in wording.

⁷National Broadcasting Co. v. United States, 319 U. S. 190, 212, 63 S. Ct. 997, 1007, 87 L. ed. 1344, 1360 (1943). In this opinion the Court reviews briefly the legislative history of radio in this country. And see Note (1950) 36 Va. L. Rev. 232.

and by "a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcast field.⁸ At the same time, Congress must have been aware that the field into which it moved was one which could almost certainly be expected to expand with unprecedented speed and in unpredictable directions. Therefore, the legislature did not attempt to place precise limits on the extent of the Commission's power, nor did it establish stereotyped standards for that agency to apply.⁹ No doubt the most immediate problem which prompted the creation of the Commission was the pressing need for technical supervision of the broadcast industry—i.e., the use of proper equipment and the elimination of interference among stations. But the Act itself negates any idea that the Commission is limited to such technical considerations; it instructs the Commission to exercise all of its powers "as public convenience, interest, or necessity requires . . ." and lists those powers in broad terms.¹⁰

The first section of that part of the Communications Act dealing with broadcasting declares that the purpose of the chapter is "to maintain the control of the United States over all the channels of interstate and foreign 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, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."¹¹ Thus, the heart of the Act is the concept of complete and exclusive government "ownership" of the channels of radio transmission,¹² and consequently the basic

⁸F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134, 137, 60 S. Ct. 437, 439, 84 L. ed. 656, 659 (1940).

⁹However, the Act defines with some care the areas within which the Commission may exercise its discretion. 47 U. S. C. A. § 303 (1955 Supp.). It does not authorize the Commission to regulate internal management of broadcast stations, to determine their rates and charges, or to censor their output. "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications . . . and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U. S. C. A. § 326 (1955 Supp.). The Commission has, however, through its licensing power, exercised varying degrees of control over program content. Hugin, Radio Broadcasting Under Governmental Regulation (1951) 4 Okla. L. Rev. 417 at 427; Note (1950) 36 Va. L. Rev. 232; Note (1950) 59 Yale L. J. 759.

¹⁰47 U. S. C. A. § 303 (1955 Supp.).

¹¹47 U. S. C. A. § 301 (1955 Supp.).

¹²One writer has pointed out that it is perhaps "more accurate to say that the electromagnetic phenomenon, the ether, is a type of *nullius in bonis* (not a subject of private property)." Hugin, Radio Broadcasting Under Governmental Regulation (1951) 4 Okla. L. Rev. 417, 422.

function of the F.C.C. in this field is the allocation and licensing of those channels for use by private individuals.¹³ It is in the exercise of this licensing power that the Commission is most often compelled to determine what constitutes "the public interest." Section 307(a) commands: "The Commission, *if* public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant thereafter a station license. . . ."¹⁴

Obviously, when the Commission is faced with two mutually exclusive applications of technically and financially qualified applicants for the same channel in the same or nearly the same location, a choice must be made. In making that choice the Commission cannot escape formulating a concept of the public interest. But it is important to note that the Act does not merely require a finding of public interest in choosing between applicants; rather it requires that *no* license is to be granted or renewed unless the public interest will thereby be served.

The Supreme Court has consistently recognized the breadth of the F.C.C.'s function and at the same time the Commission's statutory responsibility to exercise its expert discretion to safeguard the interests of the listening public. In *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*¹⁵ the Court, reviewing for the first time the merits of a controversy in this field, upheld the Commission's action in deleting the license of an existing station and granting it to another applicant. In regard to the Commission's duty, it was observed: "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. . . . [All pertinent facts and "equities" must be considered.] But the weight of the evidence as to these equities and all other pertinent facts is for the determination of the Commission in exercising its authority. . . . [T]he Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence."¹⁶ In *F.C.C. v. Pottsville Broad-*

¹³Former Chairman of the F. C. C. Wayne Coy described a broadcast license as "a leasehold to use a frequency." Hearings Before House Committee on Interstate and Foreign Commerce on S. 658, 82nd Cong., 1st Sess. 109 (1951).

¹⁴47 U. S. C. A. § 307(a) (1955 Supp.).

¹⁵289 U. S. 266, 53 S. Ct. 627, 77 L. ed. 1166 (1933). The Federal Radio Commission, established by the Radio Act of 1927, 44 Stat. 1162 (1927), was the predecessor of the present agency.

¹⁶*Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285, 53 S. Ct. 627, 636, 77 L. ed. 1166, 1178 (1933).

casting Co.¹⁷ the Supreme Court pointed out that the public interest criterion "is as concrete as the complicated factors for judgment in such a field of delegated authority permit, [serving] as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."¹⁸ And in *National Broadcasting Co. v. United States*,¹⁹ where the F.C.C.'s controversial Chain Broadcasting Regulations were tested and upheld, Justice Frankfurter for the majority stated succinctly: "But the Act does not restrict the Commission merely to supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission."²⁰

Free Competition—The Basic Policy

These, then are the "vagueish, penumbral bounds"²¹ within which Congress and the Supreme Court have ordered the Commission to function. Congress apparently has recognized that, because of its peculiar nature, broadcasting demands special treatment. That portion of the Act dealing with "common carriers" provides for a system to close supervision analogous to the regulation of railroads by the Interstate Commerce Commission, but Section 153(h) of the Communications Act specifically provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."²² With relation to broadcasting, the F.C.C.'s primary function is licensing, and its power does not extend to close

¹⁷309 U. S. 134, 60 S. Ct. 437, 84 L. ed. 656 (1940).

¹⁸F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134, 138, 60 S. Ct. 437, 439, 84 L. ed. 656, 659 (1940).

¹⁹319 U. S. 190, 63 S. Ct. 997, 87 L.ed. 1344 (1943). See discussion at note 42, *infra*.

²⁰*National Broadcasting Co. v. United States*, 319 U. S. 190, 215, 63 S. Ct. 997, 1009, 87 L. ed. 1344, 1362 (1943).

²¹F. C. C. v. RCA Communications, Inc., 346 U. S. 86, 91, 73 S. Ct. 998, 1002, 97 L. ed. 1470, 1476 (1953).

²²This section defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy..." 47 U. S. C. A. § 153(h) (1955 Supp.). Common carriers are regulated under Subchapter II of Chapter V, Title 47 U. S. C. A., whereas broadcasting is dealt with in Subchapter II of Chapter V, Title 47 U. S. C. A. That radio broadcasting includes television, see *Allen B. DuMont Laboratories v. Carroll*, 184 F. (2d) 153 (C. A. 3rd, 1950), cert. den. 340 U. S. 929, 71 S. Ct. 490, 95 L. ed. 670 (1951).

supervision of individual stations.²³ In this part of the Act the basic philosophy is the concept of broadcast channels as part of the public domain, and, at least by negative implication, it is clear from the Act that an essential part of that basic philosophy is the preservation of competition as a means of insuring against the threat of monopolistic domination.²⁴ The Commission itself has so interpreted its statutory mandate: "One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis."²⁵

Perhaps the clearest and most often cited recognition of the fundamental purposes and philosophy of government regulation of broadcasting is contained in the Supreme Court's opinion and decision in the case of *F.C.C. v. Sanders Brothers Radio Station*.²⁶ The case involved an application for a construction permit for a radio station in Dubuque, Iowa. An existing radio station in the same city (on a different channel) objected, alleging that adequate service was already being furnished and that there was insufficient advertising revenue and insufficient talent available to support two stations. The Commission granted the permit, finding that there was a need for two stations in Dubuque. Intervenor appealed to the Court of Appeals for the District of Columbia where the F.C.C. decision was reversed for failure to find facts relating to the alleged economic injury to intervenor's radio station which would result from the granting of the permit.²⁷ The Supreme Court granted certiorari and reversed the Court

²³See note 9, supra.

²⁴"... the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition." *F. C. C. v. Sanders Brothers Radio Station*, 309 U. S. 470, 474, 60 S. Ct. 693, 697, 84 L. ed. 869, 874 (1940). See 47 U. S. C. A. §§ 311, 313, 314 (1955 Supp.).

²⁵F. C. C. Order, Multiple Ownership, 18 Fed. Reg. 7796, 7797 (1953). See also F. C. C., Report on Chain Broadcasting (Order No. 37) (1941) 88, quoted in part in (1953) 101 U. of Pa. L. Rev. 721, 722; Southern Tier Radio Service, Inc., 11 F. C. C. 171 (1946); *The Louisville Times Co.*, 5 F. C. C. 554 (1938).

²⁶309 U. S. 470, 60 S. Ct. 693, 84 L. ed. 869 (1940).

²⁷*Sanders Brothers Radio Station v. F. C. C.*, 106 F. (2d) 321 (C. A. D. C., 1939). The Communications Act authorizes appeals from orders of the Commission to be taken to the Court of Appeals for the District of Columbia by any person whose application is denied or whose license or permit is revoked or suspended or "By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application..." 47 U. S. C. A. § 402(b) (1955 Supp.). See discussion in text at note 104, infra.

As to the scope of judicial review of administrative action see *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 71 S. Ct. 456, 95 L. ed. 456 (1951); Jaffe, *Judicial Review: Question of Law* (1955) 69 *Harv. L. Rev.* 239; Jaffe, *Judicial Review: Question of Fact* (1956) 69 *Harv. L. Rev.* 1020.

of Appeals. Justice Roberts for the Court distinguished broadcasting from common carrier activities and declared that "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. . . . Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public."²⁸ He concluded that prospective economic injury to an existing station is not, per se, grounds for denying a license.

Though there seems to be no dissenting voice from any official quarter to the general proposition that competition in the broadcast field is essential,²⁹ this cannot mean unrestricted laissez-faire. Obviously each broadcaster must be protected against "competition" (interference) in his service area on his assigned frequency. Since there is necessarily a limited number of usable frequencies, it is clear that in a sense broadcasting is—and must be—a monopoly. Competition in this field can only be carried on by those allowed by the government to compete. Viewed in this way, the F.C.C.'s job is to determine who and how many shall vie for the attention of the people. Congress and the Supreme Court have defined the "public interest" in this context as requiring competition. If this definition is to have any meaning, it would seem that the Commission is required to answer the question "how many?" with "as many as possible," and the question "who?" with "whoever increases the number competing."

But the Commission cannot solve its problem so easily. The "public interest" standard set forth in the Act includes more than a haphazard application of a policy to preserve competition. In general, all factors bearing on the quality of the service offered to the public must be considered. Thus, as to any applicant weight must be given to technical and financial qualifications, experience, availability of talent, local ownership, integrated management, character, programming, and so on.³⁰ Clearly, in many instances, these factors relating to quality of service will be in conflict with a policy favoring the most possible competition. The quality of service offered by an applicant who already owns several stations and several newspapers is apt to be superior to that offered by the applicant who owns none. The conclusion suggests itself that the Communications Act represents a

²⁸F. C. C. v. Sanders Brothers Radio Station, 309 U. S. 470, 475, 60 S. Ct. 693, 697, 84 L. ed. 869, 874 (1940).

²⁹But see Note (1942) 27 *Corn. L. Q.* 249 at 264.

³⁰For a thorough analysis of some of the policies applied by the Commission, see Warner, *The Administrative Process of the Federal Communications Commission* (1946) 19 *So. Cal. L. Rev.* 191 and 312.

statutory attempt to have the cake and eat it too—to preserve competition, primarily for the prevention of thought control and perhaps secondly to stimulate incentive,³¹ and at the same time to seek after those benefits more immediately evidenced by monopoly. The conflict appears to be basic; its resolution has evoked compromise.

It is not proposed here to go into a detailed analysis of the history of the F.C.C.'s treatment of its oft stated policy opposing concentration of control and favoring diversification of the media of communications. The subject does not lend itself to an analytical approach, and an attempt to trace patterns and trends is likely to yield an artificial result. What is attempted here is merely a cursory examination of the general areas where the conflicts suggested above have produced unsolved problems which have been amplified by the rapid development of television and which are manifest in a few recent court decisions.

*Chain Broadcasting Regulations*³²

In 1941 the F.C.C., utilizing a combination of its power "to make special regulations applicable to radio stations engaged in chain broadcasting"³³ and its general licensing power, affirmatively applied the policy favoring competition and opposing monopoly by promulgating eight regulations aimed at the growing national networks. In its Report on Chain Broadcasting issued with the order adopting the regulations, the Commission recognized the great benefits which accrue to the radio industry and to the public as a result of chain broadcasting,³⁴ but realizing that its responsibility is not fulfilled merely by assuring

³¹"The assumption underlying our system of regulation is that the national interest will be furthered by the fullest possible use of competition. At some point, of course, the Commission must fix standards limiting competition. But once those standards are fixed, the incentive for improvement is relaxed." Frankfurter, J., *dubitante* in *Radio Corporation of America v. United States*, 341 U. S. 412, 423, 71 S. Ct. 806, 812, 95 L. ed. 1062, 1073 (1951); see note 4, *supra*. Cf. *F. C. C. v. RCA Communications, Inc.*, 346 U. S. 86, 73 S. Ct. 998, 97 L. ed. 1470 (1953).

³²47 C. F. R. §§ 3.101-3.108 (Rev. 1953). Chain broadcasting is defined by the Communications Act as "simultaneous broadcasting of an identical program by two or more connected stations." 47 U. S. C. A. § 153 (p) (1955 Supp.).

³³47 U. S. C. A. § 303(i) (1955 Supp.).

³⁴"Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs." F. C. C., Report on Chain Broadcasting (Order No. 37) (1941) 4, quoted in *National Broadcasting Co., v. United States*, 319 U. S. 190, 198, 63 S. Ct. 997, 1001, 87 L. ed. 1344, 1353 (1943).

to listeners expensive and entertaining programs. "The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated."³⁵

The regulations adopted thus represent a compromise between the desire to retain the benefits that only big broadcasting systems can offer and the desire to protect against the eventuality of two or three big networks determining what the people shall hear. Six of the regulations were designed to force the networks to relax the airtight provisions in the contracts which they were requiring of their affiliates,³⁶ one was directed at NBC's ownership of two networks,³⁷ and one acted to prevent ownership (as distinguished from affiliation) by a network of more than one station in the same service area and network ownership of any station "in any locality where the existing standard broadcast stations are so few or of such unequal desirability... that competition would be substantially restrained..."³⁸ Criticism of the regulations was soon forthcoming.³⁹ One writer argued that even if decentralized control were a valid policy, the rules adopted were only a token move in that direction. He concluded, however, that "Despite its unique property patterns, the broadcasting industry is a public utility" and should be made the subject of a new congressional statute embodying a "positive regulatory policy" dedicated to "raising the level of listener taste rather than catering to 'average' taste" and "minimizing advertising and raising its ethical and aesthetic quality." The writer recognized that the most effective way to obtain such service is to "require regulations specifically directed to particular goals, rather than general faith in the power of competition. The goal here is not economic welfare, but the improvement of broadcasting ser-

³⁵F. C. C., Report on Chain Broadcasting (Order No. 37) (1941) 4, quoted in *National Broadcasting Co. v. United States*, 319 U. S. 190, 198, 63 S. Ct. 997, 1001, 87 L. ed. 1344, 1353 (1943).

³⁶47 C. F. R. §§ 3.101-3.105, 3.108 (Rev. 1953).

³⁷47 C. F. R. § 3.107 (Rev. 1953).

³⁸47 C. F. R. § 3.106 (Rev. 1953). The rules have been made applicable to FM, 47 C. F. R. §§ 3.231-3.238 (Rev. 1953), and to television, 47 C. F. R. § 3.658 (Rev. 1953).

Since the Commission has no authority to regulate networks as such, the rules operate directly only on the broadcast stations by providing that a license will not be granted to any station affiliated with a network which engages in the forbidden practices. See *Columbia Broadcasting System v. United States*, 316 U. S. 407, 62 S. Ct. 1194, 86 L. ed. 1563 (1942), noted (1942) 56 Harv. L. Rev. 121.

³⁹Arguments for and against the validity of the regulations are presented in Note (1941) 12 Air L. Rev. 301.

vice, to which increased competition between networks is not relevant."⁴⁰

The National Association of Broadcasters attacked the regulations as an unauthorized usurpation of power and a menace to "the freedom of the American system of broadcasting."⁴¹ But the Supreme Court, in *National Broadcasting Co. v. United States*,⁴² regarded the regulations as a "particularization of the Commission's conception of the 'public interest'" and held them to be clearly within the Commission's allowable discretion.

If the Commission hoped that the regulations would usher in a new era of stimulating competition among the networks and between networks and stations, and if the big networks feared the downfall of the "American system of broadcasting," both the hopes and fears were largely unfounded. The competitive inroads made by the smaller networks into the domain of NBC and CBS have been negligible; furthermore it is still, perhaps more than ever, almost a matter of economic necessity for a broadcast station, radio or TV, to affiliate with one of the national networks, preferably one of the top two.⁴³

VHF vs. UHF—Television's Most Pressing Problem

The network problem is brought into sharp relief against the background of television's course of development since the F.C.C. lifted the four year freeze on television authorizations in 1952.⁴⁴ At the time of the freeze there were 108 television stations authorized to operate, located throughout 63 of the nation's most populous areas.⁴⁵ Prior to 1948, when the freeze was imposed, television was assigned to broad-

⁴⁰Note (1942) 51 Yale L. J. 448, 464.

⁴¹Miller, *Legal Aspects of the Chain Broadcasting Regulations* (1941) 12 Air L. Rev. 293, 294.

⁴²319 U. S. 190, 218, 63 S. Ct. 997, 1010, 87 L. ed. 1344, 1363 (1943).

⁴³See Note (1951) 60 Yale L. J. 78 where the status of the networks ten years after the promulgation of the regulations is analyzed.

⁴⁴The freeze was imposed in 1948 because of unresolved engineering difficulties in the new medium. 13 Fed. Reg. 5860 (1948). In 1952 the Commission issued its Sixth Report and Order lifting the freeze and promulgating a table of television channel assignments to be effective throughout the nation. 17 Fed. Reg. 3905 (1952).

⁴⁵Hearings Before Senate Committee on Interstate and Foreign Commerce on the Status of UHF Television Stations and S. 3095, 83rd Cong., 2d Sess. 170 (1954). Unless noted to the contrary, the factual information which follows regarding the status of UHF has been garnered from the twelve hundred pages of testimony, correspondence, and statistics taken at this committee hearing, cited herein as Senate Hearings on UHF (1954). See also the record of more recent hearings on the same subject. Hearings Before Senate Committee on Interstate and Foreign Commerce Pursuant to Senate Resolutions S.13 and S.163, 84th Cong., 2nd Sess. (1956) parts 1,2.

cast on frequencies only in the VHF (very high frequency) band, which was already partially occupied by FM aural broadcasting and by various industrial and governmental services deemed essential. Because of the extremely wide frequency band required (6mc) for television broadcasting of acceptable quality,⁴⁶ only 12 channels were available for television in the VHF range. (These are the 12 channels which may be received on the standard unconverted television receiver.) During the years of the freeze, it became increasingly clear to the Commission that, if the ideals of diversity and competition were to be realized in the field of television broadcasting, it was essential that there be made available for potential use by new television stations far more than the few hundred assignments possible with only 12 channels. Thus, the Commission determined to open up to television an entire band of frequencies, 420 megacycles wide, located in the spectrum above the crowded VHF band. The allocation of this new UHF (ultra high frequency) band made available to TV 70 new channels and consequently many hundred additional possible station assignments. Accordingly, when the F.C.C. ended the freeze in April, 1952, it issued a long range nationwide scheme of allocation, envisaging more than 1800 commercial assignments, approximately 1300 of which are in the UHF band. The plan provided for "intermixture"—i.e., both VHF and UHF assignments in the same service areas.⁴⁷

It might have appeared that with so many assignments available and with many applicants already anxious to begin operations, the golden age of competitive, multiply-owned television was truly in sight. However, the years since 1952 have revealed several flies in the ointment, which, although not entirely unanticipated, have proven more significant than was expected. The 108 commercial TV stations on the air in 1952, were, of course, all VHF stations, located in 63 of the choicest market areas in the country; at that time 15 million families in those areas owned receivers, all of which were VHF—only. These 63 areas contain approximately 60 per cent of the nation's population and account for approximately 60 per cent of the nation's retail sales.⁴⁸ Thus, stations securing licenses to operate on one of the UHF assignments in one of these areas had the initial obstacle of set conversion to overcome before they could even begin to compete with already well ensconced VHF stations. In addition, the new UHF per-

⁴⁶As to the necessity for so wide a band, see Terman, *Radio Engineering* (3d ed. 1947) §§17-4, 17-5.

⁴⁷F. C. C., Sixth Report and Order, 17 Fed. Reg. 3905 (1952).

⁴⁸Senate Hearings on UHF (1954) 138.

mittee found that UHF transmission requires greater power than VHF for effective coverage of the same area, but the UHF transmitters with the needed power were not available; he often found that field technicians and TV service men were unaccustomed to UHF equipment and were at first unable to achieve maximum results. Furthermore, UHF transmission is less likely to vary from direct line of sight coverage, and so the location of the antenna is an even more strategic factor than in the case of VHF. These technical difficulties were not insurmountable, and, standing alone, would probably not have seriously hindered the development of UHF. But they played their part in establishing a vicious circle which has forced a number of UHF stations out of business and which, in the opinion of many, threatens permanently to deflate the hope for a "nationwide competitive system."

This vicious circle has developed in many localities typically as follows. The first UHF station to go on the air in an area begins operations with no sets capable of receiving his signal, with technically imperfect equipment, and with low power short distance transmission. If he is in a locality where there is already service from two VHF stations (which may be many miles away but which are nonetheless able to reach his city because of their longer distance transmission) his obstacles may become insurmountable. Probably the two VHF stations have CBS and NBC programs. His chances of getting any of those programs are most remote, since naturally the advertisers sponsoring them and the networks carrying them are primarily interested in affiliating with stations which can guarantee the greatest possible coverage. He may be able to secure affiliation with the third place ABC or the struggling DuMont, whose programming is concededly inferior to that offered by the two leaders. If, because he has nothing to offer in the way of coverage, he is unable to secure affiliation even with one of the two lesser lights in the network world, his chances of survival are indeed slim; but even if he is able to affiliate with ABC and DuMont, the viewers in his area are likely to be reluctant to pay the additional cost for a receiver that will tune in UHF channels when the most popular programs are available only on VHF. The circle then becomes complete, and even local advertising drops away: no programs because no coverage and no coverage because no programs.

Naturally, if the new UHF licensee begins in competition with only one VHF station, his outlook is correspondingly brighter. And if he has the market to himself, or shares it only with other UHF broadcasters, the *initial* set conversion problem will be virtually eliminated, and

he may get off to a glowing start with a big network affiliation and a growing audience. But even this UHF operator cannot rest in complete ease. Probably he was able to get his UHF grant promptly because there were no other applicants, and he was spared the lengthy rigors of a comparative hearing. But there is a strong possibility that somewhere in the area there is, under the F.C.C.'s 1952 allocation plan, an unoccupied VHF assignment—unoccupied because several would-be broadcasters have applied for it and are fighting it out in a comparative hearing. Eventually that VHF channel is granted. Of course, the UHF operator is not in the unenviable position of one beginning operations in an established VHF market; presumably he already has obtained an audience, its size depending on how long he has been on the air before VHF competition arrives. But in many instances he has had a much shorter head start than he anticipated.

Section 309(a) of the Communications Act permits the Commission to grant station permits without a hearing if there are no mutually exclusive applications involved. When the freeze was lifted in 1952, the Commission, anxious to get new stations on the air as soon as possible, adopted the procedure of considering such uncontested applications first and temporarily suspended hearings among multiple applicants for the same assignment.⁴⁹ Under this procedure it was relatively simple for a qualified applicant to obtain a UHF grant without great delay since most of the multiple applications were for the few hundred sought-after VHF assignments. This state of affairs encouraged many to apply for uncontested UHF assignments rather than join the VHF scramble and be subjected to many months of delay followed by the expense and further delay of a comparative hearing, still with no assurance of getting the grant. Therefore, most new UHF permittees felt they could anticipate a substantial period of time in which to iron out financial and technical difficulties and build up an audience. Then in May, 1953, when no UHF station could have been on the air more than a few months, the F.C.C., with Commissioner Frieda Henneck dissenting, adopted a new procedure: "Where an application upon which processing has been temporarily suspended because of mutually exclusive applications becomes unopposed... the remaining application may be available for consideration... by the Commission at a succeeding regular meeting..."⁵⁰ This new procedure had the effect of encouraging "drop-outs" among multiple

⁴⁹F. C. C., Sixth Report and Order, 17 Fed. Reg. 3905 (1952).

⁵⁰Senate Hearings on UHF (1954) 1083. The substance of this procedure is now embodied in 47 C. F. R. § 1.378(d) (Rev. 1953).

applicants for VHF assignments resulting in what is referred to by opponents of the procedure as "quickie grants".⁵¹ Such "quickie grants" occur when all but one of the applicants for a certain assignment withdraw their applications, leaving the remaining application unopposed. The "drop-out" has become increasingly popular among VHF multiple applicants as it became apparent that to await a comparative hearing with its uncertain outcome might mean indefinite delay, particularly if a court appeal were to be involved. The "drop-out" is accomplished by a merger of the two or more applicants into one company, or by the actual withdrawal of one of the applicants, who is often reimbursed by the remaining applicant for his "out-of-pocket" expenses. In this way it has frequently happened that a new UHF permittee has been faced with more immediate VHF competition than he had anticipated, and with the prospect of losing his network affiliations before he has established himself.

By mid-1954, as a result of a combination of the factors sketched above, more than 60 UHF permittees had surrendered their permits, in many cases without ever having gotten started.⁵²

The problem has been the subject of congressional attention in extensive committee hearings, which have at least revealed that there is no shortage of proposed remedies. These proposals generally fall into one of two categories. On the one hand it is argued that UHF can never survive under the present allocation scheme, that the inequities between the two services have become too firmly entrenched to respond to mere palliative remedies and thus competition between them must be eliminated. For example, DuMont, whose future is deemed inseparable from the fate of UHF, has proposed that in each major market area there be allocated a minimum of four station assignments, either all VHF or all UHF. DuMont maintains that there is sufficient advertising potential to support four healthy networks (ABC is certain there is at least enough for three),⁵³ but that this happy state can only be achieved if each of the four has an equally attractive outlet available in each market area.⁵⁴ A variation on this, espoused by a group of approximately 70 UHF licensees, is the proposal that television gradually be shifted entirely to the UHF band.⁵⁴ Commissioner

⁵¹See particularly Statement of Commissioner Frieda B. Hennock, Senate Hearings on UHF (1954) 187 et seq.

⁵²Senate Hearings on UHF (1954) 143.

⁵³Statement of E. L. Jahncke, Jr., Vice-President and Assistant to the President, American Broadcasting Co., Senate Hearings on UHF (1954) 938 et seq.

⁵⁴Statement of Allen B. DuMont, Senate Hearings on UHF (1954) 227 et seq.

⁵⁴Statement of Benedict P. Cottone, UHF Coordinating Committee, Senate Hearings on UHF (1954) 381 et seq.

Frieda Hennock,⁵⁶ whose views on the subject are not shared by her fellow commissioners, has urged that an immediate freeze be imposed on pending VHF applications while the Commission studies possible methods of "de-intermixture."⁵⁷

On the other hand, the majority of the Commission,⁵⁸ the two major networks, and representative VHF licensees feel that such drastic action is completely uncalled for, that UHF alone could not meet the nation's needs, and that de-intermixture would not only cause immeasurable loss to VHF licensees, but would be a practical impossibility. Whereas those who support a basic change in the allocation plan argue that otherwise monopoly, or "duopoly," is inevitable, this group maintains that to protect UHF against competition is contrary to the fundamental concept of the American system of broadcasting. It is contended that as UHF's technical difficulties are overcome, the problem "will disappear and leave only faint scars . . . with probably no more than the application of some hot packs and a substantial amount of loving care," with no necessity for "radical surgery".⁵⁹

In its annual report for 1955 the F.C.C. recognizes that "The failure, thus far, of UHF stations to become integrated with established VHF stations" is the most important problem in the TV industry.⁶⁰ Witness to this is the fact that at the end of 1955, of the 325 UHF station grants, only about one-third were on the air, and many of these were reportedly in precarious financial condition.⁶¹ More than three-fourths of the 458 operating TV stations were VHF.⁶² The Commission appears to have accepted the "hot pack" approach to the problem. In August, 1954, it adopted the policy of authorizing so-called "satellite" stations, which may confine their operation to the re-broadcast of the programs of established stations.⁶³ And in June, 1955, the minimum power requirements for UHF and VHF were lowered.⁶⁴ These measures are designed to make it feasible for a UHF station to commence operations on a modest financial basis. Also in June, 1955, the Chain Broadcasting Rules were amended to eliminate the use of a provision in

⁵⁶Miss Hennock's term of office expired on June 30, 1955. She was succeeded by Richard A. Mack.

⁵⁷Senate Hearings on UHF (1954) 187 et seq.

⁵⁸Statement of Commissioner Rosel H. Hyde, Chairman, F. C. C., Senate Hearings on UHF (1954) 140 et seq. Commissioner Hyde was succeeded as Chairman by George C. McConaughy in October, 1954.

⁵⁹Statement of W. T. Pierson, Senate Hearings on UHF (1954) 742, 753.

⁶⁰21 F. C. C. Ann. Rep. 95 (1955).

⁶¹21 F. C. C. Ann. Rep. 95 (1955).

⁶²21 F. C. C. Ann. Rep. 117 (1955).

⁶³19 Fed. Reg. 5144 (1954).

⁶⁴20 Fed. Reg. 4589 (1955).

network affiliation contracts by which the network was prevented from offering the same programs to a station in another city which partially served the same area.⁶⁵ This rule was promulgated by the Commission in recognition of the fact that "at this stage in TV development, network programming is essential to the profitable operation of most stations, and in many cases, to their very survival. . . ."⁶⁶ The F.C.C.'s multiple ownership rules, which are discussed in more detail below, were also amended in 1954 with the hope of encouraging established VHF station owners to enter the UHF field. Previously the rule limited to five the number of TV stations permitted to operate under common control; the amended rule raises the minimum to seven, no more than five of which may be in the VHF band.⁶⁷

These "hot pack" remedies may tend to increase slightly the number of UHF stations on the air. But an analytical look at them would seem to indicate that they are not likely to bring nearer the goal which was originally deemed to be the primary "public interest" reason for introducing UHF. Presumably that goal is the establishment of a system of television broadcasting made up of numerous multiply owned, locally controlled stations offering to the public a widely diversified choice of programs originating from different sources and representing varying viewpoints. Obviously the mere existence of numerous stations would not, per se, represent accomplishment of this goal if the majority of them serve only as outlets for the same information.

To date the Commission has shown no disposition to make basic changes in its allocation plan, nor has it adopted any policies which would improve the position of the lesser networks. It has, however, in the last year, received from Congress an \$80,000 fund earmarked to be used to begin a thorough study of television network broadcasting.⁶⁸ A bill designed to bring the networks within the licensing and

⁶⁵20 Fed. Reg. 4590 (1955).

⁶⁶21 F. C. C. Ann. Rep. 107 (1955).

⁶⁷19 Fed. Reg. 6099 (1954).

⁶⁸21 F. C. C. Ann. Rep. 120 (1955). In July, 1956, the Commission released a report analyzing the UHF problem and indicating for the first time that it felt that something more than "hot pack" remedies would be required. "For all the foregoing reasons the Commission is convinced that it should now undertake a thorough, search analysis of the possibilities for improving and expanding the nationwide television system through the *exclusive use* of the UHF band throughout or in a major portion of the United States. . . . [I]t will be necessary first to obtain facts and data relating to the basic problems. . . ." 21 Fed. Reg. 4958, 4961 (1956) [Italics supplied]. The inquiry is apparently still going on, and no final date has been set for submission of further comment by interested parties. 21 Fed. Reg. 7743 (1956). For an application of the Commission's "interim" policy, pending some final solution, see F. C. C. Docket No. 11,753, 22 Fed. Reg. 3113 (1957).

regulatory authority of the F.C.C. is presently being considered by the Senate Interstate Commerce Committee.⁶⁹

Ownership of Broadcast Facilities

Since the licensing power of the F.C.C. does not extend to networks, problems raised by their operations are not normally directly before the Commission as it performs its routine. However, factors relating to the ownership of broadcast stations are inevitably objects of the Commission's scrutiny each time it grants or denies a license or permit. And, as has been pointed out, the Commission cannot satisfy its statutory obligation by directing its scrutiny only at the technical and financial qualifications of the prospective owner. It would seem, then, that if there is truly a policy favoring as much competition as possible, it would find its strongest manifestation in the F.C.C.'s choices of station owners.

The Commission's major attempt to pay homage to the principles of competition and diversification is embodied in the so-called multiple ownership rules, which were first adopted in the early forties and amended in 1953 and 1954.⁷⁰ There are three such rules in effect, one for AM, one for FM, and one for TV. The three rules are substantially identical, each one providing, as to the type of broadcast service to which it relates, that a license shall not be granted to any party who in any manner already controls, operates, or owns another such station in the same area, and that an interest in any such station anywhere *may* act as a bar to the grant of another license "if the grant of such license would result in a concentration of control of [the type broadcasting dealt with by the rule] in a manner inconsistent with public interest, convenience, or necessity." Each rule further provides that "in any event" control of one interest in more than seven such stations will be considered a concentration of control contrary to the public interest.⁷¹

In February, 1955, an F.C.C. decision applying these rules was made the subject of a court appeal.⁷² Storer Broadcasting Co., the appellant in the case, owns seven AM radio stations and five UHF television stations located in major cities throughout the country. When it ap-

⁶⁹S. 825, referred to committee, 101 Cong. Rec. 755 (1955).

⁷⁰The present rules were promulgated in December, 1953. 18 Fed. Reg. 7796 (1953). The rule relating to television was amended in September, 1954. 19 Fed. Reg. 6099 (1954); see discussion in text at note 67, supra.

⁷¹47 C. F. R. §§ 3.35, 3.240, 3.636 (Rev. 1953).

⁷²Storer Broadcasting Co. v. United States, 220 F. (2d) 204 (C. A. D. C., 1955), noted (1955) Geo. L. J. 671.

plied for a license to operate a sixth VHF station, to be located in Miami, the Commission invoked the multiple ownership rules and denied the application without a hearing. The Court of Appeals reversed, holding that the Commission has no statutory authority to deny a license without a hearing on the basis of a preconceived notion of precisely what constitutes a concentration of control contrary to the public interest. The Court ordered elimination of those parts of the rules which set an absolute numerical limit on the number of stations which may be commonly controlled. It was held that the public interest in this connection must be determined on a case by case *ad hoc* basis. "It is conceivable that in some circumstances, common ownership of even five television stations, though permitted by the challenged rule, might be undue concentration of control; while in other circumstances, common ownership of a greater number might be compatible with the public interest. . . . We are not here concerned with the Commission's *policy* in passing upon applications. We are concerned with what purports to be a binding rule."⁷³

Thus, the Court of Appeals very explicitly was *not* holding that Storer should be granted the license; it was rather holding that the license could not be denied without a hearing to determine whether, in that particular case, the grant would be in the public interest. The United States Supreme Court granted certiorari and in May, 1956, reversed the decision of the Court of Appeals and remanded the case for further consideration, holding that the rules "are reconcilable with the Communications Act as a whole,"⁷⁴ and that a full hearing is not necessary on all applications by persons already owning the maximum number of stations allowed by the rules. However, the Court held that a full hearing must be held where such an application sets out "adequate reasons why the Rules should be waived or amended."⁷⁵

Aside from the flaws pointed out by the Court of Appeals, the rules are extremely narrow in scope if they be interpreted to embody the sum total of the Commission's policy on multiple ownership of the media of communications. The rules are completely silent on the question of *cross*-ownership of the various media, even within the broadcast field. Under the rules, it is contrary to the public interest for one person to own or control eight stations in the same field (AM, FM,

⁷³220 F. (2d) 204, 209 (1955).

⁷⁴United States v. Storer Broadcasting Co., 351 U. S. 192, 204, 76 S. Ct. 763, 771, 100 L. ed. 1081, 1091 (1956). For the result on remand, see Storer Broadcasting Co. v. United States, 240 F. (2d) 55 (C. A. D. C., 1957).

⁷⁵United States v. Storer Broadcasting Co., 351 U. S. 192, 205, 76 S. Ct. 763, 771, 100 L. ed. 1081, 1092 (1956).

or TV). Yet it is not prohibited for one person to own or control twenty-one stations divided evenly among the three fields, not to mention ownership of non-broadcast media such as newspapers. Such a result seems manifestly illogical.

Actually the multiple ownership rules do not represent the only official word on the subject. In the early forties, while AM was still the only significant broadcast medium, the Commission initiated an investigation to determine what policies should be adopted with regard to common ownership of newspapers and radio. One of the parties called to testify questioned the Commission's right to conduct an investigation on this subject, but the Court of Appeals was of the opinion that newspaper ownership of radio is a legitimate public interest consideration and therefore that the Commission was acting within statutory authority.⁷⁶ As a result of the investigation the Commission in 1944 published a broad statement of its position, indicating that it did not propose to ban newspapers from ownership of radio, but that it would regard with favor applicants having no connection with other media.⁷⁷ In the years following, the Commission in comparative hearings usually has given some consideration to this factor where one of the applicants has had newspaper interests.⁷⁸

The Court of Appeals has on several occasions endorsed a policy favoring diverse ownership as a valid public interest consideration. When, in addition to the mere fact of newspaper interests, there is some evidence of past "monopolistic" practice, the Commission is clearly justified in denying a license. In the case of *Mansfield Journal Co. v. F.C.C.*⁷⁹ the Commission had denied a radio license to Mansfield (and left the assignment open to another whose application was pending) which as owner of the only newspaper in the community had engaged in certain conduct "with the intent and for the purpose of suppressing competition and of securing a monopoly of mass advertising and news dissemination. . . ."⁸⁰ On appeal it was urged that the Commission was

⁷⁶*Stahlman v. F. C. C.*, 126 F. (2d) 124 (C. A. D. C., 1942). However, the court theorized that the Commission would not have authority to place an absolute ban on newspaper ownership of radio.

⁷⁷Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (1944).

⁷⁸In the opinion of some writers, the policy favoring non-newspaper applicants is "all but abandoned." See comment and cases cited in Weaver and Cooley, *Competition in the Broadcasting of Ideas and Entertainment—Shall Radio Take Over Television?* (1953) 101 U. of Pa. L. Rev. 721, 735, n. 48; Heckman, *Diversification of Control of the Media of Mass Communication—Policy or Fallacy?* (1954) 42 Geo. L. J. 378.

⁷⁹180 F. (2d) 28 (C. A. D. C., 1950), noted (1950) 59 Yale L. J. 1342.

⁸⁰180 F. (2d) 28, 32 (C. A. D. C., 1950).

attempting an ultra-vires enforcement of the anti-trust laws. To this the court replied: ". . . whether Mansfield's competitive practices were legal or illegal, in the strict sense, is not conclusive here. Monopoly in the mass communications of news and advertising is contrary to the public interest, even if not in terms proscribed by the anti-trust laws."⁸¹ Also rejected was the argument that freedom of the press had been violated: "Only by keeping the dissemination of news free from monopoly can the constitutional guarantees of free speech and free press ever be fully achieved."⁸²

Even where there was no evidence of improper competitive practices, the Commission has occasionally applied the diversity policy in favor of the applicant who had no newspaper interests, and the Court of Appeals has given judicial approval. In *Scripps-Howard Radio, Inc. v. F.C.C.*⁸³ the Commission had denied appellant's application for an AM license in Cleveland and granted that of intervenor, although appellant was admittedly superior financially, had greater broadcasting experience, and would serve a larger listening public.⁸⁴ The preference accorded intervenor was based on principles of diversity (appellant owned one newspaper in Cleveland), local ownership, and integration of ownership and management. In affirming, the Court of Appeals stated: "In considering the public interest the Commission is well within the law when, in choosing between two applications, it attaches significance to the fact that one, in contrast with the other, is dissociated from existing media of mass communications in the area affected."⁸⁵ Moreover, the court has insisted that in attaching significance to the ownership of existing media the Commission cannot limit itself to consideration of the immediate locality. In *Plains Radio Broadcasting Co. v. F.C.C.*,⁸⁶ where ownership of a newspaper in the community had been weighed against appellant, the court based its reversal of the Commission on the ground that evidence of intervenor's newspaper interests in neighboring communities should also have been considered.

The Commission has thus to some extent recognized that a policy favoring increased competition and diverse ownership requires that its scrutiny be directed beyond the one medium in which a license to

⁸¹180 F. (2d) 28, 33 (C. A. D. C., 1950).

⁸²180 F. (2d) 28, 36 (C. A. D. C., 1950).

⁸³189 F. (2d) 677 (C. A. D. C., 1951), cert. den. 342 U. S. 830, 72 S. Ct. 55, 96 L. ed. 628 (1951).

⁸⁴*Scripps-Howard Radio, Inc., and Cleveland Broadcasting, Inc.*, 13 F. C. C. 473 (1949).

⁸⁵189 F. (2d) 677, 683 (C. A. D. C., 1951).

⁸⁶175 F. (2d) 359 (C. A. D. C., 1949).

operate is being sought. However, the Commission's limitations on the application of this policy are perhaps more noteworthy than its occasional recognition of it. With regard to newspaper applicants, in relatively few of the F.C.C.'s decisions has there been a result based on a positive application of the diversification principle.⁸⁷ Nor has the Commission ever shown any disposition to pay heed to diversity except in comparative hearings. In 1951 Wayne Coy, then chairman of the Commission, explained its position on newspaper applicants to the House Interstate Commerce Committee as follows: "... the Commission a number of years ago had a long hearing on the question of whether newspapers were qualified to be licensed as a general question. They came to the conclusion that newspapers should not be treated differently than any other applicant. In other words, they should not be disqualified because they were newspapers.

"However, over a period of years the Commission has matured a policy with respect to differentiation of ownership of radio stations, so that they would like to have radio licenses held as diversely as possible by various elements of a community; and, in cases where newspapers have been applicants with other applicants *in contested proceedings*, generally the decision of the Commission has been that, if they are equally qualified except for the newspaper ownership by one of the applicants, to give radio licenses to other people, so as to bring about a differentiation of the media of communication in a community.

"However, there have been cases in contested proceedings in which there was a newspaper applicant and another party... and the newspaper applicant has been preferred over the other applicant because of the belief of the Commission, in that particular instance, that the newspaper would better serve the public interest."⁸⁸ The cases indicate that this statement represents a fairly complete description of the F.C.C.'s policy on diverse ownership of communications media (other than the multiple ownership rules).⁸⁹ If so, the policy seems rather incomplete

⁸⁷See Heckman, *Diversification of Control of the Media of Mass Communication—Policy or Fallacy?* (1954) 42 *Geo. L. J.* 378, where the author analyzed the newspaper cases and concluded that in most if not all the cases where the F. C. C. has found against a newspaper applicant there were other policy considerations on which the decision turned. But see *McClatchy Broadcasting Co. v. F. C. C.*, 239 F. (2d) 15 (C. A. D. C., 1956), cert. den., 353 U. S. 918, 77 S. Ct. 664, 1 L. ed. (2d) 665 (1957).

⁸⁸Hearings Before House Committee on Interstate and Foreign Commerce on S. 658, 82nd Cong., 1st Sess. 117 (1951) [italics supplied].

⁸⁹Weaver and Cooley, *Competition in the Broadcasting of Ideas and Entertainment—Shall Radio Take Over Television?* (1953) 101 *U. of Pa. L. Rev.* 721; Note (1950) 59 *Yale L. J.* 1342.

and inadequate, but not because it includes no absolute ban on the ownership of broadcast facilities by those having interests in other media. Rather, it is incomplete because it apparently does not supplement the multiple ownership rules by including consideration of *cross-ownership* among the various broadcast media (AM, FM, and TV). And it is inadequate because it relegates the principle of diversity of ownership to the inferior position of a factor to be considered only in a hotly contested comparative hearing among applicants who are otherwise equally qualified.⁹⁰

There is to this time little indication that the Commission regards unfavorably the ownership of TV stations by those having interests in other broadcast media. Of the 142 television permits granted up to January, 1953, 121 were held by permittees having ownership interests in aural radio stations, and only 8 were unconnected with other media.⁹¹ A brief look at two recent cases which were taken to the Court of Appeals may serve to indicate the official attitude towards diverse ownership of TV, and to illustrate how, in general, the diversity policy becomes a factor for consideration only to aid in the resolution of a close contest between otherwise qualified applicants for the same channel.

One of these cases, reviewed by the Court of Appeals in December, 1955, indicates that the Commission has not lost sight of the policy and that in a comparative hearing significance may be attached to the ownership of other non-broadcast *and* broadcast media.⁹² The case involved a determination between two applicants for the same channel, the Commission finding both technically and financially qualified, but finding neither entitled to a preference in regard to "awareness of and responsiveness to the needs of the community."⁹³

⁹⁰That the Commission has not been particularly averse to common cross-ownership of broadcast facilities is indicated by the status of FM. In 1954 of the approximately 600 FM stations authorized, roughly 540 of them were owned by and duplicated the programs of AM stations. Senate Hearings on UHF (1954) 1063. In this connection, it should be remembered that ten years ago it was anticipated that the introduction of the static-free FM, making available many new short range channels, would bring a new era to aural broadcasting. But since 1949 the number of FM stations has decreased from 737 to 540, and as has been pointed out, most of these merely duplicate the programs of a co-owned AM station. 21 F. C. C. Ann. Rep. 103, 117 (1955). In the opinion of some, the failure of FM is not primarily due to its being overshadowed by the development of TV, but rather the result of a combination of factors closely analogous to the present plight of UHF television. Senate Hearings on UHF (1954) 1060.

⁹¹Weaver and Cooley, *Competition in the Broadcasting of Ideas and Entertainment—Shall Radio Take Over Television?* (1953) 101 U. of Pa. L. Rev. 721.

⁹²*Columbia Empire Telecasters, Inc. v. F. C. C.*, 228 F. (2d) 459 (C. A. D. C., 1955).

⁹³228 F. (2d) 459, 461 (C. A. D. C., 1955).

One of the applicants had a substantial connection with the local newspaper and its wholly-owned radio station, and proposed to identify the TV Station with the radio station and to utilize the talent and newsgathering facilities of the newspaper. The Commission found that the newspaper and radio station had an "outstanding record of performance,"⁹⁴ but granted the license to the other applicant because it was found to be entitled to a preference as to programming and because it was dissociated from existing media of communications. The Court of Appeals affirmed, citing the *Scripps-Howard* case.⁹⁵

In January, 1956, the Court of Appeals reviewed another F.C.C. decision involving diversification of control.⁹⁶ The Commission had been forced to choose among three mutually exclusive applications for a television license in Tampa. The applicant which was chosen, The Tribune Company, owned one of the two newspapers and one of the two principal radio stations in Tampa, and furthermore its controlling stockholders controlled two daily newspapers, an AM-FM radio station, and an applicant for a television station, all in Richmond, Virginia. One of the two losing applicants, Pinellas Broadcasting Company, controlled the other newspaper and the other principal radio station in Tampa, but had no interests in media outside the area. The other losing applicant, Tampa Bay Area Telecasting Company, owned a radio and television station in Rochester, N. Y., but had no affiliation with media in the Tampa area. The Commission found with regard to diversity that "even though Tampa Bay warrants a preference over Tribune and Pinellas in this area of comparison, it is not determinative of this proceeding." The Commission further explained: "This factor, important as it may be, is only one of the *numerous comparative* factors we have weighed in reaching our decision."⁹⁷ Tampa Bay did not join in the appeal, and Pinellas did not argue the issue of diversification before the court. Consequently, in affirming, the majority opinion did not consider that point.⁹⁸ Judge Bazelon, however, dissented on grounds that the Commission should be required to make a finding "on whether, as between Pinellas and Tribune, Pinellas was entitled to preference by reason of Tribune's more extensive

⁹⁴228 F. (2d) 459, 461 (C. A. D. C., 1955).

⁹⁵*Scripps-Howard Radio, Inc. v. F. C. C.*, 189 F. (2d) 677 (C. A. D. C., 1951), cert. den. 342 U. S. 830, 72 S. Ct. 55, 96 L. ed. 628 (1951).

⁹⁶*Pinellas Broadcasting Co. v. F. C. C.*, 230 F. (2d) 204 (C. A. D. C., 1956).

⁹⁷230 F. (2d) 204, 209 (C. A. D. C., 1956).

⁹⁸However, the court included as an appendix to its opinion an excerpt from the F. C. C.'s opinion wherein the diversity point was considered. 230 F. (2d) 204, 208 (C. A. D. C., 1956).

newspaper broadcast affiliations."⁹⁹ He pointed out that the F.C.C. had in 1953, when it promulgated its amended multiple ownership rules, stated that "One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis."¹⁰⁰ Insisting that the Commission can not be allowed to overlook "a basic policy issue under the Act," he concluded: "The Commission's role is not merely that of a referee in an adversary proceeding, who scores points only upon issues selected by the individual contestants and gives the decision to the highest scorer. While this might assure a 'right' decision between the contestants, it does not assure a 'right' decision in the public interest."¹⁰¹

It appears that the Commission does recognize that "the basic underlying consideration" of the Act favoring extensive competition in the field of mass communications requires as its necessary corollary some policy with regard to common ownership of the media of communications. It further appears that the Commission has, with court encouragement, developed a policy of sorts, which is, however, "only one of the numerous comparative factors" which well may be outweighed by other factors and which will not be considered at all unless raised by a party in a contested proceeding.¹⁰²

The Protest Procedure

A series of cases which have recently arisen under the so-called protest procedure are closely related to the VHF-UHF problem and to the issue of concentration of control, and in general shed additional light on the conflicts inherent in the regulation of broadcasting.

The protest procedure was enacted by Congress in July, 1952.¹⁰³ In 1940, in *F.C.C. v. Sanders Brothers Radio Station*,¹⁰⁴ the Supreme

⁹⁹230 F. (2d) 204, 210 (C. A. D. C., 1956).

¹⁰⁰F. C. C. Order, Multiple Ownership, 18 Fed. Reg. 7796, 7797 (1953).

¹⁰¹*Pinellas Broadcasting Co. v. F. C. C.*, 230 F. (2d) 204, 211 (C. A. D. C., 1956). Cf. *Tampa Times Co. v. F. C. C.*, 230 F. (2d) 224 at 227 (C. A. D. C., 1956) where the court, in affirming an application of the diversity policy by the Commission, distinguished the *Pinellas* case.

¹⁰²The nature of the difficulties encountered by the Commission and the courts in balancing such comparative factors is well illustrated in a case which has been involved in litigation for some ten years. *F. C. C. v. Allentown Broadcasting Corp.*, 349 U. S. 358, 75 S. Ct. 855, 99 L. ed. 1147 (1955).

¹⁰³66 Stat. 715 (1952), 47 U. S. C. A. § 309(c) (1955).

¹⁰⁴309 U. S. 470, 60 S. Ct. 693, 84 L. ed. 869 (1940). See discussion in text at note 26, *supra*.

Court had held that "economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license";¹⁰⁵ but the Court there had also construed Section 402(b) of the Act to mean that a person "likely to be financially injured" by the issuance of a license to another *does* have standing to prosecute an appeal and "to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license."¹⁰⁶ Under the doctrine of the *Sanders* case one who will suffer economic injury as a result of a license grant may not set up his personal grievance as a ground for denying the license, but he is a "party in interest" and may, on appeal to the court, present general public interest considerations which have been ignored by the Commission in making the grant. This doctrine was made the basis of the 1952 protest procedure, contained in Section 309 (c) of the Communications Act.¹⁰⁷

Where there is only one applicant for a certain broadcast assignment, the Commission is authorized to grant a license without any type of hearing, if it is satisfied that the grant will be in the public interest.¹⁰⁸ Thus, in making such grants "numerous comparative factors" are not in issue, the grant apparently being almost automatic if the applicant is technically and financially qualified. The protest procedure provided a way in which a "party in interest" could force the Commission to hold a hearing upon the grant of any license if that party in interest, filing a protest within 30 days after the grant, could allege under oath with "particularity" any public interest reason why the grant should not have been made. Once the protestant established himself as a party in interest and specified "with particularity the facts, matters, and things relied upon," the Commission was required to hold a full evidentiary hearing "upon the issues set forth in said protest."¹⁰⁹ Furthermore, it was provided that the effective date of the protested grant would be postponed until after the hearing and decision unless it involved an already existing service—e.g., a renewal or transfer.

The protest provision was enacted at a time, just as the four year TV freeze was lifted, when the Commission was under increasing pres-

¹⁰⁵309 U. S. 470, 476, 60 S. Ct. 693, 698, 84 L. ed. 869, 875 (1940).

¹⁰⁶309 U. S. 470, 477, 60 S. Ct. 693, 698, 84 L. ed. 869, 875 (1940).

¹⁰⁷47 U. S. C. A. § 309 (c) (1955); Davis, *Standing to Challenge Governmental Action* (1955) 39 Minn. L. Rev. 353.

¹⁰⁸47 U. S. C. A. § 309(a)(b) (1955 Supp.); see *Ashbacker Radio Corp. v. F. C. C.*, 326 U. S. 327, 66 S. Ct. 148, 90 L. ed. 108 (1945).

¹⁰⁹47 U. S. C. A. § 309(c) (1955 Supp.).

sure to act efficiently and speedily in granting the long-awaited television assignments.¹¹⁰ The Commission, in congressional hearings, objected strongly to its passage, maintaining that "Its sole, but highly significant effect, would be to give existing stations a club by which they could delay, if not prevent, the establishment of competing stations. . . . [T]he protest rule would turn a limited license to any one station into a franchise for at least temporary monopoly operating during the period in which the useless hearing would be in progress."¹¹¹

In the first case to be appealed under the new provision,¹¹² the protestant attempted to establish itself as a party in interest by stating that as an existing radio station in the same small town in which the protested station would operate, it would "suffer economic injury" from the added competition. The Commission found this to be insufficient to identify protestant as a party in interest. In reversing the Commission in March, 1955, the Court of Appeals made it quite clear that the term "party in interest" was to be given the same interpretation as that given the term "person aggrieved" in the *Sanders* case—in other words, to include a party whose only anticipated injury is economic injury through competition.

A few days after the court's final decision in this case, George C. McConnaughey, Chairman of the F.C.C., submitted to Congress for the second time a proposed amendment to Section 309 (c).¹¹³ While this proposal was being aired in committee hearings in June and July, 1955, and before it was ultimately enacted into law in January, 1956, several other noteworthy decisions involving the protest procedure were handed down by the Court of Appeals.

One of these cases, considered by the court on March 24, 1955, illustrates the significance of the protest provision to an existing UHF television station which is threatened with the coming of additional VHF competition.¹¹⁴ The F.C.C.'s allocation plan provided for one UHF channel and one VHF channel in Greenville, S. C.; it further

¹¹⁰See, for example, Hearing Before Senate Committee on Interstate and Foreign Commerce on F. C. C. Policy on Television Freeze and Other Communication Matters, 82nd Cong., 1st Sess. (1951).

¹¹¹Hearings Before House Committee on Interstate and Foreign Commerce on S. 658, 82nd Cong., 1st Sess. 70 (1951).

¹¹²*Camden Radio, Inc. v. F. C. C.*, 220 F. (2d) 191 (C. A. D. C., 1955).

¹¹³Hearings Before House Committee on Interstate and Foreign Commerce on H. R. 5614, 84th Cong., 1st Sess. 3 (1955); 101 Cong. Rec. 2406 (1955).

¹¹⁴*Greenville Television Co. v. F. C. C.*, 221 F. (2d) 870 (C. A. D. C., 1955). Some of the information below may be found in statement of B. K. McKinnon, General Manager, WGVL-TV, Greenville, S. C., Senate Hearings on UHF (1954) 210. Also see Hearing Before Senate Committee on Interstate and Foreign Commerce on S. 1648, 84th Cong., 1st Sess. 66 (1955).

provided for two UHF channels and one VHF channel in Spartanburg, S. C., 30 miles northeast of Greenville. The two channels in Greenville were granted and the stations went on the air in 1953, the UHF station with an ABC-DuMont affiliation and the VHF station with an NBC affiliation. Apparently the UHF licensee was prepared to survive the competition of the one VHF station. Therefore, a construction permit was granted for the VHF channel in Spartanburg. The transmitter for this station was to be located on Hogback Mountain, 25 miles northeast of Spartanburg. To this grant, the UHF licensee in Greenville made no objection. However, in 1954 the VHF permittee in Spartanburg applied for a permanent modification in its permit which would relocate the transmitter on Paris Mountain located only five miles from Greenville. This location would make it possible for the new VHF station to serve not only the Spartanburg market area but also the more populous Greenville market area. The modification was granted by the Commission without a hearing over the objections of the Greenville UHF station. After the grant, the Greenville station, together with another UHF licensee in Anderson, a few miles farther south, filed protests under Section 309(c). By way of establishing themselves as parties in interest, the protestants alleged that the competitive situation in the Greenville-Anderson area would be aggravated by the grant and that it would cause the Anderson station to lose its CBS affiliation to the new VHF station. As a public interest consideration, the protest alleged that the grant was contrary to Section 307 (b) of the Act, which specifies that the Commission shall make a fair and equitable distribution of broadcast facilities,¹¹⁵ and contrary to the principles upon which the assignment of television channels was made by the Commission. It further alleged that since the existing UHF stations would be unable to compete effectively, the grant would result in a "monopoly" of television service. The Commission found that these allegations were insufficient to qualify the protestants as parties in interest. The Court of Appeals reversed, holding that protestants were parties in interest, and remanded the case with instructions to the Commission to hold a hearing on the issues set forth in the protest.

For obvious reasons, the protest procedure is regarded in a particularly favorable light by UHF licensees.¹¹⁶ It provides a way in which the coming of VHF competition can at least be delayed, and the longer the period a UHF station has in which to establish its market

¹¹⁵47 U. S. C. A. § 307 (b) (1955 Supp.).

¹¹⁶Statement of Benedict P. Cottone, UHF Industry Coordinating Committee, Hearing Before Senate Committee on Interstate and Foreign Commerce, 84th Cong., 1st Sess. 54 (1955).

before it is forced to compete with VHF, the better its chances of survival. Presumably, however, it is not the purpose of the protest provision to provide a means of bogging down the efficiency of the Commission's operation. It is for this reason that the F.C.C. objected so vehemently to the provision in hearings before the House and Senate Interstate Commerce Committees in the summer of 1955.¹¹⁷ While these hearings were in progress, the Court of Appeals handed down a decision in *Clarksburg Publishing Co. v. F.C.C.*¹¹⁸ which caused the Commission to redouble the vigor of its objections.

The *Clarksburg* case, the most important case decided by the court under the protest procedure, is extremely significant with regard to the issue of concentration of control and diversification of communications media. The case arose as follows: In 1952 Ohio Valley Broadcasting Corp. applied for a license to operate a VHF station in Clarksburg, W. Va. Thereafter another applicant filed a mutually exclusive application for the same channel. In January, 1954, the F.C.C. advised both applicants that a comparative hearing would be held, but no date was set. One month later Ohio Valley amended its application by reducing its requested power rating from 50.6 kilowatts to 4 kilowatts, presumably to avoid conflict with the F.C.C.'s multiple ownership rules in view of the fact that Ohio Valley's parent company, The News Publishing Company, substantially controls another VHF television station in Wheeling, W. Va., 58 miles from Clarksburg. Four days after this amendment, the other applicant withdrew its application without explanation. On the same day, Ohio Valley informed the F.C.C. by letter that it had agreed with the other applicant to pay to it \$14,390 "for out-of-pocket expenses incurred in the preparation and prosecution of its application."¹¹⁹ On the next day following the withdrawal of the other applicant, the Commission met and granted Ohio Valley's now unopposed application. Clarksburg Publishing Co., publisher of the two daily newspapers in Clarksburg, filed a protest to this grant under Section 309(c).¹²⁰

In April, 1954, the Commission decided, with three members dissenting, that Clarksburg's allegations that it would suffer economic

¹¹⁷Note 111, supra.

¹¹⁸225 F. (2d) 511 (C. A. D. C., 1955), noted (1956) 69 Harv. L. Rev. 1137.

¹¹⁹225 F. (2d) 511, 519, n. 28 (C. A. D. C., 1955).

¹²⁰It is interesting to note that in the summer of 1954, the owner of a UHF station in Fairmont, W. Va., 25 miles from Clarksburg, stated to a congressional committee that if a VHF station came to Clarksburg, he would be likely to lose his NBC affiliation and in that event "would be inclined to discontinue the operation." Senate Hearings on UHF (1954) 430, 432. There is, however, no indication in the record that this UHF station had any part in the protest.

injury through loss of advertising as a result of the grant were sufficient to establish it as a party in interest.¹²¹ This finding by the Commission is worth noting since it marks the first time, under the Communications Act, that a party not engaged in broadcasting has been found to be a party in interest. Possibly the finding was made by the Commission with an eye on previous recent cases in which the court had reversed for failure to construe the term broadly enough. In any event, Chairman McConaughy later described it in a Senate Committee hearing as a "reluctant determination."¹²²

Having established its standing to protest, Clarksburg stated what it considered to be public interest reasons why the grant to Ohio Valley should not have been made. Chief among these were the assertions that the grant violated the Commission's multiple ownership rules, and that, in any event, the addition of "one more component" to the extensive newspaper and broadcast interests of Ohio Valley and its parent company would result in a concentration of control of communications media contrary to the public interest.¹²³ The protest also asserted that the payment to the only other applicant was improper, and that it was contrary to public policy for the F.C.C. to grant Ohio Valley's application one day after the unexplained withdrawal of that applicant.

In dealing with the issues set forth in the protest, the Commission used a novel short-cut procedure. Rather than designating the issues for a full evidentiary hearing on the facts such as is required where application is denied, it adopted a demurrer-like approach. It assumed the facts alleged by Clarksburg to be true, and heard oral argument by the parties as to the legal significance of those facts.¹²⁴ At the conclusion of this "hearing," the Commission decided that the facts asserted by Clarksburg were, even if true, not sufficient reason to deny the grant to Ohio Valley.

On appeal, the Court of Appeals reversed, technically on the grounds that the F.C.C.'s decision was based on a "seriously inadequate record" resulting from its failure to hold a full evidentiary hearing. The court held that the demurrer approach was not within "the letter and spirit" of Section 309(c) and interpreted the statute as requiring the Commission to extend its inquiry "beyond matters alleged in the protest in order to reach any issue which may be relevant

¹²¹Ohio Valley Broadcasting Corp., 19 Fed. Reg. 2326 (1954).

¹²²Hearing Before Senate Committee on Interstate and Foreign Commerce on S. 1648, 84th Cong., 1st Sess. 25 (1955).

¹²³Ohio Valley Broadcasting Corp., 19 Fed. Reg. 2326, 2327 (1954).

¹²⁴Ohio Valley Broadcasting Corp., 19 Fed. Reg. 2594 (1954).

in determining the legality of the challenged grant."¹²⁵ It was this part of the decision, eliminating the time-saving demurrer approach, to which the Commission strongly objected and which has been the subject of subsequent legislation. However, the opinion, written by Judge Bazelon, was not limited to a consideration of this procedural point. In fact, upon reading the opinion closely, one is left with the impression that the court was actually disagreeing with the substance of the Commission's decision but that it was hesitant to base the reversal on policy matters normally within the area of administrative discretion.

As to the \$14,390 payment to the applicant who withdrew, the court specifically refrained from expressing an opinion on whether the payment of "out-of-pocket" expenses is per se contrary to the public interest. But the court held that the Commission, because of its refusal to inquire into the matter beyond Ohio Valley's letter of explanation, could not "properly have found, on this record, that no abuse was involved in the withdrawal. . . ."¹²⁶

Section 3.636(a)(1) of the F.C.C. multiple ownership rules provides: "No license for a television broadcast station shall be granted to any party . . . [who] directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area."¹²⁷ Clarksburg's assertion that this rule was violated was based on the fact that The News Publishing Co., Ohio Valley's owner, also substantially controls a television station in Wheeling. Clarksburg contended that the service areas of the two stations would substantially overlap. The Commission found that the "Grade B" signal of the two stations would be received in a large common area but that the "Grade A" signals would, according to a contour drawing submitted by Ohio Valley, be separated by two miles.¹²⁸ From this the Commission concluded that there would be no "substantial" overlap. In reaching this conclusion, no consideration was given to the existence of two privately-owned community antenna systems which carry the programs of the Wheeling station to Clarksburg subscribers. The court felt that, even aside from the antenna systems, "it seems a fair assumption that receivers in the area of overlap would receive acceptable signals from both stations,"¹²⁹ and held that the record did not adequately explain the Commission's conclusions with regard to the mechanical applica-

¹²⁵Clarksburg Publishing Co. v. F. C. C., 225 F. (2d) 511, 515 (C. A. D. C., 1955).

¹²⁶225 F. (2d) 511, 520 (C. A. D. C., 1955).

¹²⁷47 C. F. R. § 3.636(a)(1) (Rev. 1953).

¹²⁸225 F. (2d) 511, 515, n. 12 (C. A. D. C., 1955).

¹²⁹225 F. (2d) 511, 516 (C. A. D. C., 1955).

tion of the "Grade A.-Grade B rule" or its refusal to consider the effect of the community antenna systems.

Aside from the question of a specific violation of the letter of the multiple ownership rules, the court seemed particularly impressed with Clarksburg's contention that the grant would result in undue concentration of control of mass communications media. The opinion listed in some detail the interests of Ohio Valley and News Publishing Co. in the newspaper and broadcast fields in West Virginia. These interests include, in addition to the television station in Wheeling, AM and FM radio stations in Wheeling and Parkersburg and an AM station in Clarksburg. And in the newspaper field, News Publishing Co. publishes newspapers in nine West Virginia communities. Wheeling, Parkersburg, Fairmont and six other communities are, said the court, "completely dependent on the Ohio Valley interests for their local daily newspapers."¹³⁰ According to the information in the record, in the northern, north central, and eastern portions of the State combined circulation of all daily newspapers totalled 191,922, of which 121,005 represented the daily circulation of newspapers published or controlled by News Publishing Co. It was pointed out in the opinion that the Commission treated these facts as admitted for purposes of making its decision. In unusually positive language, the court held that, with regard to this issue, the record was again not sufficient to support the Commission's conclusion: "In the face of these admissions, it is difficult to understand how the Commission could have concluded that the grant would not result 'in an unlawful concentration of control or in a monopoly of the media for mass communications in the West Virginia area.' . . . Nothing in the present protest record dispels the strong impression that, on the concentration of control issue *alone*, the grant would not be in the public interest." The court then reminded the Commission that the fact that the Ohio Valley application, after the withdrawal of the other applicant, was unopposed did not relieve the Commission of its duty carefully to weigh all public interest considerations before making the grant. It was held that failure to give careful consideration to these factors was justified neither by a policy favoring speedy processing nor by the fact that Clarksburg was meanwhile being deprived of television service.

In January, 1956, Congress, at the insistence of the Commission, amended Section 309(c).¹³² The amendment effectively "repeals" the

¹³⁰225 F. (2d) 511, 518 (C. A. D. C., 1955).

¹³¹225 F. (2d) 511, 519 (C. A. D. C., 1955) [*italics supplied*].

¹³²P. L. 391, 84th Cong., 2nd Sess., 102 Cong. Rec. 2183 (1956). See also 102 Cong. Rec. 362-63 (1956). 47 U. S. C. A. 309(c) (1956 Supp.). For a retroactive application of

procedural point in the *Clarksburg* decision by providing that the Commission may use the demurrer approach to avoid a full hearing. Another and perhaps more controversial portion of the amendment is that which eliminates the provision that a protested grant must be suspended until the results of the hearing are determined. Under the new provision the Commission may allow the grant to remain in effect and the grantee to commence operation if in its discretion the public interest would be served thereby. This change was strongly opposed by representatives of UHF licensees who contended that it deprived them of the last measure of protection against the competitive encroachment of large VHF stations.¹³³ The Commission, on the other hand, envisaged the protest procedure as originally enacted as a strait jacket which bound it to hold unnecessary hearings on frivolous issues and which "opened the door to those who were primarily concerned not with the public interest, but with their own private competitive interests."¹³⁴

The validity of the objections of the Commission can hardly be denied. It seems a rather anomalous doctrine that would allow a remotely involved private party to force an administrative agency into a lengthy hearing on issues which the agency, in the exercise of its discretion, will in any event determine contain nothing worthy of consideration. If the only point in favor of the original protest procedure, with its mandatory hearing and mandatory stay provisions, is that it provides those seeking protection with a method of delaying the coming of competition it would seem that that end, if it is a valid one, might better be achieved by providing some more direct form of relief. An argument in favor of the protest procedure on any other grounds is, in a sense, directed not so much at any procedural shortcoming as at the way in which the Commission is exercising its discretion to formulate and apply public policy. The *Clarksburg* case is illustrative of this. The matters put in issue by the protestant in that case could hardly

this amendment, see *Federal Broadcasting System v. F. C. C.*, 239 F. (2d) 941 (C. A. D. C., 1956).

¹³³Statement of Benedict P. Cottone, UHF Industry Coordinating Committee, Hearings Before House Committee on Interstate and Foreign Commerce on H. R. 5614, 84th Cong., 1st Sess. 24 (1955). For recent attempts by UHF licensees to prevent the coming of VHF competition, see *Gerico Investment Co. v. F. C. C.*, 240 F. (2d) 410 (C. D. C., 1957); *Houston Consolidated Telephone Co. v. F. C. C.*, 240 F. (2d) 409 (C. A. D. C., 1957); *Coastal Bend Television Co. v. F. C. C.*, 231 F. (2d) 498 (C. A. D. C., 1956); *Greylock Broadcasting Co. v. United States*, 231 F. (2d) 748 (C. A. D. C., 1956).

¹³⁴Statement of George C. McConnaughey, Chairman, F. C. C., Hearings Before House Committee on Interstate and Foreign Commerce on H. R. 5614, 84th Cong., 1st Sess. 43 (1955).

be described as frivolous; yet the Commission dismissed them peremptorily. The court utilized a binding interpretation of the protest procedure to force the Commission to reconsider. The ultimate answer in such a case is nonetheless within the Commission's discretion unless the court is prepared to find an abuse of that discretion, but at least the original protest procedure was a guarantee that the Commission would give careful attention to important issues in certain cases where it might not otherwise have done so. The price of such a guarantee is a corresponding decrease in efficiency and a temporary deprivation of television service to some communities. The new provision enacted by Congress eliminates the guarantee and leaves it to the Commission to determine when the issues are important enough to warrant the delay. Its initial decision in the *Clarksburg* case may be indicative of how the Commission will resolve the conflict in similar cases arising in the future.¹³⁵

¹³⁵The Clarksburg case, having been remanded to the Commission, is currently awaiting hearing. Ohio Valley Broadcasting Corp., 21 Fed. Reg. 3068 (1956).

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